THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
CIVIL SUIT NO. 353 OF 2018

ST. BALIKUDDEMBE MARKET STALLS,
SPACE AND LOCK-UP SHOP OWNERS
ASSOCIATION LTD (SSLOA) ::: PLAINTIFF

VERSUS

KAMPALA CAPITAL CITY AUTHORITY ::::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The plaintiff and the defendant entered into a consent judgment on 19th February 2010 vide High Court Civil Suit No. 947 of 2001 after the defendant represented that it owned all the land that houses St Balikuddembe Market (Owino) and undertook to grant a lease of the land to the plaintiff.

On the basis of the consent order, the defendant, by its Contracts Committee meeting of 3/02/2010 under Min. KDCC 4/51/2010, billed the Plaintiff a premium of **UGX. 4,000,000,000/=** payable in advance and **UGX. 200,000,000/=** as Ground Rent per annum. The total sum of UGX **4,200,000,000/=** was paid in one lump sum in consideration for the lease of plots 24 B, 24 C, M584, M582, M583, and M585.

At all material times, the Plaintiff made it known that it would seek the funding from DFCU Bank Limited which is a commercial bank and lends for a profit. To that regard, time and conditions of delivery of the lease were of essence; and KCC represented to DFCU Bank Limited that it was lessor to whom the money was directly paid; and the defendant represented to DFCU Bank Limited that it would surrender the leases to the bank as security.

The defendant even issued a Public Notice dated the 1st March 2010 representing to the general public and all stakeholders that it would indeed grant a sublease of the market to the Plaintiff.

In order to secure the said funding from the bank, the Plaintiff mortgaged various titles as collateral for the loan as follows;Kibuga Block 12, Plot 1081 Mengo Kisenyi;Kibuga Block 12, Plot 1339 Mengo Kisenyi;Kibuga Block 12, Plot 388 Mengo Kisenyi.

The above land had been earmarked for resettlement of the vendors in the event of the impending redevelopment of the main Market; and once the lease titles were issued, they would be substituted for the above land which was privately owned by the Plaintiff. However, later, after receiving the payment above the defendant then claimed that it did not have any land to lease or sublease and was thus unable to implement its obligations.

Owing to the defendant's actions and omissions the Plaintiff defaulted on its loan obligations as it could not exercise full control, over the market from which it was to make collections and meet its loan repayments. As such, on 5th day of May 2014, DFCU Bank foreclosed one of the Plaintiff's properties and sold off Kibuga Block 12, Plot 388 Mengo land at Kisenyi.

The Plaintiff was shocked to learn from an official land survey commissioned by the Defendant that even Plots M584, M582, M583, and M585 did not exist and had been illegally created.

The Plaintiff was forced to seek specific performance and so filed an action against the Defendant in the High Court to comply with its representations in the consent Judgment vide *Misc. Civil Application No. 1463/2013 SSLOA Vs KCCA,* by which His Lorship Justice Joseph Murangira gave a deadline in which the lease titles would be surrendered by the defendant, but still the Defendant was unable to do so.

The Plaintiff, still faced with the defendant's non-compliance sought to mitigate its own loss and, it entered into direct negotiations with the Kampala District Land Board and obtained three land titles for a portion of the Market viz;

a. LRV No.4500 Folio 11, Plot 20A-22A Nakivubo Place
b. LRV No. 4514 Folio 10, Plot 24 Nakivubo Place
c. LRV No. 4500 Folio 10 Plot M34 Nakivubo Place

The defendant in its written Statement of defence made clear admission of the plaintiff's case;

3(f)" In March, 2011, without having been awarded a sublease by the Kampala District Contracts Committee, pursuant to the Consent Judgment, the plaintiff paid the premium and ground rent to the tune of UGX. 4,000,000,000/= Four Billion and UGX. 200,000,000/=(Two hundred million) respectively that had been stipulated in the award of the sublease to St Balikuddembe Market Stalls and Lock-Up Shop Owners Association(SSLOA).

3(k) Subsequent to the consent Judgment in issue, the defendant discovered that it would not be able to enter into a sublease with the plaintiff company in respect of the land on which St. Balikuddembe market is located since the same was not wholly registered in its names and it only had title for plot 24 Nakivubo Place.

3(m) The plaintiff company being dissatisfied with the pace at which the defendant was processing the sublease and also being indebted to DFCU Bank initiated contempt of Court proceedings against the defendant vide Miscellaneous Application No. 1463 of 2013:St Balikuddembe Market Stalls, Space & Lock-up Shops Owners Association vs Kampala City Council to force the defendant to comply with the consent Judgment in HCCS No..947 of 2001….."

The Plaintiff contends that it has suffered financial loss; and it has been unable to procure redevelopment of the market, suffered losses on the bank loan – arising out of interest payments and default thereon; and a depletion of the resettlement land sold off by DFCU Bank. At present, DFCU Bank has again moved to foreclose on the remaining security of the Plaintiffs for the sum outstanding balance of the mortgage.

The defendant in its defence also filed a counterclaim against the plaintiff and Kampala District Land Board contending that;

The 1st counter-defendant/plaintiff illegally and in bad faith obtained from the 2nd counter-defendant (Kampala District Land Board) certificates of titles for the land comprised in LRV 4500 Folio 10, Plot M34 Nakivubo Place LRV 4514 Folio 11, Plot 20A-22A Nakivubo Place and LRV 4514 Folio Plot 24 Nakivubo Place.

The defendant/Counter-defendant sought an Order for cancellation of the said certificates of title and also an Order for an account and payment of the monies had and received from St Balikuddembe Market on behalf of the counter-defendant since 4th February 2011, general damages and interest thereon.

The parties filed a joint scheduling Memorandum and the following facts and issues were agreed for the determination of the dispute.

AGREED FACTS

1. The plaintiff paid the defendant a sum of UGX. ***4,200,000,000/=*** Uganda Shillings Four Billion Two Hundred Million Only) as premium and ground rent for lease for land comprised in St Balikuddembe Market and the Defendant acknowledges receipt of the same amount.

2. The defendant did not grant the plaintiff the lease agreed despite receipt of 4,200,000,000/= (Four Billion Two Hundred Thousand only).

AGREED ISSUES.

(1) Whether the plaintiff is entitled to the accumulated interest of UGX ***6, 384,000,000/=*** as claimed in the plaint.
(2) Whether the counterclaim discloses a cause of action against the counter defendants.
(3) Whether the Plaintiff/1st Counter-Defendant and 2nd Counter Defendant are liable on the Counter Claim.

(4) What remedies are available to the parties?

The defendant sought several adjournments in order to allow the parties to reach an out of court settlement by way of mediation but the parties representatives failed to reach a common position and the consent was not signed.

The court decided to proceed to hear the matter and parties were directed to file their witness statements. The plaintiff filed its witness statement but the defendant failed to have its witness statement filed.

At the trial the plaintiff led its only witness in support of its case who was cross examined by the defence counsel. After the closure of the plaintiff's case, the defendant failed to produce any witnesses and the court proceeded under Order 17 rule 4.

The plaintiff submitted that the defendant had admitted its indebtedness to the plaintiff both through the pleadings paragraphs 3 and also in the Joint Scheduling memorandum to the tune of 4,200,000,000/=. All this was agreed and there was no need to prove the same.

Admission of the principle sum in the claim

In its pleadings, the Plaintiff inter-alia for a refund of **UGX 4,200,000,000/=**, special damages, general damages, interest and costs for total failure of consideration and breach of contract.

In its written statement of defence which was filed in the court on 24/09/2018, the defendant, at Paragraphs 3(f) and 3(k) left no doubt that the sum of **UGX 4,200,000,000/=** was duly received and the matter was not in dispute.

Further, on 09/09/2019, at the hearing of the suit, the defendant's counsel on record admitted and it was recorded in the proceedings that the Defendant does not contest receipt of the sum. The admission was in the following terms:

> "The UGX 4,200,000,000/= is already admitted so it is now the question of interest. So My Lord, for that aspect of interest we are requesting that instead of fixing that matter for trial, KCCA be given more time on the interest aspect to come up with a proposal."

The law on this subject of admissions is quite clear and has been restated in a long list of authorities.

Order 13 rule 6 provides as follows:

"Any party may at any stage of a suit, where an admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon the admission he or she may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon the application make such order, or give such judgment, as the court may think just."

The admission in the instant case is based on the contents of the WSD; and the representations made in the court by Counsel for the defendant.

In **KIBALAMA v ALFASAN BELGIE CVBA (2004) 2 EA 146**, the Court of Appeal observed that such admission must be unequivocal in order to entitle the party to judgment without waiting for the determination of any other questions between the parties.

In **DEMBE TRADING ENTERPRISES LIMITED v GLOBAL ELECTRICAL & ELECTRONICS LTD HCT-Comm Div-MA 202/2011**, where the court followed **KIBALAMA** *(supra)*, Her Lordship Irene Mulyagonja (as she was then) has considered the import of this rule and following a line of authorities, granted an application of the kind where there was an admission based on the WSD.

In **Dembe (supra)**, the court cited the decision of the Court of Appeal of Kenya in **MOMANYI v HATIMY & ANOR (2003) 2 EA 600,** where, following **CHOITRAM v NAZARI (1984) KLR 327** it was held:

“Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they must result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends on the language used. The admissions must have no room for doubt.

For emphasis, in the present suit, the WSD in question was drawn by Directorate of Legal Affairs of the defendant; and Counsel in conduct of the suit is a staff of the defendant to wit, it leaves no doubt that all the matters of this suit are within the firm purview of defendant; and facts especially within knowledge.

This court agrees with the plaintiff’s counsel submission that the written statement defence contains an admission of the initial sum of 4,200,000,000/=.

And the same amount was clearly admitted in the joint scheduling memorandum filed in court.

The effect of admission is that this amount once admitted, could not subject to any further proof. See Section 57 of the Evidence Act.

Therefore under Order 13 rule 6 of the Civil Procedure Rules, the court enters judgment on admission for a sum of 4,200,000,000/=.

Whether the plaintiff is entitled to bank interest on the sum admitted and other remedies?

In the circumstances of the instant suit; and the fact that an admission was made on the part of the Defendant, The plaintiff's counsel opted to argue the two issues together and make submissions thereon as below.

In its claim, the Plaintiff made a prayer for interest which interest arises from the lending of **UGX 4,200,000,000/=**, which was paid to the defendant in consideration for the grant of the lease as was agreed under the consent order in HCCS 947 of 2001. In the instant suit, the prayer for accumulated interested in inexplicably linked to special damages which essentially relate to past pecuniary loss calculable at the date of trial.

As to what constitutes a total failure of consideration, the Plaintiff relies on the authority of **Nsubuga vs Rwomushoro (Court of Appeal of Uganda, Civil Appeal no. 102 OF 2012)** where the court held that *"a failure of consideration occurred if sufficient consideration was contemplated by the parties when the contract was entered into but either on account of innate defect in the thing to be given or non-performance in whole or in part of what the promisee agreed to, nothing of value could be or was received by the promise".*

In **Nsubuga** *(supra),* the Court of Appeal followed the seminal case of ***Harbutt's Placticine Ltd v. Wayne tank and Pump Co Ltd [1970] QB 447***, a decision of the Court of Appeal of England & Wales where it was observed that; *"The basis of an award of interest traditionally is that the defendant has kept the plaintiff out of his money, and the defendant has had the use of it himself so he ought to compensate the plaintiff accordingly.*

In the case of **Oketha vs Attorney General (High Court, Arua Civil Suit no. 0069 of 2004),** His Lordship Justice Stephen Mubiru, while dealing with the question of what interest is awardable, observed as follows:

> *"In determining a just and reasonable rate of interest, courts take into account the ever rising inflation and drastic depreciation of the currency. A Plaintiff is entitled to such rate of interest that takes into account 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 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).*

Similarly, it is trite that interest is awarded at the discretion of court, but like all discretions it must be exercised judiciously taking into account all circumstances of the case; **Uganda Revenue Authority vs Stephen Mabosi SCCA No.1 of 1996.**

In the instant case, the interest claimed arises out of a commercial loan that the Defendant was at all times well aware of. In evidence, the Plaintiff's sole witness, Mr. Sanya James who is the Company accountant, exhibited a copy of the facility offer letter which was issued before the loan was disbursed and paid to the account of the defendant.

Item 2.1 thereto is quite instructive and is authored in the following terms:

2.1 "A commercial loan facility …."

Item 3.3 and 3.4 of the letter provided for, the period and are instructive on the interest rate:

3.3 "The loan is available ….

> *Any amount not repaid by its due date shall after the due date attract a 2% arrears administration fee, and interest thereon shall be charged at a penalty rate of 3.5% per month until the facility is fully repaid.*

3.4 "Interest will be charged monthly in arrears to the debit of the borrower' Uganda Shillings account on outstanding loan principal balance at the Bank's prime lending rate currently at 19% p.a.

The Bank reserves the right to change the interest rate applicable at its sole discretion depending on the changes in the market conditions and the risk rating of the facility."

The plaintiff further submitted that, the money in issue was paid out directly to the defendant by DFCU Bank Limited; and well aware that it was a loan facility upon which it had made representations that it would process the issuance of title and deliver the same to the bank upon receipt of the consideration – the premium and ground rent. – See Exhibits C, D, E, J, J1, J3 which are annexed to the plaint and were exhibited at trial. A complete list of the documents agreed for trial for the Plaintiff are contained in the Joint Scheduling Memorandum that was filed on 06/09/2019; and the documents were all supplied with the plaint.

Since August 2010, over nine years ago, the Defendant has held onto that money; and consequently, having defaulted in performing its obligations under the consent judgement, the authority of ***Hadley vs. Baxendale (1843-1860) ALL.E.R. 461***, comes to mind; and we invite the court to so consider the finding of the Court which held that:-

"*Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it*."

The supreme court in the case of **Sietco v Noble Builders Limited Supreme Court Civil Appeal no. 31 of 1995** noted that:

"… The basis of awards of interest is that the defendant has taken and used the plaintiff's money and benefited. Consequently, the defendant ought to compensate the plaintiff for the money. In the instant case the learned justices of Appeal rightly in my opinion, said that the appellants had received the money for a commercial transaction. Hence the court rate of 6% was not appropriate and I agree with them. The rate of interest of 20% awarded by the court of Appeal was more appropriate."

In the case of **Uganda Revenue Authority vs. Wanume David Kitamirike CACA No. 43 of 2010**, Kasule J.A observed that while section 26 (2) of the Civil Procedure Act gives court discretion to award interest adjudged on the principal sum from any period prior to the institution of the suit, or from the date of filing the suit to the date of the decree, or on the aggregate sum adjudged from date of decree to date of payment in full, and the burden is on the party claiming interest to plead and adduce some evidence entitling that party to interest.

From the evidence in court, the loss arising is a follows, per the evidence of Mr. Sanya James as is contained in his witness statement:

Para. 13	Interest on principal loan amount from 04/03/2011 to 05/09/2019	UGX 8,278,280,290
Para. 14	Penalties on loan facility	UGX 14,994,000,000
Para. 14	Administration fees on loan default March/2011 to August/2019	UGX 84,000,000
Para. 15	Loss of property Kibuga Block 12 Plot 388 Mengo	UGX 1,500,000,000
Para. 16	Legal fees to Kyeyune Kasekende	UGX 691,362,000
Para. 17	Legal fees to DFCU external lawyers	UGX 740,000,000
Para. 18	Bailiff's fees re-DFCU sale	UGX 136,136,731
	Total	**UGX 26,423,779,021**

The above evidence was barely challenged and we invite the court to find that it is fair and reasonable in the circumstances of this case as sufficient recompense to atone the inconvenience occasioned to the plaintiff.

In **Shakil Pathan v DFCU Bank Limited – High Court Commercial Div, Civil Suit no. 236 of 2017,** His Lordship David Wangututsi came to the following conclusion which is a position we equally invite the court to apply:

> *"It is without doubt that the Defendant kept the Plaintiff out of use of his money. The bank must have used this money for commercial purposes. It is also without doubt that if the Plaintiff had borrowed that money from the*

bank, he would have paid it back at commercial interest rate. What is good for the goose should also be good for the gander. I find that since the Defendant must have used the money at commercial rate, it is only fair to treat the Plaintiff in the same manner. The decretal sum shall therefore attract interest of 21% per annum from April 2016 till payment in full in respect of the special damages."

The plaintiff prayed that court grants special damages of **UGX. <u>26,423,779,021</u>** to the plaintiff. Obviously, these amounts include the commercial rate of interest which was suffered by the Plaintiff.

The prayer for General damages

Section 61 (1) of *The Contracts Act*, 7 of 2010, provides that where there is a breach of contract, the party who suffers the breach is entitled to receive from the party who breaches the contract, compensation for any loss or damage caused to him or her. For a loss arising from a breach of contract to be recoverable, it must be such as the party in breach should reasonably have contemplated as not unlikely to result. The precise nature of the loss does not have to be in his or her contemplation, it is sufficient that he or she should have contemplated loss of the same type or kind as that which in fact occurred.

The rule of the common law is that where a party sustains a loss by reason of a breach of contract, he 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. ***see*** **Kibimba Rice Ltd v. Umar Salim, S.C. Civil Appeal No. 17 of 1992)**.

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.*"

Per **Shakil Pathan v DFCU Bank Limited – High Court Commercial Div, Civil Suit no. 236 of 2017,** it was observed that a Plaintiff who suffers damage due to the wrongful act of the Defendant must be put in a position he or she would have been in had she or he not suffered the wrong and when assessing the quantum of damages, courts are namely guided by the value of the subject matter, the economic inconveniences that a party may have been put through and the nature and extent of the breach.

In that suit, above, the Court relied on the decisions of *Kibimba Rice Ltd vs Umar Salim SCCA No. 17 of 1992* and *Uganda Commercial Bank vs Kigozi [2002] 1EA305* which are instructive on the issue.

To assist the court in coming up with the damages, it is the Plaintiffs' evidence that:

a. it borrowed money from DFCU Bank to pay for premium for the property that it was acquiring from the Defendant;
b. the defendant guaranteed that the titles would be given to the bank after the money is released;
c. the money was released to the Defendants' bank account and it failed to deliver on its bargain;
d. the Defendant interfered with the administration of the Plaintiffs business in as far as collection of market dues is concern thus making them fail and or finding difficulty in their repaying the loan to DFCU Bank thus making the bank to foreclose on one of its properties and is now again threatening to foreclose its other properties.
e. the Plaintiff has struggled through the circumstances for which the Defendant is liable and occasion a breach.

That inconvenience as can be gleaned from pleadings and the submissions above ought to be atoned and in the premise of this case, we pray for an award of **UGX. 2,500,000,000/= as general damages**.

The defendant submitted that, the plaintiff is praying for interest allegedly arising from the loan facility of UGX.4,200,000,000 which was paid to the Defendant in consideration for the grant of the lease.

It is also the plaintiff's submissions that the prayer for accumulated interest is inexplicably linked to special damages which essentially relate to past pecuniary loss calculable at the date of trial.

The Defendant is in disagreement with the above submissions of the plaintiff.

The basis of an award of interest is that the Defendant has kept the plaintiff out of his money and the Defendant has had the use of it himself. This was held in the

case of **NSUBUGA VS RWOMUSHONO COURT OF APPEAL CIVIL APPEAL NO. 102 OF 2012.**

On the other hand, the law on special damages is that special damages must be pleaded and strictly proved. This was held in **JOHN ELETU VS UGANDA AIRLINES CORPORATION [1984] HCB 44.**

Also under sections 101-103 of the evidence Act Cap.6, the burden of proof in civil cases rests on the plaintiff and not the defendant.

The plaintiff is seeking from Court for among others interest on the principal loan amount from 4/3/2011 to 5/9/2019 amounting to UGX. 8,278,280,290**,** penalties on loan facility amounting to UGX. 14,994,000**,** Administration fees on loan default from march 2011-August 2019 amounting to UGX. 84,000,000 loss of property comprised in Kibuga Block 12 Plot 388 Mengo North, UGX. 1,500,000,000 legal fees to Kyeyune Kasekende UGX. 691,362,000, Legal fees to DFCU external lawyers UGX. 740,000,000 and Bailiff's fees UGX. 136,136,731.

The party who bears the burden must produce evidence to satisfy it, or his or her case is lost. The facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the trier of fact may reasonably be satisfied. The law does not authorise court to choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another or the others. This was held in the case of **OYOO FRANCIS VS. OLANYA MARTIN GULU HIGH COURT CIVIL APPEAL NO.5 OF 2017.**

The plaintiff has failed to discharge its burden of proof in the present suit as evidenced hereunder;
There is no evidence on Court record by way of a loan agreement in the sum of UGX. 4,200,000,000 to which the Defendant was a party creating rights and obligations upon the defendant.
The only loan agreement on court record is in the sum of UGX. 4,800,000,000 and the same has no connection with the plaintiff's claim for refund of UGX. 4,200,000,000 had and received as premium and ground rent for St. Balikuddembe Market land. There is also no loan agreement on court record specifically providing for obligations and rights of the Defendant.

It the defendant's submission that the Defendant is a third party or a stranger to the loan agreement on court record in the sum of UGX. 4,800,000,000.

There is no evidence justifying the plaintiff's entitlement to UGX. 8,278,280,290 as interest on principal loan amount of UGX.4,800,000,000 from the Defendant. The only sum of money known to the defendant is UGX. 4,200,000,000 and there is no evidence of a loan agreement in the said sum of UGX. 4,200,000,000.

In the alternative and without prejudice to the foregoing, the Defendant submits that there is no legal basis by the plaintiff to claim interest from 4th March 2011 to 5th Sept 2019 when it got the titles for the said market land in the year 2014.

The defendant's counsel further submitted that, UGX. 4,200,000,000 was consideration for the sublease of market land and the plaintiff got the same in the year 2014.

The Defendant submits that since there is no loan agreement on court record to which it was a party and stipulating its rights and obligations, there is no legal basis to pay UGX.14,994,000,000 as penalties on the said loan of UGX.4,800,000,000.

The Defendant submits that there is no legal basis to pay administration fees on loan default by the plaintiff since there is no such loan agreement creating rights and obligations to the Defendant and to which the Defendant was a party.

Under **Order 1 Rule of Civil Procedure Rules**, a third party proceeding is an action involving the plaintiff's claim taken by the defendant for contribution or indemnity against a third person or a co-defendant as a third party.

According to defence counsel, in the absence of a third party Order and judgment rendered against the defendant, the legal fees allegedly paid to Kyeyune Kasekende Advocates and to DFCU Bank external lawyers amounting to UGX. 691,362,000 and UGX. 740,000,000 respectively, the Defendant submits that there is no legal basis to pay the said legal fees. There is equally no agreement between the defendant and the plaintiff providing for an indemnity clause regarding the said loan agreement in the sum of UGX. 4,800,000,000.

For the above stated reasons, there is no legal basis for the defendant to pay the alleged Bailiff's fees amounting to UGX. 136,136,731.

The plaintiff has adduced no evidence connecting the defendant to the alleged loan facility of UGX.4,800,000,000 and its related interest charges, default charges and its related legal costs.

In light of the above facts, the defendant submits that the plaintiff's the claim of UGX. 26,423,779,021 is baseless, unreasonably high and not legally justified in the circumstances of the present suit and pray to Court to decline to award the same to the plaintiff.

The defendant's counsel submitted that the plaintiff is not entitled to the same claim for General damage of UGX. 2,500,000,000.

The defendant further submitted in opposition to general damages, general damages is such, as the law will presume to be the natural consequence of the Defendant's act. It arises by of law and may be averred generally.

Counsel contended that the plaintiff has not showed facts and evidence to court to help court arrive at a decision awarding the plaintiff UGX. 2,500,000,000.

General damages are not a profit. it is intended to put the injured party to the position he/she would have been in had the Defendant not committed the wrong. The award of UGX. 2,500,000,000, to the plaintiff would tantamount to a profit and against the principle of unjust enrichment.

In light of the above facts, the law and the circumstances of the present suit, the defendant submits that the plaintiff is not entitled to the award of general damages of UGX 2,500,000,000 and pray that the same is not awarded to the plaintiff.

The plaintiff prayed for costs of the suit. The defendant submits that under section 27 of the Civil Procedure Act, the award of costs is at the discretion of Court. The defendant prays that in the interest of justice and fairness, each party bears own costs to promote reconciliation between the parties. It is an admitted fact and on court record that the defendant has always been willing to amicably

settle this matter and the same is pending clearance by the Minister for Kampala and the Attorney General. However, the defendant's spirit to explore an amicable settlement of this matter should not be mistaken for an admission of the plaintiff's claims and allegations against the defendant.

The defence counsel prayed for the dismissal of the plaintiff's suit against the defendant since the same is based on loan agreement in the sum of UGX. 4,800,000,000 which is strange to the defendant and allow the counter claim.

Determination

The plaintiff led evidence through its Finance Manager/accountant Sanya James who testified through a witness statement. He confirmed that they obtained a loan from DFCU bank of the said amount.

The plaintiff's witness tendered PE-4 letter of offer from DFCU bank and it was very clear in its terms;

"*3.4 Interest will be charged monthly in arrears to the debit of the borrower's Uganda Shilling Account on outstanding loan principal balance at Bank's Prime lending rate currently 19% p.a.*

The Bank reserves the right to change the interest applicable at its sole discretion depending on the changes in the market conditions and the risk rating of the facility."

There are letters on the court record which indicated that the bank DFCU wrote to the Town clerk then confirming and guaranteeing the disbursement of 4,000,000,000/= upon grant of the lease.

It is also not in dispute that KCC then granted a lease on land it never owned and took the money from the plaintiff under a misrepresentation.

The defendant's submission is neither here or there, since the defendant admitted receiving a payment of 4,200,000,000/= from the plaintiff and the plaintiff has indeed satisfied the court that the said money was borrowed from the bank at an interest of 19% per annum.

The defendant's submission that the amount borrowed from the bank was 4,800,000,000/= and that the interest should be computed on the basis of 4,200,000,000/= is very hollow and devoid of merit. The said loan offer clearly indicates that the plaintiff and the loan applicant had to pay a processing fee of 0.75% of the approved amount paid up front and legal fees of 0.75% on the approved.

This court takes judicial notice of the fact that banks charge the said fees and other handling charges including taxes and it forms part of the loan being advanced. Therefore the interest should be computed on the entire amount based on the letter of offer.

Exhibit PE4 gives a breakdown of the loan of 4,800,000,000/=;

3.2. Operation.

3.2.1 The bank will disburse the loan amount for the premium of Ugx 4,000,000,000/= (Uganda shillings Four Billion only) on your current account and will thereafter be paid directly to Kampala City Council.

3.2.2 UGX 720,000,000/= (Uganda Shillings Seven Hundred and Twenty Million only) will be disbursed towards the tax obligations of the borrower towards this lease acquisition.

3.2.3 UGX 80,000,000/= (Uganda Shillings Eighty Million only) will be disbursed towards incidental expenses which will be verified and approved by DFCU Bank's Credit Committee.

It is clear that the plaintiff in reliance on the promise of the defendant conferred some value on the defendant. The defendant failed to perform his promise and yet retained the money paid by the plaintiff of 4,200,000,000/=.

The court has a duty to disgorge the value received from the plaintiff. This is intended to prevent gain by the defendant as a defaulting party against the plaintiff in order to stop unjust enrichment.

The plaintiff changed his position in reliance on the said promise of the defendant by obtaining a loan from DFCU Bank in order to facilitate the transaction at an interest of the bank of 19%, incurring facility fees and other expenses in the investigation of defendant's title. The plaintiff further incurred expenses incidental thereto, when they defaulted on the repayment of the said loan and bank engaged lawyers and bailiffs to recover the said loan.

The court should be in position to award such interest that came along with the loan advanced to the plaintiff and which money was paid to the defendant and the same has remained in their possession and yet the bank continues to charge interest on the same.

The said interest awarded and the general damages awarded to the plaintiff are intended to undo the harm which its reliance on the defendant's promise has caused it. The object is to put the plaintiff in as good a position as it was before the promise was made.

The plaintiff is entitled to payment of interest on the whole amount-4,800,000,000/= obtained as a loan from DFCU bank at the bank rate which may have been changing over time since 2010. It is true that the bank interest rate was 19% but the contract/Loan offer provided for the change of interest depending on the changes in the market conditions and the risk of rating the facility.

The plaintiff has also set out other incidental expenditures arising out of the loan and the same are recoverable as special damages as set out in their plaint including premium, ground rent, Interest since 2011, loan facility fees, legal fees to the bank, legal fees paid to defend recovery action by DFCU bank and loss for the sale of land at Kibuga Block 12, Plot388.

This court notes that the plaintiff tried to change its case during trial without amending its pleadings. It is a principle of law that parties are bound by their pleadings. A party may not prove a case before court that does not arise from the pleadings filed in court. See ***Order 6 rule 7 of the Civil Procedure Rules.***

The plaintiff in proof of its case presented evidence in court which to a great extent was very different from what had earlier on been pleaded and sought a sum of 26,423,779,021/= as special damages.

The said amount is a clear departure from the pleadings in court and this court will not allow the plaintiff to make such a departure. The plaintiff is allowed to compute the interest based on the entire amount advanced in the loan of 4,800,000,000/= at the different prevailing interest rates until the date of Judgement.

The amount of 4,800,000,000/= in view of court is not a departure but rather an error since the Letter of Offer (PE4) shows this is the amount indicated as advanced. The interest shall only be ascertained by the plaintiff's banker-DFCU and this would guide the actual computation of interest until the date of Judgement.

General damages

The plaintiff has sought general damages in sum of 2,500,000,000/=. The plaintiff has set out the principles governing exercise of discretion in award of general damages.

General damages are such as the law will presume to be direct natural probable consequence of the act complained of. In quantification of damages, the court must bear in mind the fact that the plaintiff must be put in the position he would have been had he not suffered the wrong. The basic measure of damage is restitution. See ***Dr. Denis Lwamafa vs Attorney General HCCS No. 79 of 1983 [1992] 1 KALR 21***

The character of the acts themselves, which produce the damage, the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstance and nature of the acts themselves by which the damage is done. See ***Ouma vs Nairobi City Council [1976] KLR 298.***

Section 61 (1) of *The Contracts Act*, 7 of 2010, provides that where there is a breach of contract, the party who suffers the breach is entitled to receive from the party who breaches the contract, compensation for any loss or damage caused to him or her. For a loss arising from a breach of contract to be recoverable, it must be such as the party in breach should reasonably have contemplated as not unlikely to result. The precise nature of the loss does not have to be in his or her contemplation, it is sufficient that he or she should have contemplated loss of the same type or kind as that which in fact occurred.

The rule of the common law is that where a party sustains a loss by reason of a breach of contract, he 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. ***see*** **Kibimba Rice Ltd v. Umar Salim, S.C. Civil Appeal No. 17 of 1992)**.

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.*"

Per **Shakil Pathan v DFCU Bank Limited – High Court Commercial Div, Civil Suit no. 236 of 2017,** it was observed that a Plaintiff who suffers damage due to the wrongful act of the Defendant must be put in a position he or she would have been in had she or he not suffered the wrong and when assessing the quantum of damages, courts are namely guided by the value of the subject matter, the economic inconveniences that a party may have been put through and the nature and extent of the breach.

The plaintiff has set out the circumstances under which the said transaction happened and the several cases filed against it by the DFCU upon default together with earlier suit between themselves to obtain a certificate of title such expenses include; legal fees to DFCU external lawyers, Bailiffs fees for loan recovery, legal fees to its lawyers and penalties for loan repayment default. This court finds that an award of 1,500,000,000/= as a fair award as general damages.

Interest

Section 26 provides for an award of interest that is just and reasonable. In the case of ***Kakubhai Mohanlal vs Warid Telecom Uganda HCCS No. 224 of 2011***, Court held that;

“ ***A just and reasonable interest rate, in my view, is one that would keep the awarded interest rate, in my view, is one that would keep the awarded amount cushioned against the ever rising inflation and drastic depreciation of the currency. A plaintiff ought to be entitled to such a 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 economic vagaries and the inflation and depreciation of the currency in the event that the money awarded is not promptly paid when it falls due***”

The decretal award including both special and general damages shall attract an interest rate of 24% from the date of Judgement until payment in full.

Costs

The plaintiff is awarded costs of the suit.

Counter-claim.

The defendant/Counterclaimant did not prove the counter-claim. It is deemed that it was abandoned and or lacked any merit. The same is dismissed with costs.

In sum therefore the plaintiff is awarded the following sums as special damages;

a) 4,800,000,000/= as the total loan advanced.
b) Interest on the loan amount based on the prevailing bank interest rate on the total loan from 4-3-2011 until date of Judgment.
c) 500,000,000/= being legal fees to defend recovery action.
d) 1,150,000,000/= loss for the sale of Kibuga Block 12, Plot 388 Mengo Kisenyi.

I so Order

SSEKAANA MUSA
JUDGE
5th/02/2020