

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL SUIT No. 0018 OF 2014

NILECOM LIMITED **PLAINTIFF**

5

VERSUS

KODJO ENTERPRISES LIMITED **DEFENDANT**

10 **Before: Hon Justice Stephen Mubiru.**

JUDGMENT

The plaintiff is a private limited liability company and so is the defendant. The plaintiff company is the distributor of all M.T.N airtime products in the central region of Uganda. On the other hand, the defendant had in July, 2000 won a franchise for the distribution of M.T.N products in the districts of Arua, Maracha, Moyo, and Yumbe. Around the year 2011, the defendant realized that it was increasingly becoming difficult for it to meet the sales targets set for it by M.T.N. It therefore sought to sell off the franchise. It approached the plaintiff and following a series of negotiations, a deal was struck whereby an agreement dated 20th January, 2012 (exhibit P. Ex.1) was executed by which the defendant sold off its franchise goodwill to the plaintiff, at the price of shs. 375,000,000/= payable in four installments, the last one of which was due thirty days after the defendant's handing over its activities in Moyo District, to the plaintiff. The first two installments were to be paid in the form of supply of shs. 250,000,000/= worth of M.T.N airtime scratch cards, while the last two installments were to be paid for in the form of shs. 125,000,000/= worth of M.T.N. electronic airtime (Easy load). Payment of the last two installments was conditioned on the defendant obtaining prior consent of M.T.N to the transaction and proof of a monthly net income of shs. 8,472,222/= from Moyo District.

30 Before the aforementioned transaction, starting around November, 2011 running through to around December, 2012 the defendant had from time to time placed orders with the plaintiff for the supply of diverse denominations of M.T.N. airtime. The arrangement was that after the defendant placed an order, the plaintiff would dispatch from Kampala, the corresponding batch of scratch cards by bus and upon receipt of the consignment in Arua, the defendant would credit

the plaintiff's bank account with a sum of money representing the price of the specific consignment. Differences subsequently erupted with the plaintiff claiming that the defendant had paid far less than the value of total volume of products it had had dispatched over time. On its part the defendant contended that the plaintiff had persistently been dispatching less than the
5 actual quantities specified in the orders placed by the defendant, and as such the defendant had paid in full for the actual deliveries made such that the plaintiff's claim represents the value of shortfalls in deliveries that were never made.

In order to resolve that dispute, meetings were convened during April - May, 2013 intended to
10 reconcile their respective positions. Those meetings resulted in establishment of a credit balance of shs. 135,682,485/= which the plaintiff now claims as money due and owed to it by the defendant. It is on basis of that reconciliation that the plaintiff claims that sum as the undisputed amount due to it from the defendant, and the costs of the suit.

15 In its written statement of defence, the defendant contends that the figure claimed by the defendant was arrived at under intimidation, undue influence, coercion and duress intended to cover up the plaintiff's hostile takeover of the defendant's business in breach of the agreement of 20th January, 2012. The defendant avers that out of the agreed price of shs. 375,000,000/= the plaintiff made deliveries of airtime worth only shs. 25,575,000/= on 11th February, 2012 leaving a
20 balance of shs. 349,425,000/= unpaid for which the defendant counterclaims against the plaintiff, with interest and costs.

P.W.1 David Mutabanura the plaintiff's Managing Director, testified that he came to know the defendant company through its two directors, Mr. Richard Edemacu and Mrs. Scholarstica
25 Edemacu who expressed interest in selling of their M.TN. franchise to the plaintiff company. After negotiations, and agreement was executed on 20th January, 2012 by which the defendant sold its franchise to the plaintiff at the price of shs. 375,000,000/= The purchase price was to be paid in kind in the form of physical scratch cards and electronic airtime. The defendant breached the agreement in respect of the last installment which was pegged to the defendant handing over
30 its operations in Moyo District. The plaintiff discovered that a different company, Ejab and Family Investments Company Limited held the franchise for Adjumani, Koboko, Moyo, Nebbi

and Zombo Districts and thus purchased that franchise at the cost of shs. 610,000,000/= as per the agreement dated 6th March, 2012 (exhibit P. Ex.4). The defendant further failed to produce proof that it had secured the consent of the M.T.N to the transaction, as required by the terms of the contract. The defendant also failed to provide proof of the net monthly earnings from the franchise and to hand over its shop in Arua and two motorcycles, as required in the agreement. Nevertheless, the plaintiff went ahead to pay the contract price in full as in intended to start business with expedition.

Even before the signing of that contract, the defendant was already indebted to the plaintiff out of previous dealings. Under that arrangement, the plaintiff would supply M.T.N products to the defendant on credit and the defendant would be obliged to pay subsequent to the deliveries. These business transactions continued alongside the sale / purchase of the franchise transactions, necessitating an internal reconciliation of accounts, in order to establish the actual net amount outstanding. Following the reconciliation it was established that the defendant was indebted to the plaintiff in the excess of a sum of shs. 200,000,000/= This fact was brought to the attention of the defendant by way of a letter dated 17th May, 2013 (exhibit P. Ex.2). The defendant's directors disputed some of the figures stated in that letter, necessitating a joint reconciliation exercise. Joint meetings with the defendant's directors were convened on 24th and 25th May 2013. From that reconciliation, a sum of shs. 135,682,485/= was mutually agreed as outstanding due from the defendant to the plaintiff, arising from stock sales by the plaintiff to the defendant in respect of the period running from 3rd November, 2011 to 30th December, 2012. The defendant's directors subsequently negotiated for payment of that sum in installments, starting August, 2013 and paying in full by September, 2013. The minutes of the meeting were exhibited as P. Ex.5. They issued the plaintiff a post-dated cheque which was returned unpaid and they have not paid that sum to-date.

The defendant's breach of contract caused the plaintiff financial loss and in order to maintain its business volume with M.T.N, the company had to borrow from banks by way of overdrafts and invoice financing, suffered penalties on its business transactions, hence the plaintiff's claim of interest on the outstanding amount at the rate of 20% per annum and the costs of the suit.

Under cross-examination, this witness admitted that the plaintiff has received the defendant's stock requisition form dated 31st August, 2012 for airtime worth shs. 12,237,700/= (exhibit D. Ex.3). By that document, the plaintiff acknowledged indebtedness to the defendant in the sum of shs. 52,400,000/= and the defendant owed the plaintiff shs. 40,162,300/= hence the payment of
5 shs. 12,237,700/= in final settlement of that account. Between 26th September, 2013 and 21st November, 2013 the defendant instructed its bankers to transfer shs.180,000,000/= to the plaintiff.

P.W.2 Ampulira Grace, the plaintiff's Internal Auditor, testified that on 31st August 2012,
10 accounts for the purchase of the franchise were settled with the plaintiff paying the defendant shs. 12,237,000/= after an offset of shs. 40,162,300/= due from the defendant to the plaintiff against shs. 52,400,000/= that was due from the plaintiff to the defendant (exhibit D. Ex.3). She also participated in reconciling accounts relating to the plaintiff's claim of shs. 241,000,000/= as receivable from the defendant for the period 2011 - 2012. The meetings took place on 24th and
15 25th May, 2013 at the defendant's offices in Arua. At the conclusion of that reconciliation, it was mutually agreed that the defendant owed the plaintiff shs. 135,684,485/= as reflected in exhibit P. Ex. 6 dated 25th May, 2013. The disputed figure remained shs. 82,000,100/= After the reconciliation, the defendant paid a total of shs. 18,000,000/= in three installments towards settlement of that outstanding balance; shs. 5,000,000/= on 26th September, 2013, shs.
20 3,000,000/= on 13th October, 2013 and shs. 10,000,000/= on 31st November, 2013. The balance outstanding after those payments remained shs. 117,682,485/=

P.W.3 Walabdas Eric testified that he was the plaintiff's General Manager in charge of the West Nile region at the time of the disputed transactions. At that time, the defendant and another
25 company, Ejab and Family Investments Company Limited, were conducting similar business in the West Nile Region. On 20th January, 2012 the plaintiff entered into an arrangement of purchase of the defendant's operations by paying off its goodwill at shs. 375,000,000/= by way of an equivalent in value, of M.T.N. products. It was agreed that the plaintiff would supply the defendant with a consignment of M.T.N. products and set off its value against the agreed
30 purchase price. Alongside that transaction, the defendant continued to trade with the plaintiff by ordering for products for its business. On 31st August 2012, accounts for the purchase of the

franchise were settled with the plaintiff paying the defendant shs. 12,237,000/= after an offset of shs. 40,162,300/= due from the defendant to the plaintiff against shs. 52,400,000/= that was due from the plaintiff to the defendant. Due to an account entry error, the plaintiff discovered that it had exceeded the payment due to the defendant under the franchise purchase agreement. After
5 reconciliation of accounts relating to the two transactions on 24th and 25th May, 2013, it was mutually agreed that the defendant owed the plaintiff shs. 135,684,485/= that was undisputed. Out of that, the defendant paid shs. 18,000,000/= By 26th November, 2011 the plaintiff had supplied the defendant with stock worth shs. 121,830,000/= That was the close of the plaintiff's case.

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DW1 Richard Edemacu, a director of the defendant testified that on 7th July, 2000 the defendant was granted a franchise as distributor of M.T.N products in Arua District (exhibit D. Ex.2). In the year 2011 M.T.N raised the defendant's monthly sales target to shs. 431,000,000/= and on failure to achieve the target the defendant would get penalised or receive a reprimand. Having
15 found it difficult to cope, the defendant resolve to sell the franchise to the plaintiff and an agreement to that effect was executed between the two companies on 20th January, 2012. The price was shs. 375,000,000/= to be paid as follows; shs. 150,000,000/= upon execution of the agreement. This was not paid. The next installment of shs. 100,000,000/= was supposed to be paid after sixty days, i.e. around 20th March 2012. This too was not paid. The next installment of
20 shs. 55,000,000/= was supposed to be paid 90 days from 20th January 2012, that is around 20th April 2012 but this too was not paid. The last installment of shs. 70,000,000/= was supposed to be paid within 30 days from the handover of Moyo District. The defendant handed over Moyo District in March 2012 by taking the Manager of Nilecom to Moyo and Adjumani but the defendant did not receive that instalment as well.

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During the three months' period of transition the defendant would buy products from the plaintiff and sell them on the market. For that period, the defendant was like a customer or agent of the plaintiff in the sub-region. The defendant from April 2012 right up to August 2012 demanded for payment of the agreed purchase price for the franchise. The defendant was not paid but instead
30 the plaintiff started off-setting the payment due to the defendant, against stock purchased from

them. Those dealings went on for the period of April – May 2012. the defendant demanded for copies of all invoices for the purchases it had made from them, to no avail.

The agreed arrangement had been for the defendant to place an order and airtime would be sent to Arua physically by bus. The plaintiff was supposed to send the invoices together with the stock but they never used to do so. The defendant would pay after delivery by cheque to the plaintiff's collection account in KCB and Stanbic Bank Arua, by channeling it through the defendant's account in Bank of Africa. There was no instance when airtime was delivered and the defendant failed to pay except that there were occasions when the stock delivered did not match the orders the defendant had placed. The defendant came to know that the plaintiff had merged the purchase price for the franchise with the normal operations of trade when they told the defendant that they had offset the stock against the purchase price.

On 21st August, 2012, the plaintiff's agents presented to the other director of the defendant, Mrs. Edemacu Scholastica, an invoice which indicated that the defendant had ordered for airtime worth shs. 52,400,000/= and yet what was delivered to the defendant was worth shs. 12,237,700/= (exhibit D. Ex.3). The said director signed the invoice as acknowledgement of final payment. As a result the defendant lost shs. 40,162,300/= When the defendant asked for the invoices the plaintiff did not avail the originals. They instead sent computer generated invoices running from January 2012 to December 2012. They showed the defendant was indebted to the plaintiff in the sum of shs.250,396,985/= The defendant found discrepancies between the computer generated invoices and its original records of the orders it had placed. The defendant found invoices for products which had in fact not been supplied to it. Examples were that on 14th June 2012, the defendant purchased stock with a cash payment of shs. 21,000,000/= but it was posted as shs. 20,000,000/= on 16th June 2012 by P.W.3 Eric Walabdas. A receipt in the sum of shs. 20,000,000/= was issued to Kodjo Enterprises by Nilecom on 14th June 2012 and the ledger generated by Nilecom shows shs. 20,000,000/=

This forced the two companies to undertake a joint reconciliation which took place at the defendant's offices in Arua on 24th and 25th of May 2013. It was difficult to reconcile because the plaintiff came up with an opening balance of 245,288,000/= which could not be explained

because it had no documents to support it. The problem of mismatch in their respective records persisted. For example the defendant's records indicated that on 27th November 2012 it had placed an order for stock worth shs. 6,545,000/= and only stock worth shs. 3,506,250/= had been supplied yet the plaintiff's computer generated ledger indicated that on 30th November 2012 it had supplied the defendant with stock worth shs. 11,220,000/=, which stock the defendant never received. On 14th June, 2012 the defendant had placed an order for stock worth shs. 21,000,000/= and we paid cash over the counter and a receipt to the effect was issued. There was no corresponding posting on the ledger but the closest found was on 15th June 2012 as item 32. It is itemised as cash deposit by Walabdas Eric (P.W.3) the accountant for Nilecom. The entry made was shs. 20,000,000/= hence one million was not accounted for yet the defendant had a receipt for shs. 21,000,000/= (exhibit D. Ex.5).

Whereas P.W.3 testified that the sale price for the plaintiff's purchase of the defendant's franchise was posted twice in error such that the amount would have been shs. 750,000,000/= this is not reflected on the computer generated ledger. Instead after the entry of 30th December, 2012, there is a summary at the bottom indicating total outstanding as goodwill being shs. 625,396,985/= and a debit of shs.250,396985 /= The computer generated ledger was therefore found to be unreliable without physical documents to support it. To make matters worse, in an attempt to provide supporting documentation, the plaintiff provided a multiplicity of stock requisition forms (twenty one forms marked as annexure "A" to the plaint). Only eleven of them are in the names of the defendant. Ten of them are made in the names of other persons, like " Malindi Arua."

Of the ten stock request forms in the name of Malindi, the first one is dated 21st December 2011 and the amount 33,945,000/=, second dated 23rd December 2011 and the amount is not specified, 28th December 2011 and the amount 66,030,000/=, 6th February 2012 and the amount 46,965,000/=, 9th February 2012 and the amount 60,450,000/=, 11th February 2012 and the amount 25,575,000/=, 14th February 2012 and the amount 46,500,000/=, 16th February 2012 and the amount 41,850,000/=, 17th November 2011 and the amount 21,855,000/= and 24th November 2011 and the amount 21,855,000/=. The defendant does not owe the plaintiff that amount. These stocks were never sent to the defendant but came to the defendant's notice only with the plaint.

Prior to the reconciliation this witness received some calls from a police officer at Kira Road Police Station who introduced himself as Isaiah Igumira. Him and the plaintiff's Managing Director, Mr. David Mutabanura, put the witness under a lot of pressure demanding for payment and for him to report to Kira Road Police Station on allegations of obtaining goods by false
5 pretence from the plaintiff. The figure they claimed the defendant owed the plaintiff kept on varying between 250,000,000/= and 650,000,000/= In order to avert that pressure, the witness agreed to a joint reconciliation which then took place on 24th and 25th of May 2013. When the plaintiff's team returned to Kampala, the defendant expected a revised ledger from them but they did not send one. Instead they filed this current suit.

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Against the plaintiff's claim, the defendant has a counterclaim for payment of monies for the defendant's goodwill; they had bought the defendant's interest in MTN and were supposed to pay shs. 375,000,000/= payable in designated periods, which they failed to pay. They have in effect borrowed from the defendant and the defendant therefore claims interest on the amount. As the
15 principal amount the defendant claims shs. 375,000,000/= and interest at the rate of 30% interest per annum. The first installment was shs 150,000,000/=. The accumulated interest is now 21,256,688/= for the first 72 days from 20th January 2012 when the agreement was made. Interest The next installment was supposed to be made after 60 days in the sum of shs. 100,000,000/= the interest up to filing is shs. 39,539,376/=. The final amount was shs. 55,000,000/= and the amount
20 from 31st August 2012 until date of filing. The final installment was for shs. 70,000,000/= due 30 days from hand over and the interest up to the time of filing is 164,088,425. The total amount at the time of filing is shs. 574,309,489/=. The rate of 30% interest per annum was the lending rate by commercial banks. The prime lending rate of Stanbic Bank as per the New Vision of Friday March 9th 2012 was 28.5 and reduced to 27.5 by March. The defendant was using borrowed
25 money to trade.

At the reconciliation, the plaintiff's representatives came with a computer generated ledger without the corresponding invoices and he had the defendant's counter book. Nevertheless, using that counter-book where entries of stock received from the plaintiff every week would be
30 entered, the directors of the defendant undertook an exercise of reconciliation of accounts with representatives of the plaintiff. That reconciliation took place but under duress. on 24th and 25th

May 2013 at the end of which he signed Exhibit P. Ex. 6 on 25th May, 2013 where at page 2 Table C there is indicated an undisputed figure representing an amount due to the plaintiff from the defendant. He was under duress because he was being harassed by letters of demand from lawyers and phone calls from the plaintiff's managers yet he is hypertensive and has a heart
5 problem.

The suit had originally been filed under summary procedure but upon application of the defendant for leave to appear and defend, which was granted by the consent of counsel for both parties, hearing commenced without the suit first undergoing a scheduling conference. In the
10 result, out of what appears to have been an oversight, the issues for determination of court were not framed at the commencement of the hearing on 21st April, 2015. Nevertheless, under the provisions of Order 15 rule 5 of *The Civil Procedure Rules*, court is empowered to frame issues at trial arising from evidence on oath by either party and the court may also amend or frame additional issues on such terms as it thinks fit before judgment. According to Order 15 rule 3 of
15 *The Civil Procedure Rules*, the court may frame issues from all or any of the following materials;- (a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the advocates of the parties; (b) allegations made in the pleadings or in answers to interrogatories delivered in the suit; and (c) the contents of documents produced by either party. I therefore consider the following to be the issues for the determination of court;

1. Whether the reconciled position between the parties is binding on the defendant.
2. Whether the defendant owes the plaintiff the sum of shs. 135,682,485/=
3. Whether the plaintiff is indebted to the defendant in the sum of shs. 241,810,515/=
4. What remedies are available to the parties?

In his final submissions, counsel for the plaintiff Mr. Donge Opar, argued that there is no evidence of duress, intimidation and undue influence that was brought to bear on the defendant as claimed in its pleadings. The two companies had dealings at arm's length and pestering the defendant for payment should not be construed as intimidation, duress or undue influence. After
30 the reconciliation, it was mutually agreed that the defendant owed the plaintiff a sum of shs. 135,682,680/= out of which the defendant paid only shs. 18,000,000/= leaving a balance of shs.

117,682,485/= unpaid which ought to be decreed to the plaintiff. The reconciliation resulted in a figure that figure as the undisputed amount and the plaintiff has limited its claim to that amount, excluding the amount that remained disputed following the reconciliation. During the exercise of reconciliation, the amount agreed upon as the purchase price for the franchise was taken into
5 account and offset against the defendant's indebtedness to the plaintiff as reflected in table (a) of exhibit P. Ex.6 as goodwill. To award the defendant that sum with interest as claimed by the defendant would be double payment and unjust enrichment. Having failed it its contractual obligation to provide proof of sales and to obtain the consent of M.T.N to the transaction, the defendant cannot claim interest for late payments since by the defendant's conduct, time ceased
10 to be of the essence in the performance of the contract. The defendant by its conduct, waived any obligation on the part of the plaintiff to observe the time schedules stipulated in the contract. He therefore prayed that judgment be entered for the plaintiff against the defendant in the sum of shs. 117,682,485/= general damages of shs. 80,000,000/= for breach of contract, and costs.

15 In response, counsel for the defendant Mr. Peter Jogo Tabu argued that the defendant has proved that its director, D.W.1 Mr. Richard Edemacu is hypertensive and has a heart problem yet the reconciliation exercise had been preceded by incessant calls to him and a report to the police at Kira Road Police Station, where upon he was being summoned to record a statement in response to allegations of obtaining goods by false pretence. He therefore executed exhibit P. Ex.6 under
20 duress occasioned by threats of criminal prosecution. Furthermore, the reconciliation was based on a computer generated ledger that was not supported by any invoices as a result of which the plaintiffs have failed to strict prove that the defendant owes it the sum claimed. On the other hand, the defendant has proved that there was an agreement for the purchase of his franchise at a price of shs. 375,000,000/= payable in specified installments. The defendant admitted having
25 received only shs. 25,575,000/= There is no evidence that the balance was paid by the plaintiff. In the result the plaintiff's suit should be dismissed with costs and judgment be entered in favour of the defendant on the counterclaim in the sum of shs. 349,425,000/= interest thereon at the rate of 28% per annum for the last six years, hence shs. 587,000,000/= general damages of shs. 100,000,000/= inters on the decretal sum and costs

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First issue: Whether the reconciled position between the parties is binding on the defendant.

Second issue: Whether the defendant owes the plaintiff the sum of shs. 135,682,485/=

5 It is common ground between the parties that before the agreement of 20th January, 2012 (exhibit P. Ex.1) was executed, by which the defendant sold off its franchise goodwill to the plaintiff, the two companies had been trading with each other. The defendant would from time to time order for stock from the plaintiff, some of which it paid for in cash and rest of which it would receive on credit and pay for later. These transactions continued even after the signing of exhibit P. Ex.1.

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In that agreement, it was agreed that the defendant's franchise goodwill would be paid for in kind, in three installments. The first two installments were to be paid in the form of supply of shs. 250,000,000/= worth of M.T.N airtime scratch cards, while the last two installments were to be paid for in the form of shs. 125,000,000/= worth of M.T.N. electronic airtime (Easy load).

15 Payment of the last two installments was conditioned on the defendant obtaining prior consent of M.T.N to the transaction and proof of a monthly net income of shs. 8,472,222/= from Moyo District. The last installment was due thirty days after the defendant's handing over of its activities in Moyo District, to the plaintiff.

20 Despite the defendant's failure to obtain the consent of M.T.N to the transaction, which instead was secured by the plaintiff; its failure to provide proof of a monthly net income of shs. 8,472,222/= from Moyo District; and handing over Moyo District, the latter two breaches of which the defendant denies, the plaintiff went ahead to honour its side of the bargain by supply of M.T.N airtime scratch cards electronic airtime (Easy load). Unfortunately, none of the parties

25 kept separate ledgers for supplies made under the franchise goodwill purchase agreement from those made under the regular business transactions between them. As a result, the plaintiff relied on one computer generated ledger (the first twelve pages of exhibit D. Ex.7) for its record of both transactions, while the defendant relied on its counter-book, where entries of stock received from the plaintiff every week would be entered for both transactions (exhibit D. Ex.8). Whereas

30 the plaintiff's ledger entries indicated the defendant was indebted to the plaintiff in the sum of

shs. 218,189,485/= the defendant's counter book entries did not reflect any credit balances in the plaintiff's favour.

5 It became necessary to reconcile their respective accounts whereupon a joint exercise was undertaken on 24th and 25th May, 2013 between representatives of the plaintiff and the defendant's directors. On the first day of that exercise, it was discovered that several of the entries made by the plaintiff in its computer generated ledger were inaccurate or did not have corresponding invoices to support them, or had been attributed to the defendant whereas they related to the plaintiff's dealings with entities other than the defendant. The defendant expressly
10 pointed out some of these anomalies to the plaintiff in its letter of 24th May, 2013 (exhibit D. Ex.6).

At the conclusion of the verification process, the parties came up with a mutually agreed position reflected in exhibit P. Ex.6. Out of the shs. 218,189,000/= claimed by the plaintiff, the defendant
15 had certified shs. 135,682,485/= as undisputed (see table "c" at page two of that exhibit) and shs. 82,507,000/= as the unverified sum whose verification awaited production of invoices corresponding to a total of eight consignments supplied between 1st December, 2011 and 14th November, 2012 in respect of which entries in the plaintiff's computer generated ledger were at variance with the entries in the defendant's counter book entries (see table "b" at page two of that
20 exhibit). In the process of reconciliation, it was mutually acknowledged that the price of shs. 375,000,000/= payable to the defendant under the franchise goodwill purchase / sale agreement of 20th January, 2012 (exhibit P. Ex.1) had been settled on 31st August, 2012 (as per exhibit D. Ex.3) and was thus offset against the gross volume of stock supplies made in the two years under consideration, 2011 and 2012 (see table "a" at page one of exhibit P. Ex.6). The representatives
25 of both parties then executed that document on 25th May, 2013. It is that document that founds the plaintiff's claim in this suit which document the defendant now challenges as voidable.

Exhibit P. EX.6 is practically an admission by the defendant of its indebtedness to the plaintiff in the sum of shs. 135,682,485/= According to section 16 of *The Evidence Act*, an admission is a
30 statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact. Admissions are not conclusive proof of the matters admitted, but they may operate as

estoppels (see sections 28 and 114 of *The Evidence Act*). The focus of section 114 of *The evidence Act* is the position of the person who was induced to act, and the principle on which it rests is that it would be most inequitable and unjust to the person induced if another, by a representation made or by conduct amounting to a representation, has induced him or her to act
5 as he or she would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his or her former statement to the loss and injury of the person who acted on it. If the person who made the statement did so without full knowledge or under error, it may in the result be unfortunate for him, but it would be unjust, even though he acted under error, to throw the consequences on the person who believed his statement and acted
10 on it as it was intended he should do.

On the other hand, it is trite law that when a document containing contractual terms is signed, then, in the absence of fraud, or misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not (see *L'Estrange v. F Graucob Ltd [1934] 2*
15 *KB 394* and *Steel Makers Ltd v. AB Steel Products (U) Ltd, H. C. Civil Suit No. 824 of 2003*). It seems to be generally accepted that a person who signs a lawful contractual document may not dispute his or her agreement to the terms which it contains, unless he or she can establish one of five defences; fraud, misrepresentation, duress, undue influence or *non est factum*.

20 Where a person has been induced to sign a contractual document by fraud or misrepresentation, the transaction will be voidable. A mistake of fact is a factual error that, if the correct fact had been known, would have resulted in a different contract. A mistake of fact arises where either (1) the facts exist, but are unknown, or (2) the facts do not exist as they are believed to exist. The defence of mistake would arise in a case where only one party has knowledge of the subject
25 matter and the other simply relies on what the first party intimates. Ordinarily, unilateral mistake does not make a contract void, except where one party relied on a statement of the other about a material fact that the second party knew or should have known was mistaken by the first part or where the mistake was “unconscionable”, i.e. so serious and unreasonable to be outrageous. There is a distinction between mechanical calculations and business error.

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In the instant case, the defendant's director D.W.1 Mr. Richard Edemacu was not laboring under any mistake of fact regarding the nature of the transaction. He was fully aware that the reconciliation was all about settling accounts between his company and the plaintiff. He acknowledged the sums that were proved to his satisfaction, then isolated, pointed out and
5 rejected those that were not. If there was any mistake on his part, which has not been proved, then it was as to quantum and not the subject matter of the agreement. An erroneous opinion as to the value or quantum of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact (an ignorant mistake), but rather a decisional mistake. Decisional mistakes occur when a party makes the wrong choice between two known, alternative
10 sets of facts. On the other hand, an ignorant mistake occurs where a party is unaware of the existence of the correct alternative set of facts. For the defence of mistake to hold, the alleged mistake of fact must be an ignorant mistake, which is not the case here. D.W.1 ably distinguished those claims in respect of which the plaintiff provided proof to his satisfaction from those that the plaintiff did not. He was fully aware of the existence of both alternative sets of facts and
15 made appropriate decisions with regard to each. A decisional mistake cannot be characterised as an ignorant mistake. Since the defendant neither pleaded nor proved any fraud or misrepresentation in the transaction leading up to the signing of that document, this then leaves court with only, duress, undue influence and *non est factum* to consider as circumstances that could possibly have vitiated this agreement.

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Non est factum is a defence which may be available to someone who has been misled into signing a document which is fundamentally different from what he or she intended to execute or sign, where one party has signed a contract, believing it to be something different from what it actually is. The signatory must have made a fundamental mistake as to the nature of the contents
25 of the document being signed, having regard to the intended practical effect of the document; and the document must be radically different from the one the signatory intended to sign (see *Saunders v. Anglia Building Society* [1971] AC 1004, sub nom *Gallie v. Lee* [1969] 2 Ch 17; [1969] 1 All ER 1062. See also *Muskham Finance Ltd v. Howard* [1963] 1 All ER 81). Without such a defence, the mistaken party may be liable under a document appearing to be valid and
30 binding. The plea will be rejected where the person signing had some idea about the nature of the document and what it was dealing with, even though he or she may have been unclear, or

even mistaken, as to the nature of some of the obligations created by the instrument, or as to the particular class to which it belonged. In this case, D.W.1 Mr. Richard Edemacu as director of the defendant company was aware of the general nature of the transaction and was unable to show that the document he signed was fundamentally different from what he thought it to be. This defence too is not available to the defendant.

As regards the defendant's argument that D.W.1 signed the contract under undue influence, "persuasion is not unlawful, but pressure of whatever character if so exerted as to overpower the volition without convincing the judgment..., will constitute undue influence, though no force has been either used or threatened" (see Sir J. P. Wilde in *Hall v. Hall* LR 1 P&D 481, at p. 482). The concept of undue influence involves one person taking advantage of a position of power over another person. "... in all cases of undue influence the critical question is whether or not the persuasion or the advice, in other words the influence, has invaded the free volition of the [victim] to accept or reject the persuasion or advice or withstand the influence. The [victim] may be led but [he or] she must not be driven and [his or] her will must be the offspring of [his or] her own volition, not a record of someone else's. There is no undue influence unless the [victim] if [he or] she were free and informed could say "This is not my wish but I must do it." (see *Daniel v. Drew* [2005] EWCA Civ 507, [2005] WTLR 807 CA at para. 36).

In *Bank of Credit and Commerce International SA v. Aboody* [1992] 4 All ER 955, the Court of Appeal classified this doctrine into two types: actual and presumed. Under actual undue influence the claimant must prove that he or she was induced to sign a contract or agree to a transaction under applied undue influence; whereas in presumed undue influence the claimant only has to prove that there was enough trust and reliance in between the parties that the side committing the wrong abused that relationship by exerting undue influence and inducing them to enter an ambiguous transaction. In the instant case, there was no relationship of such a kind that the defendant in fact placed its trust and confidence in the plaintiff to safeguard its interest. The two companies were dealing at arm's length. The transaction was not founded upon a fiduciary relationship of trust and therefore presumed undue influence does not arise at all.

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In respect of actual undue influence, the claimant must adduce evidence to show that the power was unbalanced at the time of the signing of the contract. It usually arises in a relationship of influence involving acts such as threats to end a relationship, or continuing to badger the party where they have refused consent until they eventually give in. For example in *CIBC Mortgages v. Pitt [1994] 1 AC 200*, the respondent's husband wished to purchase some shares on the stock market. He pressured his wife, the respondent, into signing a mortgage of £150,000 securing the family home. The stated purpose of the loan was to purchase a holiday home and pay off the existing mortgage. The husband used the money to purchase shares and then used those shares as collateral to purchase further shares. For a time the shares did very well and he was a millionaire on paper. The wife saw no benefit from these shares as any income was always used to purchase more shares. In 1987 the stock market crashed. The bank sought to enforce the security under the mortgage which at the time exceeded the value of the home. The wife raised actual undue influence in defence. It was held that the transaction on its face did not seem to the manifest disadvantage of the wife, because the stated purpose was to purchase a holiday home.

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With regard to this case, I observed the plaintiff's witnesses who were involved in the accounts reconciliation exercise, P.W.2 and P.W.3 as well as that of the defendant, D.W.1, as they testified. It appeared to me that the representatives of both parties were intelligent, well-educated people with a reasonable knowledge of accounting and substantial experience in business affairs of this type. There was nothing in the character or personality of P.W.2 and P.W.3 to suggest that they were forceful and that during that reconciliation, they created a relationship or environment of influence or threat, at least by them over or towards D.W.1. In the witness box, D.W.1 presented as a man of mature age, of (at least) moderately strong character and personality who had been actively engaged in transacting business of this nature, in a majority of the districts of the West Nile Region, since 14th July, 2010 (see exhibit D. Ex.2). He was therefore a person of substantial experience in this business in which he had been actively engaged for the preceding three years. Neither P.W.2 nor P.W.3 projected a capacity to intimidate D.W.1.

In the circumstances, the plaintiff through its agents at that reconciliation, was not in a position of power over the defendant through its director D.W.1. He did not display any weakness of character or personality in the witness box susceptible to influence or intimidation, to the point of

having been possibly vulnerable to the influence or threats of either P.W.2 and P.W.3 or their director, P.W.1 by then in Kampala. Moreover the short duration of the reconciliation exercise meant that there was little opportunity for any of the plaintiff's officers to develop a relationship of ascendancy of which they then took unfair advantage to exert influence over D.W.1 and there is no evidence to suggest that they did so. There is no evidence to suggest that exhibit P. Ex.6 was the product of influence by either P.W.1, P.W.2, or P.W.3 but rather it appears to have been a voluntary act of D.W.1, who at the time was not in a relationship of influence which would attract the operation of the equitable doctrine. Without evidence of any specific acts of coercion during that reconciliation, the defense of undue influence is not available to the defendant.

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On the other hand, the defendant pleaded duress by threats and persistent calls made to D.W.1. Duress in the law of contract relates to situations where a person enters into an agreement as a result of threats. Where a party enters into a contract because of duress, he or she may have the contract set aside. Originally, the common law only recognised threats of unlawful physical violence, however, in more recent times the courts have recognised economic duress as giving rise to a valid claim. The basis of the duress as a vitiating factor in the law of contract is that there is an absence of free consent. Pressure not amounting to duress may give rise to an action for undue influence in equity. The effect of a finding of duress and undue influence is that the contract is voidable. Otherwise, a document signed without compulsion implies that the person who subscribes his or her signature thereto, intends his or her signature to authenticate his or her full agreement to its contents.

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Where a person enters into a contract as a result of threats of physical violence, the contract may be set aside provided the threat was a cause of entering the contract. There is no need to establish that they would not have entered the contract but for the threat. For example in *Barton v. Armstrong [1976] AC 104*, the appellant was the managing director of a company, whose main business was in property development. The appellant made a deed by which the company agreed to pay \$140,000 to Alexander Armstrong, a state politician and former Chairman of the company's Board of Directors, and buy his shares for \$180,000. Evidence was led to show that Armstrong had threatened to have the appellant killed. The Privy Council decided that the appellant could avoid the contract for being under duress, and it did not matter that he may have

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agreed to the deal any way. Lord Cross, Lord Kilbrandon and Sir Garfield Barwick held that physical duress does not need to be the main reason, it must merely be one reason for entering an agreement.

5 However for duress to vitiate a contract, it must be threat of a physical nature. There are three requirements for the defence of physical duress; (i) it must be shown that some illegitimate means of persuasion was used, (ii) that the illegitimate means used was a reason (not the reason, nor the predominant reason nor the clinching reason), and (iii) third that his evidence is honest and accepted. In the instant case, the pressure which D.W.1 testified to have been subjected was
10 not of a physical nature and neither was it illegitimate. He stated that he was told a case of obtaining goods by false pretence had been reported to the police where he ought to report to make a statement. That does not constitute duress in law. D.W.1 may have been subjected to pressure but it did not amount to compulsion of the will and either was that pressure illegitimate.

15 Although a threat to commit a lawful act can sometimes amount to unlawful duress, that is determined after court applies the following tests;- whether the victim protested; whether there was an alternative route available to the victim; whether the victim independently advised; and whether the victim took steps to avoid the agreement after entering in to it. These tests have been applied when courts consider whether the impugned conduct, although legitimate, amounted to
20 economic duress. In *Occidental Worldwide Investment Corporation v. Skibs (The Sibeon & The Sibotre)* [1976] 1 *Lloyds Rep* 293 it was held that commercial pressure was not enough. It must be shown that there existed a state of affairs constituting coercion of the will so as to vitiate consent. "The classic case of duress is, however, not the lack of will to submit but the victim's intentional submission arising from the realisation that there is no other practical choice open to
25 him" (*The Universe Sentinel* [1983] 1AC 366). Accordingly two elements of duress are required; compulsion of the will - absence of choice and illegitimacy of the pressure.

For example the Court of Appeal in *Hennessy v. Cragmyle* [1986] 1 *ICR* 461 considered a case where an employee was faced with the choice of summary dismissal or redundancy with
30 compensation on terms that he would make no further claims. The employee after consultation with ACAS accepted the offer of redundancy but later claimed that he was subject to economic

duress, an argument which the Court of Appeal rejected stating: "However, like the well-established duress to the person, it is a ground of avoidance only if the duress is such that the will of the contractor is overborne. His consent must be vitiated."

5 Lastly, in *CTN Cash & Carry v. Gallagher [1994] 4 All ER 714* a buyer had paid money following the supplier's threat to stop the buyer's credit facilities if the money was not paid. In circumstances where the supplier genuinely believed the money was owing, the court had to decide whether the doctrine of economic duress enabled the buyer to recover the payment. It was held that the Defendant's conduct did not amount to economic duress because: (a) The parties
10 were in dispute over arm's length commercial dealings between two trading companies. The fact that the Defendant was in a monopoly position as the sole distributor of popular brands of cigarettes was irrelevant and could not convert what was not otherwise duress into duress since the common law does not recognise the doctrine of inequality of bargaining power in commercial dealings. (b) The supplier was legally entitled to refuse to enter in to any future
15 contracts with the buyer for any reason or indeed for no reason at all and it could legally refuse to grant credit to the buyer. (c) The supplier genuinely believed the money was owed to it and had exerted commercial pressure in order to obtain payment of a sum it considered due.

In deciding whether or not the transaction was procured by duress, the fundamental question
20 always is whether the pressure crossed the line from that which must be accepted in normal robust commercial bargaining. Illegitimate pressure must be distinguished from the rough and tumble of the pressures of normal commercial bargaining (see *DSND Subsea Ltd v. Petroleum Geo Services ASA [2000] EWHC 185*). The minimum basic test of subjective causation in economic duress ought to be a "but for" test. The illegitimate pressure must have been such as
25 actually caused the making of the agreement, in the sense that it would not otherwise have been made either at all or, at least, in the terms in which it was made. In that sense, the pressure must have been decisive or clinching (see *Huyton SA v. Peter Cremer GmbH [1999] 1 Lloyds Rep 620*). The classic case of duress is not the lack of will to submit but the victim's intentional submission arising from the realisation that there is no practical choice open to him or her. The
30 absence of choice can be proved in various ways, e.g. by protest, by the absence of independent

advice, or by a declaration of intention to go to law to recover the money paid or the property transferred.

That it is necessary in a claim of duress to show that there was no reasonable alternative should
5 not be underestimated. This is clear from the decision in *DSND Subsea v. Petroleum Geo Services ASA [2000] BLR 530* where the Claimant was carrying out construction work for the Defendant on an oil rig but suspended its work pending the signing of a contractual variation on more favourable terms. The Defendant contended on the basis of economic duress that it should not be bound by the variation. This argument was rejected for three reasons: (a) the pressure
10 from the Claimant was not illegitimate because the Claimant was acting in good faith in insisting on new terms. (b) the Defendant had realistic practical alternatives to accepting the variation of the contract. (c) the contract had been affirmed when the Defendant was free from any duress.

There is a fine line between tough negotiations and actual economic duress. It must be shown
15 that the claimant was put in a position where no other practical solution was available. It is important for the party claiming signing under duress to prove that there was indeed no other alternative, but to accept the conditions given under illegitimate (excessive) pressure, in which case, the claimant must also prove that he or she protested against such proposal and took all possible and necessary steps to avoid the deal (see *Pao On v. Lau Yiu Long [1980] AC 614*). It
20 follows from the above decisions that the necessary ingredients for a successful economic duress claim are: (a) Pressure which is illegitimate; (b) that the pressure was a significant cause that induced the claimant to enter into the contract; (c) that the practical effect of the pressure is that there is compulsion on, or a lack of practical choice for, the victim. It is the above principles that I now apply to the facts of this case by considering the contemporaneous documents and
25 behaviour of the parties.

As regards whether or not there was application of pressure that was illegitimate, this is decided by considering whether the person allegedly exerting pressure acted in good or bad faith. In establishing whether pressure is illegitimate, consideration should be paid to the nature of the
30 demands being made and whether they can be justified. It entails pressure, the practical effect of which is compulsion or the absence of choice. "Outside the field of protected relationships, and

in a purely commercial context, it might be a relatively rare case in which lawful acts duress can be established. And it might be particularly difficult to establish duress if the defendant bona fide considered that his demand was valid" (see dictum of Lord Steyn in *CTN Cash & Carry Ltd v. Gallaher Ltd [1993] EWCA Civ 19*).

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In the instant case, the plaintiff relied on its running ledger (exhibit D. Ex.7) to lay its claim to a sum it initially presented as shs. 218,189,485/= There is nothing in the manner that ledger was kept to suggest that the plaintiff did not genuinely believe that to be the amount the defendant owed it. There is nothing to suggest that it was a deliberate misstatement of the claim, or was
10 there evidence of a fraudulent or malicious intent in making that claim. If indeed the plaintiff did intimate to the defendant that it would resort to lodging a complaint of obtaining goods by false pretence, I do not see anything unlawful or illegitimate in adopting such a course of action in a bid to recover a debt, in so far as the facts suggested a criminal intent in the defendant's conduct, a matter that the police could investigate upon such complaint. The pressure from the plaintiff
15 was not illegitimate because it was acting in good faith in insisting on the timely payment of a debt it genuinely considered to be due from the defendant.

As to whether there was a lack of practical choice for the defendant in accepting the quantum stated as due from it, I find that this was not the case. D.W.1 was able to negotiate the amount
20 down from the plaintiff's original claim by insisting on the plaintiff providing proof of its claim. Exhibit D. Ex.6 shows that D.W.1 was able to single out the specific claims in respect of which the plaintiff had not provided proof to its satisfaction. He was able to point out the sum that had been tentatively agreed upon and insisted on the channel of communication he considered would provide more accurate information. The tone of the letter is not one of a person with no practical
25 choice. The final outcome, exhibit P. Ex.6 categorised the claim into three; a summary of both accounts in part "a", disputed entries that were subject to further verification and reconciliation in part "b" and the undisputed amount in part "c." This is an indication that at the time he signed, D.W.1 was fully aware of the status of all categories and he had the freedom to reject that with which he was disagreeable. The evidence suggests that he negotiated terms contained in P. Ex.6
30 on a give and take basis and not on the basis of dictation by the plaintiff's agents. Lack of a practical choice for the defendant has not been proved.

As to whether the pressure was the decisive or clinching factor without the agreement would not have been signed, the defendant had the onus of proving that the circumstances were such that, but for that illegitimate pressure, D.W.1 would not have entered into the disputed contract. In the instant case, the reconciliation took place in the defendant's office where D.W.1 had the authority
5 to eject the plaintiff's representatives from, in the event of inappropriate conduct; the persons alleged to have threatened him with a complaint to the police were at Kira Road Police Station or other places in Kampala, over five hundred kilometres away from his office in Arua and posing no real or imminent threat of arrest; there is no evidence either before, during or after the signing of exhibit P. Ex.6 that D.W.1 of a protest against duress or a declaration of intention to go to the
10 law to revoke the document. Indeed, the allegation of duress was only raised after the current proceedings had been commenced by the plaintiff. As a result, there is no evidence that it was a significant cause of inducing the defendant into the contract. This suggests that the agreement was not entered into under the influence of illegitimate pressure or, alternatively, that the plaintiff's conduct was not a significant cause in the defendant's decision to sign exhibit P. Ex.6.

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Lastly, the defendant's conduct after executing that acknowledgement, affirmed it. Four months after the agreement, the defendant affirmed it by paying a total of shs. 18,000,000/= in three installments towards settlement of that agreed outstanding balance arrived at after the mutual reconciliation. The defendant paid shs. 5,000,000/= on 26th September, 2013, shs. 3,000,000/= on
20 13th October, 2013 and shs. 10,000,000/= on 31st November, 2013. A contract entered into under duress is only voidable, not void. As a result, the party who has the right to avoid the contract loses that right by affirming the contract. A contract may be affirmed expressly or alternatively impliedly by acquiescence. There is acquiescence if the victim fails to take any steps to set aside the transaction within a reasonable time after he is freed from the duress or undue influence (see
25 *DSND Subsea Ltd v. Petroleum Geo Services Asa*, [2000] EWHC 185 (TCC), [2001] BLR 23, [2000] BLR 530). The defendant took steps to affirm the agreement four months after it was signed and continued to comply with its terms up to six months after it was executed. Not only did the defendant acquiescence by failure to take any steps to set it aside but also affirmed it expressly by complying with its terms. D.W.1 had ample opportunity to take a different course
30 of action avoiding the agreement but maintained the decision he had initially made, independently, voluntarily, and fully understanding what he was doing.

In the final result, I find in favour of the plaintiff on both issues. The reconciled position between the parties is binding on the defendant and consequently by virtue of that reconciliation, the defendant owes the plaintiff a sum of shs. 135,682,485, less the shs. 18,000,000/= the defendant paid thereafter. This leaves an outstanding sum of shs. 117,682,485/= due from the defendant to the plaintiff.

Third issue: Whether the plaintiff is indebted to the defendant in the sum of shs. 241,810,515/=

The position reached on 25th May, 2013 following a mutual reconciliation of the accounts kept by both parties, was that the price of shs. 375,000,000/= payable to the defendant under the franchise goodwill purchase / sale agreement of 20th January, 2012 (exhibit P. Ex.1) had been settled on 31st August, 2012 (as per exhibit D. Ex.3) and was thus offset against the gross volume of stock supplies made in the two years under consideration, 2011 and 2012 (see table "a" at page one of exhibit P. Ex.6). In light of that position, the defendant's counterclaim is misconceived and it is hereby dismissed with costs.

Fourth issue: What are the remedies available to the parties?

The plaintiff has proved on the balance of probabilities that the defendant owes it shs. 117,682,485/= and judgment is entered in its favour in that amount.

The plaintiff further claimed general damages for breach of contract. The normal measure of damages in cases of belated repayments of money is by way of interest which the money would attract during the period of breach, taking the rates of interest and inflation into account (see *Sowah v. Bank for Housing & Construction [1982-83] 2 GLR, 1324*). I have therefore applied a rate of interest of 15% per annum, as the measure of profit which the money would have attracted during the period of breach, i.e. from 23rd May, 2013 to-date (nearly five years), as general damages to be awarded to the plaintiff. I therefore award the plaintiff shs 5,250,000/= as

general damages. This translates into shs. 20,352,402 per annum and when multiplied by the five years of default, the result is shs. 101,762,010/= which is hereby awarded as general damages.

5 Under section 26 (1) of *The Civil Procedure Act* where interest was not agreed upon by the parties, Court should award interest that is just and reasonable. In determining a just and reasonable rate, courts take into account “the ever rising inflation and drastic depreciation of the currency. A Plaintiff is entitled to such rate of interest as would not neglect the prevailing economic value of money, but at the same time one which would insulate him or her against any further economic vagaries and the inflation and depreciation of the currency in the event that the
10 money awarded is not promptly paid when it falls due (see *Mohanlal Kakubhai Radia v. Warid Telecom Ltd*, H. C. Civil Suit No. 234 of 2011 and *Kinyera v. The Management Committee of Laroo Boarding Primary School*, H. C. Civil Suit No. 099 of 2013). Consequently, the award of general and special damages shall carry interest at the rate of 8% per annum from the date of judgment until payment in full.

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In the final result, Judgment is entered for the plaintiff against the defendant in the following terms:-

- a) shs. 117,682,485/= as the principal sum owed.
- b) shs. 101,762,010/= general damages.
- 20 c) Interest on the award in (a) and (b) above at the rate of 8% per annum from the date of judgment until payment in full.
- d) The costs of the suit and of the counterclaim

25 Dated at Arua this 15th day of March, 2018

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Stephen Mubiru
Judge,
15th March, 2018.