

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MASINDI

CIVIL SUIT NO. 29 OF 2014

Tulihamu Budongo SACCO Limited :::::::::::::::::::: Plaintiff

Versus

Karubanga Geoffrey :::::::::::::::::::: Defendant

Judgment

Before: Hon. Justice Byaruhanga Jesse Ruyema

- [1] The Plaintiff, a Micro Finance Co-operative Savings and Credit Society sued the Defendant for breach of contract, recovery of a **Motor Vehicle Registration No. UAB 151Z** Nissan Hard body double cabin or its money's worth at the current market rate, a logbook for motorcycle registration No. UDQ 864C, Centenary Bank Cheque book serial numbers **151-200, UGX 145,208,644=** as money had and received by the Defendant, interest on the above amount as the Plaintiff's lending rate of 3.5% per month amounting to **UGX 41,301,644=**, damages for loss of property as a result of the Defendant's actions, costs and interest thereon.
- [2] It is the Plaintiff's case that between the year 2006-2013, while the Defendant was serving the Plaintiff as the **Technical Advisor, Chairperson Internal Audit Committee and Treasurer,** misappropriated, embezzled and/or diverted for personal use the

Plaintiff's **Motor Vehicle Registration No. UAB 151Z** Nissan Hard body double cabin, a log book for **Motor Cycle Registration No. UDQ 864C**, a Centenary Bank Cheque book serial numbers **151-200** and **UGX. 145,208,644=** thus depriving the Plaintiff the beneficial interest therein.

- [3] The Plaintiff further averred that the Defendant bought the said vehicle using the SACCO funds and following purchase, diverted it and turned the same into personal property and did not hand over the vehicle following his removal from the Plaintiff's Board on 15th June, 2013. During the Defendant's tenure as the Plaintiff's Board Member, he illegally received and misappropriated money belonging to the Plaintiff whose details and when had and received were outlined in the particulars leading to the cause of action totaling to **UGX. 145,208,644=**.
- [4] In his defence, the Defendant denied the Plaintiff's allegations and contended that the **Motor Vehicle Registration Number UAB 151Z and the Centenary Cheque book serial Nos. 151-200** were available and he was ready to hand over the same to the Plaintiff. In answer to the claim of the total sum of **UGX. 145,208,644=** he averred that he handed over all accountability to the Donor of the project as a signatory to the Plaintiff's Books of Account and that he bought assets for the Plaintiff which are in the Plaintiff's ownership and possession. He also outlined the details of the funds had and received by him and how they were expended.
- [5] During the joint scheduling conference, the following were agreed facts:

- (a) The Plaintiff is a Co-operative Society duly incorporated with the **Co-operative Societies Act Cap. 112** (and therefore with the capacity to sue and be sued).
- (b) The Defendant is a member of the Plaintiff's organization who served the Plaintiff as Board Supervisory Committee Chairperson and later Board Treasurer until when he left the Plaintiff's Board on 15th June, 2013.
- (c) The Defendant did not make a handover report nor formally hand over office to the Plaintiff and he is in possession of the Plaintiff's property, namely: Motor Vehicle Registration Number UAB 151Z Nissan Hard body together with its original log book and its purchase agreement, a log book for Motor Cycle Registration Number UDQ 804C, an original Centenary Bank Cheque book with serial numbers 151-200 and a Laptop.

A joint scheduling Memorandum to the above effect was filed on the 24th November, 2014 and is on record.

[6] The following were agreed issues for the determination of this suit:

- 1. Whether the Defendant breached the Loan Agreement for payment of UGX. 10,000,000= dated 1st January, 2013.*
- 2. Whether the Defendant converted the Plaintiff's property including Motor Vehicle Registration Number UAB 151Z Nissan Hard body double cabin, its log book, log book for Motor Cycle Registration Number UDZ 804C, Centenary Bank Cheque book serial numbers 151-200 and a Laptop.*

3. *Whether the Defendant is indebted to the Plaintiff in the sum of UGX. 158,458,175=.*
4. *What remedies are available to the parties?*

Counsel Legal Representation:

- [7] The Plaintiff was represented by **Counsel Simon Kasangaki of Ms. Kasangaki & Co. Advocates, Masindi** while the Defendant was represented by **Counsel Ian Musinguzi of Ms. Musinguzi & Co. Advocates, Masindi**. Both Counsel filed their respective written submissions and are on record for consideration in the determination of this suit.

Burden and Standard of Proof:

- [8] The evidence Act (Cap.6) provides instances of parties on whom the evidence of proof lies as follows:

“101. Burden of Proof:

- (1)Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.*
- (2)When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*

102. On Whom Burden of Proof Lies:

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

103. Burden of Proof as to Particular Fact:

The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.

The general principle that cuts across all the above provisions is that *“he who alleges must prove”*. In this instant case, the burden is on the Plaintiff to prove its case on the balance of possibilities that the Defendant is indebted to the Plaintiff in the items/properties and the sum of money as pleaded, see also **Nsubuga vs Kavuma [1978] HCB 307** where it was held that:

“In civil cases the burden of proof lies on the Plaintiff to prove his or her case on the balance of probabilities”.

Resolution of Issues:

[9] During the course of scheduled conferencing, a partial consent was executed arising out of conferencing between the parties and it was on the following terms:

“1. That the Defendant delivers up to Plaintiff’s premises or its Counsel the Plaintiff’s property in his possession:

- (i) *Motor vehicle registration number **UAB 151Z** Nissan Hard body together with its original logbook and purchase agreement.*
 - (ii) *A logbook of Motorcycle registration number **UDQ 864C**.*
 - (iii) *An original **Centenary Bank cheque book with serial numbers 151-200**; and*
 - (iv) *A Laptop.*
2. *That the Defendant pays the Plaintiff a tune of UGX 33,000,000= (thirty three million shillings only) being a debt admitted by the Defendant.*
 3. *That the rest of the Plaintiff's claims are disputed and shall go for trial.*
 4. *The costs incurred by the parties be in the cause”.*

[10] The partial consent was dated 19th day of November, 2014 and was filed in Court on 24th day of November, 2014. As per the Court record of 2nd December, 2014 it is clear that the Defendant complied and fulfilled his obligation under the partial consent. The partial consent above resolved the **entirety of issue number 2 and partially issue number 3**. The record however at page **16 of the typed proceedings** is to the effect that by then, out of the 33m= consented to, he had only paid 12m=.

Issue No. 1: Whether the Defendant breached the Loan Agreement for payment of UGX. 10,000,000= (ten million shillings only) dated 3rd January, 2013.

Loan Agreement Obligations:

- [11] It is an admitted fact by the Defendant that on 3rd January, 2013, he obtained a loan of **10m=** from the Plaintiff to be repaid in ten months with an interest of 1.5% per month and the penalty of **UGX. 60,000=** for month of default. The loan agreement of **UGX. 10m=** is **P.Exh.8**. The loan agreement was also pleaded in **paragraph 4(c) xiv** of the Plaintiff.
- [12] According to the Plaintiff's pleading, the Defendant partly paid the loan leaving an outstanding balance of **UGX. 5,440,000=** being arrears inclusive of interest and penalty.
- [13] Counsel for the Plaintiff submitted that the Defendant in his **Sworn Statement paragraph 48** admitted **paragraph XIV** of the Plaintiff and therefore Court should enter Judgment of the sum under **0.13 r.6 CPR**.
- [14] Counsel for the Defendant on the hand submitted that the Defendant paid off part of the loan directly and another part of the loan was offset by monies due to the Defendant from the Plaintiff and the final part of the loan was offset by the Defendant paying off a loan owed by the Plaintiff to Centenary Bank where the Defendant's Title was pledged by the Plaintiff as security. That however, the Plaintiff's Manager failed to update the Defendant's loan ledger card (**P.Exh-9**). That by 30th July, 2013, a balance of **UGX. 4m=** was outstanding and no penalty was indicated.
- [15] As regards the balance of **UGX. 4m=**, Counsel for the Defendant submitted and argued that the Defendant prepared a **strategic**

(Business) Plan for the Plaintiff at the cost of **UGX. 3m=** and the Plaintiff Board approved this payment to the Defendant as per **Minutes 4 and 5 of the Plaintiff's Board Meeting of 16th April, 2014 at page 14 of P.Exh-28.** That the **3m=** reduces the outstanding balance to about **1.6m=.**

- [16] Counsel submitted that the outstanding balance of **1.6m=** was cleared out of an understanding between the Defendant and the Plaintiff that the Defendant was to clear the loan that existed between the Plaintiff and Centenary Bank i.e., an **overdraft of 15m=** that was offered to the Plaintiff by Centenary Bank which was secured by the Defendant's Certificate of Title.
- [17] The Defendant as a borrower, it is trite that he had an obligation to repay the loan in accordance with the agreed upon repayment schedule since the loan agreement is legally binding between the Plaintiff and the Defendant.
- [18] Indeed, I have looked at the **ledger card (P.Exh.9)** in respect of the Defendant's loan with the Plaintiff. By 30th July, 2013, the Defendant's loan balance was **UGX. 4,000,000=** with interest thereon of **UGX. 600,000=** totaling to **UGX. 4,600,000=.**
- [19] It is also trite that a loan ledger card being a record prepared and updated by the lender representative setting out inter alia, the effective date, the facility amount, any repayment, interest rates and calculation basis etc in respect of the facility as agreed upon between the lender and the borrower, it helps to generate a detailed trace of a loan processed i.e. from loan application, approval, disbursement, breakdown of instalment due and even

repaid loan amount if any and therefore, it is a reliable document of ascertaining the status of the borrower as regards the loan liability.

[20] In the instant case, I find that by 30th July, 2013, the Defendant's loan balance/amount due to the Plaintiff as per the loan agreement dated 3rd January, 2013 was **UGX. 4,600,000=** as principal sum and interest thereon.

[21] As per the Plaintiff's **Board Meeting Minutes 4 and 5 of 16th April, 2014 at page 14 of P. Exh. 28**, the Plaintiff's Board cleared **UGX. 3,000,000=** for the Defendant's preparation of the **Strategic (Business) Plan 2013-2017** to reduce on his loan obligations with the Plaintiff. The **3m=** was set off from his loan obligations with the Plaintiff.

[22] It was not disputed by the Plaintiff that the Plaintiff had the loan, **overdraft of UGX. 15m=** with Centenary Bank. The Defendant's Certificate of Title being used to secure this loan obtained by the Plaintiff for Centenary Bank was acknowledged by the Plaintiff's Manager **Ms. Akugizibwe Jacinta (Pw1)**, in evidence during cross examination. This loan had not been cleared. The Plaintiff did not counter the defence as to how that Centenary Bank loan secured by the Defendant's Certificate of Title was cleared, if not under the arrangement as put across by the Defendant. No evidence was led by the Plaintiff that this loan is still pending and due. According to the Defendant, upon this arrangement, the arrears due on the loan by the Plaintiff with Centenary Bank was cleared by him to enable him rescue his pledged Certificate of Title and this was set off on his loan with the Plaintiff.

[23] Indeed as proof that the Defendant's loan with the Plaintiff was cleared, no notice of breach of payment or default in payment of his loan with the Plaintiff was ever given to the Defendant. As a borrower, the Defendant had a right to an explanation of default and its consequences in cases where a default has occurred. The lender must provide a notice to the borrower outlining which obligation the borrower has defaulted on, and the time which will be given for the borrower to rectify the default. The Plaintiff's **loan policies and procedures, July 2006 PART III (P.Exh.24)** provided as follows:

“3.2 Overdue Loans (Arrears) and Handling of Defaulters

- *A loan shall be considered overdue if the loan remains outstanding after close of business on the day when it should have been fully repaid according to the repayment schedule.*
 - (a)...*
 - (b)If no repayment is received,... and if the instalment is not repaid the Manager **shall issue the notice of loan default** with a copy to the guarantor and area LC. Officials.*
 - (c)Names of the defaulting clients shall be displayed on the Notice Board for every member to see and cause action to be taken by management”*

[24] The onus was on the Plaintiff to show that the above procedures were followed and complied with as proof that the Defendant defaulted in the repayment of the loan sums advanced to him on 3rd January 2013. I do find that the Plaintiff failed to discharge this burden. The claim by Counsel for the Plaintiff that in **paragraph 48 of his written witness statement**, the Defendant

admitted the defaults surely, depends in what context his evidence is to be taken. In my view, the Defendant merely admitted obtaining the loan facility but as he pleaded in his written statement of defence and during cross examination, denied the indebtedness.

[25] In the absence of evidence of any loan default Notice issued to the Defendant by the Plaintiff, this Court in view of the other available evidence by the Defendant that he cleared his loan obligations, is inclined to believe the Defendant's version of repayment of the loan. In the premises, I find that the Plaintiff has failed to discharge the burden upon it to prove that the Defendant failed to honour his loan obligation of the **UGX. 10,000,000=**. The 2nd issue is accordingly found in the negative. It is in favour of the Defendant.

Issue No. 3: Whether the Defendant is indebted to the Plaintiff in the sum of UGX 158,458,175=

[26] Counsel for the Plaintiff submitted that the Plaintiff's claimed sum of money received by the Defendant as particularized in the Plaintiff amounted to **UGX. 103,907,000=** plus interest thereon at a rate of 3.5% per month as derived from the **Loan Policies and Procedures Manual (P.Exh. 24)** for 15 months from the date of departure of the Defendant from the Plaintiff's Board on 15th June, 2013 to 15th September, 2014 when this suit was filed amounting to **UGX. 54,551,175=** thus totaling to **UGX. 158,458,175=**.

[27] I don't think this is the correct approach for determination of the total sum due. This is because, there is no evidence from the

Plaintiff that during the process of payment and advancement of the various sums to the Defendant, save for the loan pleaded under **paragraph 4 (c) (XIV) of the Plaintiff**, it was a condition or there was an agreement that each payment or advance would attract an interest rate. In any case I would find that this calculated sum of **UGX. 54,551,175=** as interest was not pleaded and therefore the sum is inadmissible. Interest on the sum claimed would only be payable upon determination of the sum due to the Plaintiff at the conclusion of suit where the interest rate thereon, would accordingly be assessed. It would therefore follow that the **UGX. 54,551,175=** as interest has to be excluded from the claimed sum. The sums had and received did not prescribe any interest and therefore did not warrant interest.

[28] The issue for resolving in the premises becomes whether the Defendant is indebted to the Plaintiff in the sum of **UGX 103,907,000=** and not **UGX. 158,458,175=**.

[29] During the determination of the 1st issue, it was found that the loan advancement pleaded under **Paragraph 4(c) XIV of the Plaintiff** was duly paid by the Defendant and therefore he does not owe the Plaintiff any balance. It follows therefore, that **UGX. 5,440,000=** claimed as balance outstanding on the loan has to be deducted from the claimed sum due and reduce it to **UGX. 98,467,000=**.

Money Had and Received

[30] The Defendant in his Written Statement of Defence did not deny the pleaded had and received money in **Paragraph 4(c) XIV of the**

Plaint. He only labored to explain or/and account how he expended the money.

[31] As is the law, the general rule is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. When that party adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof; that is, his allegation is presumed to be true, unless his opponent adduces evidence to rebut the presumption: **S.101 (2) of the Evidence Act.** See also **John Museveni vs Kikamulo Co-operative Savings and Credit Society, H.C.C.S. No. 192/2005.**

[32] In the instant case it is asserted that the Defendant had and received a total sum of **UGX. 158,458,175=** now reduced to **UGX. 98,467,000=** which he allegedly misappropriated and/or diverted to personal use. The burden lies on the Plaintiff to prove on the balance of probabilities that what he asserted is true and once this burden is discharged, the defendant has to offer an explanation or accountability of the money had and received.

[33] The Defendant testified as per his Written Witness Statement that he helped over 200 Cooperatives which include the Plaintiff SACCO to be established and between 2006 and 2009, he worked for the Plaintiff as the **Chairman Supervisory Committee**, in 2006 the Board Members appointed him as the **“Director”** of the Plaintiff responsible for steering the growth of the Plaintiff SACCO. Lastly, that in 2010, he was appointed as the **Treasurer** and served the Plaintiff in that capacity up to **June, 2013.**

[34] It is the Plaintiff's case that upon vacating the office of Treasurer in the Plaintiff's SACCO, the defendant did not make a handover report nor formally handover office to the Plaintiff, a fact the Defendant admitted during the scheduled conference.

[35] The Manager of the Plaintiff **Akugizibwe Jacinta (Pw1)** adduced evidence that during the Defendant's tenure as the Plaintiff's Board Member, the Plaintiff received and misappropriated money belonging to the Plaintiff and this was reflected in the **Greenfield & Co. Certified Public Accountants' Report** dated 17th April, 2014 (**P.Exh.27**). The monies are broken down and summarised as follows:

1. **Money withdrawn from Bank without authorization and Management approval;**

23.11.2006	Cheque No. 32- Centenary Bank	16,500,000=
09.03.2007	Cheque No. 33- Centenary Bank	15,000,000=
05.02.2008	Cheque No. 66- Centenary Bank	1,900,000=
01.09.2008	Cheque No. 96- Centenary Bank	2,000,000=
01.06.2009	Cheque No. 176-Centenary Bank	5,000,000=
06.10.2009	Cheque No. 184- Centenary Bank	2,000,000=
28.10.2009	Cheque No. 185- Centenary Bank	9,000,000=
06.11.2009	Cheque No. 188- Centenary Bank	3,687,700=
16.01.2010	Cheque No. 10- Barclays Bank	6,000,000=
16.02.2010	Cheque No. 191- Centenary Bank	10,000,000=
01.03.2011	Cheque No. 22 - Barclays Bank	10,880,000=
	Total	81,967,700=

- [36] As already observed, the defendant did not deny withdrawing the above sums of money at the indicated dates, as is also reflected in the Audit Report dated 17th April, 2014 (**P.Exh.27**) and in the Plaintiff's Bank Statements, **P.Exhs. 2 and 3**. He however denied misappropriating, embezzling and/or diverting the said funds for personal use. He contended that the funds were used to run the affairs of the Plaintiff.
- [37] The Defendant testified that upon being bestowed a title of a "Director", he continued to mobilize resources for the Plaintiff which included a **Matching Grant** approved by the EU/GOU-SUFFICE programme, a **concessional loan from Post Bank** and **several concessional loans from the Microfinance Support Center** and that cheque No. 32 of **UGX. 16,500,000=** and cheque No. 33 of **UGX. 15,000,000=** were part of the EU/GOU-SUFFICE Programme. That the funds were used to implement the agreement and the Defendant acted as a coordinating person to secure and procure the items below as also listed in the Assets register (**P.Exh. 26**) of the Plaintiff; **Desktop Computer, Laptop computer, Motorcycle UDE 198W, printer, Filing cabinet, Money safe, Banking counter, Computer table, Training exposure visit and Training of staff, and Development of operating policies**. Further, that another **UGX. 2,000,000=** was the Plaintiff's contribution to the above **Matching grant** and that the **grant** was fully accounted for and original accountabilities were presented to the donor.

- [38] Lastly the defendant averred that the grant was audited under audit period 2006-2007 by the external auditors and that, there was **No Management Letters** indicating that the grant was not accounted for and/or was not utilized for the same purpose. That it was the responsibility of the Plaintiff's Manager to keep copies of the accountabilities at the Plaintiff's office premises.
- [39] The Defendant however did not adduce any evidence in support of the above claims and contentions. He did not present any evidence of purchase of the alleged items or present any other form of evidence to show that he appropriated the said amount to buy the claimed assets, and that they are now in possession of the Plaintiff. In addition, the Defendant did not adduce any evidence showing that the said procured goods and services were authorized and/or approved in accordance with the Plaintiff's **Accounting and Operations Manual (P.Exh. 25)**.
- [40] **Section V, 5.1 of the P.Exh.25 on Procurement of Goods and Services** provides that the Manager shall identify a need for the asset and raise a requisition Form to the appropriate committee for authorization and approval. Then, **Section III 3.9.2 on the Expenditure** provided inter alia that the Plaintiff's expenditure shall be in the approved budget and that no expenditure shall be incurred without the Plaintiff's authorization/approval.
- [41] The Defendant in this case did not adduce proof of purchase of the said assets of the Plaintiff in the claimed sum. No requisition or expenditure voucher was shown in Court to prove the expenditure.

- [42] The same apply to the **Software** that the Plaintiff claim he purchased using the funds. The two allegedly trained staffs of the Plaintiff using the funds are neither named nor is there evidence that the training took place. It was also not shown that the said expenditure was budgeted for.
- [43] The rest of the funds, the Defendant claim that he spent them on the purchase of **Motor vehicle Registration number UAB 151Z, Nissan Double Cabin**, then its engine overhaul and other related expenditure during its acquisition.
- [44] Again, the Defendant adduced no evidence in the first instance, that the said vehicle was purchased by and upon authorization of the Plaintiff. No alleged bidding documents for the said vehicle were presented. It was not shown that the Plaintiff had in its budget the alleged expenditure or that the said expenditure was lawfully requisitioned for and approved as per the Plaintiff's policy.
- [45] The Defendant presented **D.Exhs 1-5** as expenditures on the said Plaintiff's vehicle but in the first instance, the alleged **Mr. Sonko John** who allegedly did the engine overhaul did not appear to testify to that effect, **D.Exhs. 1-5** and not accompanied with any requisition, evidence of budgetary estimates, and/or approvals by the Plaintiff's Board to expend the monies indicated in the said Defence Exhibits.
- [46] I in the premises find that **D.Exhs. 1-5** reflect the Defendant's personal expenditures not passed in the Plaintiff's books and they are therefore the responsibility of the Defendant. The Motor

vehicle in question had been purchased by the Defendant using the Plaintiff SACCO funds without authority and approval for the Defendant's personal use. However, with the help of Court, the Plaintiff was able to recover it together with the other items the Defendant had obtained through a similar approach. As rightly put by Counsel for the Plaintiff, clearly, the car project was a personal enterprise that benefited the Defendant to the Plaintiff's colossal financial prejudice. Its expenditures is not binding on the Plaintiff.

[47] The claim by the Defendant that he paid **UGX. 6,000,000=** to Centenary Bank to retrieve his Certificate of Title pledged as security for an **Overdraft of 15m=** advanced to the Plaintiff by Centenary Bank is without evidence. Whereas it is true that the defendant pledged his Certificate of Title to secure the **15m= Overdraft** in favour of the Plaintiff, there is neither evidence of authority from the Plaintiff for payment of the Plaintiff's funds to retrieve his Title nor evidence that actually this sum was paid to Centenary Bank for retrieval of his Title. A payment or deposit slip of the sum indicating the deposit of the **UGX. 6,000,000=** issued by the Centenary Bank indicating the purpose would have sufficed. It was never produced.

[48] As regards **UGX. 10,880,000=**, the Defendant claimed that the funds were part of the COOPAFRICA grant which was well accounted for to the donor. The said grant was clearly for the Plaintiff SACCO and not the Defendant. The Defendant did not explain why he had to receive the said sum forming part of the

grant that was meant for the Plaintiff. The Defendant did not also show how the said money was spent and under what authority.

[49] The claim that the withdraw of **UGX. 2,000,000=** was for the Plaintiff's contribution to the EU/GOU SUFFICE Grant, a matching grant by a donor where the recipient has a financial contribution to make towards the full implementation of the project, is not a correct explanation. The request by the Defendant for that sum is **P.Exh.4**. It was for purchase of fixed assets and surely, not the contribution to the EU/GOU SUFFICE Grant. It was a mere requisition to enable the Defendant access the Plaintiff's funds which he eventually expended, now with neither proof of the purchased assets nor authorization and approval of the Manager or the relevant Board Committee.

[50] In conclusion, I find that in the absence of evidence that the Plaintiff's Manager and Plaintiff's Board authorized and/or approved the expenditure of the Plaintiff's funds by the Defendant, this Court is entitled to make a finding that the Defendant did not utilize the said funds to the benefit of the Plaintiff but for his personal gain. The Defendant has failed to discharge his burden of giving a sufficient account for the funds he accordingly accessed.

[51] The claim by the Defendant that all original receipts and the accountabilities for the purchase of the Plaintiff's assets were prepared and submitted to the donors in accordance with the Grant Agreement cannot help the Defendant. This is so because the alleged receipts and accountabilities are not evidence of authorization and or approval and in any case, they were not

presented for examination by Court. They did not entitle or justify the Defendant to withdraw funds from the banks and spend it without the necessary authorization and approval.

Other Advances to the Defendant never settled.

[52] The summary of the advances is as follows:

	Date of Requisition	Amount	Voucher
1.	30.06.2007	2,000,000=	P.Exhs. 4 and 5
2.	01.10.2011	3,000,000=	P.Exhs. 14 and 15
3.	22.10.2011	4,000,000=	P.Exhs. 12 and 13
4.	30.01.2012	5,000,000=	P.Exhs. 10 and 11
5.	14.03.2012	2,500,000=	P.Exhs. 6 and 7
	Total	16,500,000=	

[53] A perusal of requisition form and voucher as exhibited however reveal that UGX 4,000,000= under vouchers dated 22nd October, 2011 (**P.Exhs 12 and 13**) was requisitioned by the one **Aganyira Janet**. The Plaintiff's sole witness (**Pw1**) did not in her evidence, connect these funds to the Defendant or adduce evidence connecting the defendant and the said **Aganyira Janet** and attribute the funds to the Defendant. Indeed, the Defendant in his Sworn Witness Statement protested the figure. He refuted the **UGX. 4,000,000=** that was requisitioned and paid to **Aganyira Janet**. In the premises the **UGX. 4,000,000=** cannot be accounted on the Defendant. The Defendant however admitted receipt of the funds under vouchers dated 1st October, 2011 (**P.Exhs. 14 and 15**), 30th January, 2012 (**P.Exhs. 10 and 11**) and 14th March, 2012

(P.Exhs. 6 and 7) whose amount total to UGX. 10,000,000= of which he conceded were refundable to the Plaintiff. As regards voucher dated 30th June, 2007 (P.Exh. 4) as already observed, it refers to contribution to purchase assets of which there is no evidence that the assets were actually purchased.

[54] In conclusion, the total amount found had and received by the Defendant due to the Plaintiff is UGX. 81,967,700= proved under the head: **“Monies withdrawn from Bank without authorization and management approval”** and UGX. 12,500,000= under the head: **“Other Advances to the Defendant never settled”** all totaling to UGX. 94,467,700= (inclusive of the UGX. 33,000,000= advanced under the partial consent on record).

Reports and Funds Under HIVOS, COOPAFRICA and EU/GOU SUFFICE Grants and or Matching Grants

[55] In evidence and on Court record, no financial reports for the above grants were produced. Indeed, the Plaintiff's cause of action is not based on funds misappropriated from the above grants. The cause of action is based on monies had and received and or advanced to the Plaintiff. It is a fact that these donor funds for the Plaintiff SACCO were banked with the Plaintiff's two Banks; Centenary Bank and Barclays Bank. The queried funds were withdrawn from the Plaintiff's Bank Accounts by the defendant using various cheques without authority and approval of the Plaintiff's Manager and the Board of the Plaintiff.

Centenary Cheque book Serial Nos. 151-200

[56] During cross examination of **Akugizibwe Jacinta (Pw1)** at **page 13 of Proceedings**, she revealed that the Defendant asked her to sign a number of blank cheques. These blank cheques include those in the **Centenary Cheque book-serial Nos. 151-200**. During the **special joint consultative meeting of current and previous Board Members held on 16th April, 2014 at the SACCO Office**, (P.Exh. 28) attended by the Defendant, Ex Treasurer of the Plaintiff SACCO at **Min. 5 at P.10**, on the issue of the cheque book, the defendant responded as follows:

- “- For the Cheque book, he told the members that he took it, when Post bank required postdated cheques as security for the loan.*
- He added that he had made Manager to sign as it was needed in Post Bank but when he reached there they only asked for only three leafs ...he forgot to bring back the cheque book at office and he continued to use it to withdraw money...”*

The funds the Defendant withdrew using the said postdated cheques are queried funds that were withdrawn by the defendant from the Plaintiff's Centenary Bank Account without authority and approval of the Plaintiff's Manager and or the relevant Board Committee of the Plaintiff.

[57] In my view, the defendant illegally retained the Plaintiff's cheque book and proceeded to make unauthorized and or unapproved withdraws. It was also an abuse of his position while serving as treasurer of the Plaintiff when he directed the Plaintiff's Manager **Jacinta Akugizibwe (Pw1)** to sign blank cheque leaves. He used

the said signed blank Cheques to illegally access the suit funds from the Plaintiff's Bank Accounts. There cannot be any justification for the expenditure of the funds illegally accessed by the Defendant from the Plaintiff's Bank Accounts. The defendant's claim therefore that he used the money for Plaintiff's office work and not for his personal use is completely untenable and therefore, by all standards, unacceptable. Indeed, he has not been able to satisfactorily, lawfully account for those funds illegally withdrawn from the Plaintiff's Bank Account.

Motor Vehicle Registration No. UAB 151Z Project

[58] The defendant denied to have used some of the illegally accessed funds amounting to UGX. 9,000,000= to purchase the above motor vehicle and other funds to overhaul it. In the first instance, there was no Board resolution to authorize the purchase of the motor vehicle or budget estimate for it or its repairs. It was purchased without the Plaintiff's authority and or approval and the same apply to its repairs. The Defendant's expenditure therefore on the said motor vehicle is not binding on the Plaintiff and it was done in breach of policy, irregularly made and the resultant loss occasioned is borne by the defendant. He could not use any expenditure on it to account for the funds he had in any case illegally and wrongfully accessed from the Plaintiff's Bank Account.

Defendant's Position as "Director" in the Plaintiff's SACCO

[59] The Defendant claim to have held the position of "Director" of the Plaintiff's SACCO in 2006. The Defendant's assumption of the position of "Director" of the Plaintiff's SACCO is found to had

been illegal. This is because the position of “Director” is not in the organizational structure of the Plaintiff’s SACCO administration (**P.Exh. 23**). There is neither any Board resolution, minutes, appointment letter nor terms of reference for the defendant as the “Director” of the Plaintiff SACCO. It is apparent that the Defendant assumed this illegal position of “Director” of the Plaintiff SACCO to be enabled to overwhelm and subdue the Plaintiff’s Manager and eventually was able to swindle the huge queried funds of the Plaintiff both in cash and through its Bank Accounts for his lavish personal spending without the employer sanctioning the same. In evidence, he boasted of putting up a double storey building/a flat.

Order of Discovery of Documents in Possession of the Plaintiff

[60] Counsel for the Defendant in his submissions complained that no order of discovery was made in relation to documents in possession of the Plaintiff. That the defendant had no access to the documents that could prove his innocence and therefore invited Court to apply reason to this matter.

[61] Applications for Orders of Interrogation, Discovery and Inspection are provided for under **O.10 CPR**.

O.10 r.1 CPR provides thus:

“ In any suit, the Plaintiff or Defendant may apply to the Court within twenty one days from the date of the last reply or rejoinder..... for leave to deliver interrogatories and

discoveries in writing for the examination of the opposite parties, or any one or more of those parties ...”

Such interrogatories would include questions related to the documents the defendant would be interested in; See **Kyenda Godfrey v SBI International Holdings M.ltd., H.C.M.A. No. 52 of 2013 [2014] UG HCCD 44**

R.12. Application for Discovery of Documents

“(i) Any party may, without filing any Affidavit, apply to the Court for an Order directing the other party to the suit to make discovery on oath of the documents, which are or have been in his or her possession or power relating to any matter in question in the suit”.

See also **Absolom Kagyo vs Orient Bank Ltd, H.C.M.A. No. 150/2013 [2013] UGACCD 115.**

R.14. Production of Documents

“The Court may, at any time during the pendency of any suit, order the production by any party to the suit, upon oath, of such of the documents in his or her possession or power relating to any matter in question in the suit”.

[62] The defendant in the instant suit had the above options of discovery in relation to documents and any other information he claimed to had been in possession of the Plaintiff. He opted not to invoke and apply any of the above enabling provisions of our rules of procedure. In my view, he has nobody to blame but to stay in his own comfort zone of the law. In any case, when he attended the Plaintiff’s **Special Joint Consultative Meeting of**

Current and Previous Board Members held on 16th April, 2016 at the SACCO Offices (P.Exh. 28) where most or all the issues in connection with this suit were raised, he had the opportunity to address the meeting and demand from the Plaintiff's Board members those "relevant" documents if at all they were available, for his defence to the meeting.

[63] Instead, the defendant having had and received the queried money in question, he undertook to pay all his debts with the Plaintiff SACCO. The meeting resolved that the defendant makes a written commitment on how to pay his debts and a written explanation of the money he withdrew after leaving the Plaintiff's SACCO. Then, that he also brings all the Plaintiff's property in his possession. The Defendant undertook to return the properties in his possession but failed to comply until Court intervened during the proceedings of this case.

Whether the Plaintiff's Claims are barred by Limitation

[64] Counsel for the Defendant submitted that the Plaintiff's claims having been founded in Tort and Contract, under **S.3 of the Limitation Act**, the Plaintiff's claims against the Defendant founded before the 12th September, 2008 are time/statute barred since the suit was filed on 12th September, 2014 and the limitation time is 6 years.

[65] In my view, and from the pleading it appears the Plaintiff came to discover or be aware of the fraud and misappropriation of the funds in 2014 when the auditors audited the Plaintiff SACCO (**P.Exh. 27**). The suit was filed in 2014. Computation of time started running upon discovery of the fraud and misappropriation

of the funds and therefore, the Plaintiff's claims are not barred by limitation: **Hammaann Ltd & Another v Ssali & Others: HCMA No. 449/2013.**

[66] From the totality of the foregoing, I find the 3rd issue in favour of the Plaintiff to the extent that the Defendant is indebted to the Plaintiff in the total sum of **UGX. 94,467,700=** (inclusive of the UGX. 33,000,000= admitted under the partial consent on record).

Issue No. 4: Remedies Available to the Parties:

(a) An Order of recovery of the due sum of money by the Defendant to the Plaintiff.

[67] The law regarding special damages is that these must be specifically pleaded and strictly proved; **Kyambadde v Mpiji District Administration [1983] HCB 44.** The Plaintiff in this case pleaded and particularized special damages amounting to the total of **UGX. 103,907,700=** and calculated interest thereon at the rate of 3.5% per month as derived from the **Loan Policies and Procedure Manual** of the Plaintiff (**P.Exh. 24**) for 15 months from the date of departure from the Plaintiff's Board on 15th June, 2015 to 15th September, 2019 when the suit was filed amounting to **UGX. 54,551,175=** thus totaling to **UGX. 158,458,175=.** Upon evaluation of evidence Court found that the claimed sums of money did not attract any interest and therefore, the ought to be claimed sum of money amounted to **UGX. 103,907,000=** less the loan advancement balance sum amounting to **UGX. 5,440,000=** that the Defendant was found to had paid thus reducing the debt to **98,467,000/=.** However, upon further evaluation of evidence during the resolution of the 3rd and last issue, the proven amount

due by the Defendant to the Plaintiff reduced from **UGX. 98,467,000=** and settled at **UGX. 94,467,700=** (inclusive of the **UGX. 33,000,000=** admitted under the partial consent).

[68] In the premises an order for recovery of the total sum of **UGX. 94,467,700=** (inclusive of the **UGX. 33,000,000=** admitted under the partial consent on Court record) accordingly issues.

(b) General Damages

[69] General damages are the natural consequence of the Defendant's act or omission and are awarded at the discretion of Court. Such consequences may be loss of use, loss of profit, physical inconvenience, mental distress, pain and suffering. A Plaintiff who suffers damage due to wrongful act of the Defendant must be put into the position he/she would have been had he/she not suffered any wrong; **James F. Nsubuga v A.G, H.C.C.S. No. 13 of 1993, Kibimba Rice Ltd v Umar Salim, S.C.C.A. No. 17 of 1992 and Kampala DLB and Another v Venensio Babweyaka, S.C.CA. No. 2 of 2007**

[70] In the instant case, the Plaintiff led evidence that due to misappropriation of the funds by the defendant, the Plaintiff SACCO occasioned and continue to occasion financial loss and inconvenience which impaired its operations. The Defendant breached the policies, manuals and operating instruments of the Plaintiff yet he was in an enviable position of the Treasurer of the Plaintiff, besides being the Board member thus enjoying the fiduciary status or position with the Plaintiff SACCO Board which he abused. The Plaintiff further suffered in business terms of constraints to disbursements of further loans to members, loan

portfolio growth and image (local and donor). In the premises, I find that the Plaintiff merit an award of general damages.

[71] Lastly, it is also “well established that when damages are at large and a Court is making a general award, it may take into account factors such as malice or arrogance on the part of the defendant and this is regarded as increasing the injury suffered by the Plaintiff, as for example, by causing him humiliation or distress. Damages enhanced on account of such aggravation are regarded still as being essentially compensatory in nature”; **Obongo v Municipal Council Kisumu [1971] E.A. 91.**

[72] Upon analysis of the facts in issue and the circumstance of the case, I find the Defendant’s conduct towards the Plaintiff and its Manager, **Akugizibwe Jacinta, (Pw1)** was oppressive, the defendant acted with a lot of arrogance in the aggrandizement of the Plaintiff’s funds and assets to himself, it was as if the Plaintiff SACCO was his personal property and as a result, the Plaintiff suffered huge loss. Considering the totality of the above, I award the Plaintiff general damages of **UGX. 60,000,000=.**

Punitive/Exemplary Damages:

[73] Punitive damages focus on the defendant’s misconduct and not the injury or loss suffered by the Plaintiff. They are in the nature of a fine to appease the victim and discourage revenge and to warn society that similar conduct will always be an affront to society and also the Court’s sense of decency; **Ahamed El Termewy v Hassan Awidi and Others: H.C.C.S No. 95 of 2012 [2015] UGHCCD 4.** In **Waiso Davies v Mohanlal K. Shah [1957] E.A. 352,** Court noted that Punitive damages represent a sum of money of a

penal nature in addition to the compensatory damages given for pecuniary loss and mental suffering. They are deterrent in nature and aimed at curbing the repeat of the offending act. They are shown entirely without reference to any proved actual loss suffered by the Plaintiff. The rationale behind the award of punitive/exemplary damages is not to enrich the Plaintiff but to punish the defendant and deter him from repeating similar conduct; **Luzinda v Ssekamate and 3 Others: H.C.C.S. No. 366/2017 [2020] UGHCCD 20.**

- [74] An award of exemplary damages should not be excessive. The punishment imposed should not exceed what would be likely to have been imposed in criminal proceedings, if the conduct were criminal; Per Spry V.P. in **Obongo v Municipal Council of Kisumu (supra)**.
- [75] In the instant case, the Defendant was high handed in the manner he treated the Plaintiff and its Manager. He diverted funds to his personal gain and bragged about how he was constructing a double storey flat house. By his conduct, he put at risk the savings of all the poor farmers who entrusted their money with the Plaintiff SACCO as their saving organization. The acts of the defendant were criminal in nature; causing financial loss to the Plaintiff SACCO, theft of Cheque book and embezzlement. All this cannot go unabated, they are punishable.
- [76] Bearing the principles in the above referred to authorities and the above enumerated circumstance of this case, I award the Plaintiff punitive damages of **UGX. 40,000,000=.**

Interest:

[77] **S.26 CPA** provides for an award of interest that is just and reasonable; see also **Kakubhai Mohanlal vs Warid Telecom (U) Ltd H.C.C.S. No. 224/2011**;

“A just and reasonable interest rate is one that would keep the awarded amount cushioned against the ever rising inflation and drastic depreciation of the currency”.

[78] In the instant case, this Court is going to consider interest regarded as representing the profit the Plaintiff might have made if that party had use of the money or conversely the Plaintiff suffered because of non-use of the money; **Riches v Westmont Bank Ltd (1947) AC 390 and Ruth Aliu and others v A.G, H.C.C.S 1100/1998**.

[79] Considering the circumstances of this case, I award the Plaintiff interest at the rate of 15% per annum for both general and the Punitive damages to run from the date of filing this suit until payment in full.

Costs to the Plaintiff:

[80] In conclusion, Judgment is entered in favour of the Plaintiff against the Defendant for the following orders and/or reliefs.

1. An order for recovery of **UGX. 94,467,000=** (ninety four million, four hundred sixty seven thousand shillings only) (inclusive of the **UGX. 33,000,000=** (thirty three million shillings only) admitted under the partial consent agreement dated 19th November, 2014.

2. General damages of **UGX. 60,000,000=** (sixty million shillings only).
3. Punitive damages of **UGX. 40,000,000=** (forty million shillings only).
4. Interest of **15% per annum** on the above from the date of filing the suit till full payment.
5. Costs of the suit.

Dated at Masindi this 2nd day of June, 2022.

Byaruhanga Jesse Rukyema
JUDGE