THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CIVIL APPEAL NO. 34 OF 1997

CORAM: HON. MR. JUSTICE C. M. KATO, .J.A.,
HON. MR. JUSTICE (G.M. OKELLO, J.A. &
HON. MR. JUSTICE J.P. BERKO, J.A.

KANOBLIC GROUP OF
COMPANIES (U) LTD…… APPELLANT

VERSUS

SUGAR CORPORATION
UGANDA LTD……RESPONDENT

(Appeal for the Ruling of the Hon. Lady Justice L.E.M. Mukasa Kikonyogo of 26th February 1997 in Misc.AppI.No. 653/96)

JUDGMENT OF BERKO, JUSTICE OF APPEAL.

The appeal arose from the ruling of Mukasa -Kikonyogo (Mrs.) J (as she then was) on the 26th February, 1997 in respect of an appeal brought under Order 46 rules 1, 7 and 8 of The Civil Procedure Rules in which she set aside the Registrar's Certificate awarding compound interest, ordered the appellant to refund with interest the Shs. 8,403,193/= to

the respondent/judgment/Debtor and set aside the attachment respondent/Judgment/Debtor's Account No. 0150107032. She ordered each party to bear its own costs.

The facts of the case are fully set out in the judgment appealed against. Briefly the Respondent/Judgment/Creditor in Arbitration award No. 7 of 1994 obtained an award in its favor against the appellant/Judgment/Debtor in the following terms:
(I) Shs. 45,475.341/= special damages,
(ii) Shs. 10,000,000/= General damages,
(iii) Interest on (I) and (ii) at the rate of 30% p.a. from
1.10.92 till payment in full
- Costs of the arbitration
- Dissatisfied with the terms of the award, the appellant/Judgment/debtor instructed its counsel at that time Mr.Kaggwa of Mugerwa & Matovu & Co. Advocates to file an application under S. 12 of The Arbitration Act and Rules 7, 8 and 16 of The Arbitration Rules S. I 55 — I) to set aside the award. It was dismissed with costs by the High Court.

Following the dismissal M/s. Barya and Byamugisha and Co. Advocates representing the Respondent/Judgment Creditor proceeded to carry out execution. Before the execution was carried out, the appellant/judgment debtor through its new counsel Mr. Mulira filed two applications in the High Court. One application was for stay of execution under 0.19 rule 26 of the Civil Procedure Rules whilst the second one was seeking an order of the High Court to set aside the dismissal order to set aside the Arbitration award dated 2/5/95. Both applications were dismissed on 20.7.95.
However, on the application by Mr. Mulira, leave was granted to the appellant/Judgment/Debtor to appeal to the Supreme Court on condition that security was deposited into court. In compliance with the courts order Shs. 130, 448, 6011/= by way of bank draft was deposited into court. The appeal was, again, dismissed with costs to the Respondent.

Judgment/Creditor failing the dismissal of the appeal the Deputy/Registrar Civil of the High Court paid the security amount of Shs. I 30,448,601/= to the Respondent/Judgment Creditor in

settlement of the Decretal amount and interest owed by the appellant/Judgment Debtor.

The above payment notwithstanding, on 3/10/96 the learned counsel for the Respondent/Judgment/Creditor wrote to the Deputy Registrar a letter marked Annexture 'A' to the affidavit of M.D. Hedge the Company Secretary of the appellant/Judgment/Debtor. It was, inter alia, seeking for payment to the Respondent/Judgment/Creditor Shs. 62,233 ,667/= by the appellant/Judgment/Debtor being money still due as a result of calculations of compound interest made by the counsel for the Respondent/Judgment Creditor as guided by one official from the Cooperative Bank as per attached to the letter. Acting on the said calculations the Deputy Registrar Civil proceeded to issue the certificate of interest dated 1 November, 1996. It reads as follows:

"This is to certify that in accordance with the Arbitration Award dated 23rd day of January, 1995 compound interest on Shs. 119,308,846/ at the rate of 30% per annum from 25th May 1995 till September, 1996, is Shs. 62,233,667/= which is due from the Respondent (Judgment/Debtor) to the applicant ('Judgment/creditor,) ". The counsel for the appellant/Judgment Debtor were not given a copy of the letter, although it was claimed that Mr. Mike Musisi, an advocate who represented them at taxation, was verbally informed.

Following the issue of the said certificate of interest the counsel for the Respondent/Judgment Debtor filed an exparte chamber summons under order 20 rules 1 and 10 of The Civil Procedure Rules for Garnishee Proceedings. A decree Nisi returnable on 13/11/96 was issued to be served on both the Bank of Baroda (U) Ltd. hereinafter to be called the Garnishee and the Respondent/Judgment Debtor.

When the matter was placed before the High Court on 13.11 .96 Mr. Nester Byamugisha, who on that day represented the Respondent/Judgment/Creditor, intimated to the High Court that he had discussed the matter with the counsel for the appellant/Judgment /Debtor and they had agreed to settle the matter amicably. He therefore asked the court to adjourn the application to enable them

to finalize the settlement. Mr. Mukasa, who on that day appeared for the appellant/judgment/Debtor, in reply appeared to have suggested that had they seen the letter to the Deputy Registrar dated 3/10/96 which precipitated the Garnishee proceedings, the matter would not have come to court, but settled.

The Garnishee was represented by Mr. Magezi who told court that the Garnishee was not in a position to pay the monies on the appellant/Judgment Debtor's account with the Garnishee to the Respondent/Judgment/Creditor. Since there was a likelihood of an amicable settlement the Garnishee proceedings were adjourned to 18.11 .96. The court rejected Mr. Magezi's request for costs as the Garnishee would have had to appear before court any way to show cause why the Garnishee should not pay the monies from the appellant's account to the Respondent.
On 18. 11 .96 Dr. Barya appeared for the Respondent/Judgment/Creditor, whilst Mr. Tumusingize represented the Appellant/.Judgment Debtor. Mr. Magezi appeared for the Garnishee. Instead of recording a settlement reached upon by the parties, Mr.Tumusingize told the court that when they returned to their chambers they realized that Shs. 62,233,667/= which was the subject matter of the Garnishee proceedings was not due to the Respondent/Judgment/Creditor. They had noticed that it had applied compound interest instead of simple interest. The counsel for the Appellant/Judgment Debtor explained that The Arbitration award spoke of 30% interest per annum and in those circumstances interest had to be simple and not compound based on the Deputy Registrar's certificate of interest issued in the absence of the counsel for the appellant/Judgment/Debtor.
As far as they were concerned the total amount of interest at the time payment in full was effected was supposed to be Shs. 66,570,408/= that is as from October, 1992 to September, 1996. At the time of the payment, the award decretal amount and interest owing stood at Shs. 122,045,749/= only. The appellant/Judgment/Debtor having deposited into court Shs. 130,448,601/ as security which was paid to the Respondent/Judgment Creditor there was an excess payment of Shs. 8,403,193/ which was refundable to the appel1ant/Judgment/Debtor.

It was explained that when Mr. Mukasa conceded to the adjournment for the purposes of negotiating a settlement, the counsel for the appellant/Judgment/Debtor honestly believed that there was still money owing to the Respondent/Judgment Creditor which they subsequently

found was not the case. Without compounding the interest there would not have been any money due and owing to the Respondent/Judgment Creditor.

It was submitted before the learned Judge that the court could not enforce illegality as the provisions of Section 26(2) of the Civil Procedure Rules are clear. Counsel submitted that where compound interest was not agreed and determined then the interest in the judgment was deemed to be simple.

It was contended. on behalf of the appellant, that the arbitrator's award was based on compound interest on the grounds, firstly, that it was not disputed by the respondent/Judgment/Debtor that the appellant borrowed the money from the Nile Bank and that it carried interest secondly, the compound interest was not disputed at the time the award was made or at the time of the application for setting aside the award or in the Supreme Court when compound interest was clearly implied. Consequently it was contended that compound interest had been acquiesced and therefore the matter was res judicata. Finally, it was contended that Mr. Kaggwa, who represented the respondent/Judgment/Debtor at the time the award was made, agreed when the award was interpreted that compound interest was implied.

The learned Judge rejected the appellants' submissions, and upheld the respondents' contention that no compound interest was implied in the award.

The memorandum contains four grounds, which are:-

1. The learned trial judge erred in law and fact by not finding that compound interest was implicit in the award,

2. The learned trial judge erred in law and fact by not finding for the respondent/judgment creditor (now the appellant) on an affidavit of its representative which was uncontroverted a fact which was conceded by Counsel for the appellant/judgment debtor (now the respondent),
3. The learned trial judge erred in law and fact by ordering the respondent/judgment creditor (now the appellant) to refund Shs. 8,403,193/= by way of decretal amount and interest, and
4. The learned trial judge erred in law and fact by setting aside the order of attachment of the

appellant/judgment debtor's (now respondent) account No. 0150107032 kept with the Garnishee Bank of Baroda (U) Ltd.

It was contended in ground one that the learned Judge erred in law and in fact by not finding that compound interest was implicit in the award made by the arbitrator. The reasoning of the learned Counsel was that the arbitrator had evidence before him that the appellant had obtained the money from a Bank and that it was a commercial transaction. Therefore in awarding the 30%, the arbitrator had in mind that the interest would be compound.

On behalf of the respondent M/s Nakabuye Charity contended that no compound interest was implied in the award. She referred to Halsbury's Laws of England vol. 27 3rd Ed page 8 where the learned author had this to say about compound interest:

> **"Compound interest will not be allowed except where there is an agreement, express or implied to pay it or where the debtor had employed the money in trade and had presumably earned it, or unless its allowance is in accordance with a usage of a particular trade or business".**

She contended that the agreement between the appellant and its Bankers had nothing to do with what happened between the appellant and the respondent. In any case compound interest was not claimed in the plaint. It was argued on behalf of the respondent that it was riot proper to interpret the award of the arbitrator to imply compound interest when the award was silent on it**.** Finally it was contended that the award of interest is governed by the provisions of S.26 of the Civil Procedure Act. It was for the court to determine the interest to be awarded and not the parties.
I will start by setting out the relevant part of the award concerning interest: The arbitrator introduced the subject as follows: -
"The applicant also claimed interest on the claimed accounts at the rate of 30% from 1st October, 1992, till payment in full. The respondent did not address me on the question of interest. The claim by the applicant is for delayed payments and none payments of monies on a contract. That source of his money was the Bank which charged interest. The transaction was a commercial transaction in which interest is contemplated in case a party fails to pay the other."

Thereafter he made the following finding:

> **"In the circumstances I find that interest is payable on the monies the respondent owes to the applicant as awarded here in."**

He then made the following award:

> **"I therefore award interest on the monies awarded herein at the rate of 30% from 1st October 1992 till payment in full".**

There is no reference any where in this award to compound interest. In the plaint it was not pleaded that the parties agreed to pay compound interest. So I would reject any suggestion that there is any express agreement to pay compound interest.

Then, was there an implied agreement to pay compound interest. Compound interest are only implied when there is a Banker and customer relationship. There are respectable authorities on the point. The case of **Williamson v Williamson** (1869) LR 7 E p 542 was a case of Banker and customer. It was held that the Bank was entitled to charge compound interest up to the date of the customer's death but not thereafter. James V-C said:

> **"With regard to the interest accruing after the testator's death, I should take some time before assenting to the proposition that the account did not bear simple interest, but I have not to decide the point. I am bound, however, by authority of the House of Lords to hold that compound interest is incidental to the continuance of the relation of bank and customer. From the testators death therefore, only Simple interest of 5% will be allowed on the account"**

But the death of the customer is not the only event which will bring the relationship of Banker and customer to an end. In the **Deutsche Bank case (1934) 4 legal Decisions Affecting Bankers,** 293, the Plaintiff bank advanced £ 100,000 to the defendant Bank before the 1914-18 war. In 1930 the plaintiff issued a writ for the recovery of the sum lent with compound interest. **Scrutton** L.J at page 295 said:

"In my opinion, after December 31st 1914, this was not such an account; Germany was at

war with Russia and there were no mutual dealings between the Dentsche Bank and the Moscow Merchant Banks, only debits of interest and credits for securities sold by the English Government. I should be of the opinion, if it were necessary to decide the question that compound interest should stop after the account of December 3lst 1914".

Romer L.J said (at 297):

> **"In these circumstances it is plain that the defendants must be taken to have agreed to be charged wit compound interest. It is, however, established by several authorities that this implied agreement must be limited in its operation to the time during which the relation of Bank and Customer existed between the parties. The Plaintiffs cannot justify the charge of compound interest after the mercantile account current for mutual transactions had been closed and the relations between the parties had become merely that of creditor and debtor".**

The Law is well summarized in Paget on Banking (9th Ed. 1982) at page 116 as follows:

"The endorsement of a statement of claim must show how the claim is based. Where the customer has acquiesced in the charging of interest that would justify the claim. Such acquiescece will justify the charging of compound interest or interest with periodical rests, so long as the relation of banker and customer exists, and the relationship is not changed into that of mortgagee and mortgagor".

It is plain from the above that the person claiming to be entitled to compound interest ought to have pleaded the basis for his claim for compound interest in the first place. If that was not done, as in this case, then the failure to take that point until at a late stage can be blamed entirely on him.

In my view compound interest was not implied in the award as the relationship between the parties was not that of Banker and customer. The relationship was pure and simple that of a debtor and creditor. For this reason ground one must fail.

In ground two it was argued that if interest was not expressly awarded, the parties later interpreted the award to include compound interest. I agree that parties can settle their cases after judgment. What they are not entitled to do is to put words into the mouth of the court. If there is an ambiguity in a judgment or order of the court, the course open to the parties is to refer the matter to the Judge or court for clarification. In the instant case, what Kaggwa and others did was to **"re-write"** the award. This they were not entitled to do. If they felt that there was an ambiguity in the award of interest, they ought to have referred the matter back to the arbitrator.

In my view, the fact that Mr. Anatoli Kamugisha's affidavit in reply was not controverted is neither here nor there. The fact on the matter is that the parties were not entitled to **"re-write"** the award made by the arbitrator. The Judge was right when she held that the alleged consent subsequent to the award could not entitle the appellant to compound interest which had not been awarded at the time the award was made.

Ground two therefore should fail.

> For the reasons I have given, I would hold that the appellant is not entitled to compound interest. I would summarize those reasons as follows:
>
> (I) there is no right to compound interest save by agreement, express or implied, or custom binding on the parties,
>
> (11) there was no express agreement to pay compound interest in this case.
>
> (I11) an agreement to pay compound interest may be implied by acquiescence; but
> (IV) Such an agreement is not normally implied except as to Banker and Customer relation which is not so in the instant case;
> (V) the appellant never pleaded or proved a custom entitling it to charge compound interest in its dealing with the respondent and (VI) the alleged subsequent interpretation put on the award is unlawful, as it had the effect of rewriting the award of the arbitrator.

In ground three it was argued that even at simple interest there was still a deficit of 2,737,901/= which should have been paid to the appellant and therefore the Judge was wrong to order the appellant to refund Shs. 8,403,193/= to the respondent. This was readily conceded by M/s. Nakabuye Charity.
So ground 3 should succeed. With regard to ground 4, I do not think it is necessary to disturb the order of the learned Judge because of the small sum that is outstanding.

In the result I would allow the appeal in part by declaring that the interest awarded was simple interest and not compound. The appeal in ground three allowed. The order that the appellant should refund Shs. 8,403,193/= to respondent is set aside. In place therefore judgment is entered for the appellant for the sum of Shs. 2,737,901/= with interest at the rate of 30% from date of the award till payment in full. Each party to bear its own costs.

Dated at Kampala this 26th day of June 1998.

J.P Berko

JUSTICE OF APPEAL.

JUDGMENT OF C.M. KATO, J.A.

I have had the benefit of reading the judgment of Berko, J.A. in draft, I agree with it entirely for the reasons given by him. The appeal is accordingly allowed to the extent he has proposed.

Dated at Kampala this 26th day of June 1998.

C.M.KATO

JUSTICE OF APPEAL

JUDGMENT OF G.M OKELLO, JA.

I have had the chance to read in draft the judgment prepared by Berko JA. and I agree entirely with it and with the order, proposed by him.

I have nothing useful to add

Dated at Kampala this 26th day of June 1998

G.M. OKELLO

JUSTICE OF APPEAL.