**THE REPUBLIC OF UGANDA,**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(COMMERCIAL DIVISION)**

**CIVIL SUIT NO 277 OF 2010**

1. **HIGHLAND AGRICULTURE EXPORT LTD}**
2. **ARVIND R. PATEL}........................................................................PLAINTIFFS**

**VERSUS**

1. **ALPHA GLOBAL 21ST JOINT VENTURE LTD}**
2. **RICHARD SSENABULYA}**
3. **COSMA ELOTU}**
4. **STEFAN OKWALO}**
5. **ACHILLES MUWONGE}**
6. **DR. APILLI EVERLYN}...............................................................DEFENDANTS**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**JUDGMENT**

The Plaintiff filed this action against the Defendants jointly and severally for recovery of Uganda shillings 969,065,116/=. The Plaintiffs averred in the plaint that the first five Defendants were joint customers of the Plaintiffs and the Plaintiffs would supply goods and technical advisory/consultancy services on account to the Defendants on request. On 19th of August 2008 the Plaintiffs and the Defendant executed an agreement for the Plaintiffs to provide credit facilities. By 31st of January 2010, the Defendant's indebtedness stood at Uganda shillings 920,465,372/= and the Defendant issued in favour of the second Plaintiff a Messieurs Barclays bank Uganda Ltd cheque number 000118 for Uganda shillings 900,000,000/= in payment of the account. The Plaintiff also asked the Defendants to amend the second Defendant’s signatories to account number 0001102006 with Messieurs Barclays bank Uganda limited in order to act as security and ensure payments to the Plaintiffs. But in breach of the agreement and unknown to the Plaintiffs and secretly and fraudulently the Defendant opened account number 2215100344 and withdrew all monies paid to the Adjumani projects, paid by the Ministry of Agriculture, Animal Industry and Fisheries. By the end of April 2010 the Defendants account with the Plaintiffs and their indebtedness stood at Uganda shillings 969,065,461/=.

The suit against the sixth Defendant was resolved by consent of the Plaintiff and the sixth Defendant and the suit against the sixth Defendant was withdrawn with no order as to costs.

The Plaintiff also claimed interest at 24% per annum from 10th of May 2010 till full payment, general damages for breach of contract and costs of the suit.

In the written statement of defence filed jointly by Messieurs Kabega, Bogezi and Bukenya advocates, the first up to the fifth Defendants denied the claim of the Plaintiffs as disclosed in the plaint. In reply they averred that the dealings between the Plaintiff and the Defendants went as far back as February 2007 and they have since paid to the Plaintiff of Uganda shillings 648,583,000/= for supplies made to them and cash advances and asserted that they do not owe the Plaintiff the money claimed in the plaint. Secondly cheque number 000118 was never issued by the Defendants in payment of any money but was among undated and unfilled cheques held by the Plaintiff as security for payment by the first applicant in the fifth Defendants of any amount confirmed by the parties after verification exercise at any time in the course of their dealings. They further alleged that the filling and dating and banking of the cheque was done by the Plaintiff in bad faith and was unknown to the Defendants. It was without any entitlement to payment. Furthermore, account number 2215100344 of Centenary Bank Ltd was opened way back on 11th December, 2006 and as such was never secretly and fraudulently opened up as claimed and any withdrawals there from were for purposes of executing project works for which funds had been advanced by the Ministry of Agriculture Animal Industry and Fisheries. Furthermore, the Defendants are not in any way indebted to the Plaintiffs in the amount claimed or any amount at all and the statement of claim was not a true statement of account and is an exaggeration. Any goods obtained plus any money advanced by the Plaintiff to the Defendants were pursuant the agreement between the parties and or withdrawals were made for purposes of implementing the project.

**ISSUES**

Joint scheduling notes were filed and the following issues framed fordetermination;

1. Whether the 1st Defendant issued cheque No. 000118 to the Plaintiffs for payment of Nine Hundred Million Shillings (Uganda shillings 900, 000, 000)?
2. Whether the Plaintiffs supplied the goods to the 1st to 5th Defendant as alleged in the plaint?
3. Whether the 6th Defendant is liable to the Plaintiff's claim by the fact that she was made signatory to the 1st Defendant's account No. 2215100344 with Centenary Bank?
4. Whether cheque No. 000118 was issued by the 1st Defendant in payment of the Plaintiffs Nine Hundred Million Shillings (Uganda shillings 900,000,000/=)?

The Plaintiff’s Counsel submitted that the only issues for determination in this matter are issues (1) and (2) mainly because issue (3) was overtaken by the withdrawal of a claim against the 6th Defendant and issue (4) is similar to issue (1).

At the trial the Plaintiffs called one witness the Second Plaintiff "PW1" whereas the Defendants called two witnesses *to wit* John Kintu Kalonde "DW1" and Stefan Okwalo the Fourth Defendant "DW2".

**RESOLUTION OF ISSUES:**

**ISSUE NO.1:**

**Whether the First Defendant issued cheque No. 000118 to the Plaintiffs for payment of Uganda shillings 900,000,000/= (Uganda shillings Nine Hundred Million only)?**

The Plaintiff’s Counsel submitted that "PW1" Mr. Arvind Patel in his examination in chief did testify that himself and his company the First Defendant on different dates during the time they transacted with the Defendants did supply goods, offered credit facilities including cash and also offered consultancy services to the Defendants in return for payment. It was his evidence that he and the First Plaintiff entered into various agreements with the Defendants and by 31st January, 2010 the Defendants were indebted to them to a tune of Uganda shillings 920,465,372/=, (Uganda shillings Nine Hundred and Twenty Million, Four Hundred Sixty-five Thousand, Three Hundred Seventy-two only) out of which the Defendants issued cheque No. 000118 of Barclays Bank worth Uganda shillings 900,000,000/= in partial fulfillment of the debt. To date the same said amount in the cheque has never been paid to him since the cheque was returned unpaid when presented for payment. The Plaintiff’s Counsel further submitted that the evidence of "DW1" was largely unchallenged by the Defendants mainly due to the fact that "DW2" Mr. Okwalo Stefan testified that he signed the cheque in issue and that he was a director of the first Defendant. He went ahead to testify that the cheque in issue was given to the Plaintiffs as security to the Plaintiffs just like many other cheques but he could not produce any proof to show that indeed the cheque was issued as security and not for payment of the Plaintiffs. "DW2" Mr. Kintu Kalonde testified that he did not get all the documents necessary to come up with a conclusive audit report. This is a clear testimony that the Audit report that was produced in court did not reflect the true position of the affairs of the parties and as such the report cannot be relied on.

Counsel also submitted that Section 2 of the Bills of Exchange Act defines a Bill of Exchange to mean "an unconditional order in writing addressed, to one person by another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum of money to or to the order of a specified person or to the bearer. Under sub Section (4) there under a bill is not invalid by reason of not being dated, that it does not specify the value given or place where it was drawn among others".

Counsel submitted that the cheque in issue was a valid bill of exchange because it was signed by the parties authorized to sign it and more importantly it matters not that at the time it was given to the Plaintiffs it was not dated since Section 11 of the Bills of Exchange Act gives any holder of the undated cheque authority to insert the date. Under Section 46 (2) of the Bills of Exchange Act, it is provided that subject to the Act, when a bill is dishonored, by non-payment, an immediate right of recourse against the drawer and endorsers accrues to the holder.

He further submitted that the cheque was duly issued by the First Defendant for payment of the sum of Uganda shillings 900,000,000/= and the same was returned unpaid when presented for payment and since there was never any evidence adduced during the trial to the contrary the Plaintiff has a right to recover the sum as mentioned in the cheque.

He also submitted that notice of dishonor of the cheque was duly communicated to the Defendants as duly acknowledged by "DW2" Okwalo Stefan in his witness Statement under paragraphs 25 and 26 where he testifies that when the cheque bounced they were called by the police after the Plaintiffs had reported the matter.

He further submitted that the Plaintiff duly notified the Defendants about the dishonor of the cheque and demanded for payment but the Defendants did not take heed pursuant to which a criminal matter was reported at the police.

The Plaintiff’s Counsel also submitted that this Honorable Court in the case of Steel and Tube Industries Ltd vs. Mwesigwa Titus High Court Civil Suit No. 446 of 2010 decided that a notice of dishonor of a bill of exchange can be in writing or through personal communication. The Court in the same case above also decided while quoting, Her Lordship Mulyagonja's decision in Sembule Investments Ltd vs. Uganda Baati Ltd HCMA No. 0664 of 2009 and Kotecha vs. Mohammad [2002] 1 EA 112 of the Court of Appeal of Uganda and Maersk Uganda Ltd vs. First Merchant International Trading Ltd HCCS No. 143 of 2009, that the cheques are payment and not security. Also in the case of Sembule Investments Ltd vs. Uganda Baati Ltd High Court Misc. Application No. 0664 of 2009 it was decided that one cannot issue a cheque on any conditions, except if those conditions are notified to the banker.

Counsel submitted that this being the position of the law, the Defendants cannot have any reason which indeed they did not give as to why the cheque was not given for payments to the Plaintiffs. He further submitted that on this issue that the Plaintiffs have authoritatively submitted and proved that the first Defendant on behalf of the rest of the Defendants duly issued the cheque in issue towards payment of Uganda shillings 900,000,000/= (Uganda shillings Nine Hundred Million only) and prayed that Court be pleased to find so.

In reply, the Defendant’s Counsel submitted that the 1st Defendant, in line with clause 3 (a) of the agreement cum memorandum of understanding dated the 19th day of 2008 which provided that the 1st Defendant/clients therein should provide security for *inter alia* provision of goods and the said security shall be by way of post-dated cheques, issued blank cheque No. 000118 in Barclays Bank (U) Ltd as security but not for the payment of Uganda Shillings 900,000,000/=.The 2nd Plaintiff went ahead and maliciously filled in the figures of Uganda Shillings 900,000,000/= well knowing that the bank account where the said cheque was to be banked had no money to meet the same.

The Defendant’s Counsel further submitted that DW2 in his testimony in chief lays out the element of malice and how the amounts were filled in. In paragraph 6 the 1st Defendant approached the 2nd Plaintiff for material and financial assistance and made the latter a co-signatory with the two of them in the bank account at Barclays bank A/C No. 0341102006, (the account where cheque No.000118 bounced). Paragraph 7 states that the 1st Plaintiff had become over bearing on the 1st Defendant. In paragraph 9, the 1st Plaintiff made claims in disregard of the Defendants' concern and that it turned worse when he withheld his signature and further in paragraph 10 that this became a threat to the delivery of Adjumani DFI as funds received would be used to settle unrealistic claims as opposed to the project activities. Dw2's testimony in chief in paragraph 11 states that Patel would insist he first be paid lest he withholds his signature and in paragraphs 12 and 13 that they would even pay for undelivered things.

Further in paragraph 14 that per diem for trips were made for Patel (PW1) which never took place. In paragraph 19 he testified that they stopped honoring PW1'S demands as prudent business men until the matter was settled between him and themselves.

Further in paragraph 20 PW1 in a meeting refused an audit of dealing between him and the Defendants and this prompted for a way forward thus in paragraph 22, the Defendants made a rational decision to revert and direct payment instructions to their old operational account No. 2215100344 held in corporate branch, Centenary Bank and changed the mandate of running this account to allay fears of contractors. In paragraph 23 the said action was taken in bad faith by PW1, albeit the project later was completed. Further in paragraph 24 PW1 learnt of these new measures but didn't seek explanation from the Defendants and instead opted to bank one of the many security cheques in his custody, signed it and fixed a figure of Uganda Shillings 900,000,000/= and banked it well aware there were no funds on the account but with the sole motive of harassing the Defendants.

Counsel also submitted that the harassment as seen in paragraph 26 where one of the officers of the 1st Defendants was arrested until he signed consent of 900,000,000, he would not be released. DW2 in cross examination, page 36 of the record maintains that he signed many cheques and admitted that he signed on the cheque in dispute. On page 37 he testified that he allowed PW1 to be signatory to the account as a way of securing the money in terms of materials. He maintains that he didn't open another new account but reverted to the old account which was there before they opened this new account at Barclays bank, in which PW1 wasn't signatory and that they had indicated to Patel they would stop the account. In page 38 that he signed blank cheques. In reexamination that he doesn't know who filled in the figures in question of 900,000,000 Uganda shillings and that all signed cheques were in custody of Patel. The cheques were signed awaiting figures to be fixed. He maintains that he had indicated to Patel in the meeting where Sam Engola attended that the account would be suspended until reconciliation was done although Patel didn't know of the change of account. He maintained that they don't owe Patel 900,000,000/= Uganda shillings and they believe they cleared him everything. PW1 in his testimony in chief, paragraph 6 states that he could not get some cheques to have been in possession of the 1st Plaintiff. In the EXH 01, page 8, clause 1.4 (i) (IV) that they could not access crucial documents for the 1st Defendant like cheque books. A summary of transaction between the two at page 9 of EXH 01 reveals the total value owed by the Plaintiff to the 1st Defendant to be 15,050,100/=. The same amount is stated by PW1 in paragraph 9. In reexamination at page 32, he maintained that crucial documents were in possession of the Plaintiff as they were informed. That there is a liability of UGX 15,070,100/= owed to the 1st Plaintiff by the 1st Defendant.

Counsel further submitted that the said agreement was duly signed/sanctioned by the Plaintiff with the effect that the Plaintiffs knew that the postdated cheque was in principle only a security for payment in line with clause 3(a) & 3(b) of the agreement and was marked "posted". In other words not one for payment and it was not therefore intended for presentation nor for entitling the Plaintiff to present on cash the cheque as that would be against the spirit of the agreement pertaining to clause 3 (a) and 3 (b) thereof. Going by the strict import and meaning of clauses 3 (a) and 3 (b) above referred to the Plaintiff are within the ambit of Section 28 and Section 114 of the Evidence Act are estopped from relying on a contrary view. The Plaintiffs do not deny being signatories to the agreement and admit the import of clause 3 (a) and 3 (b) of the agreement amounts to admission of the full meaning and import of Clause 3 of the agreement (See Section 19 Evidence Act).

He further submitted that there is no better evidence or better judgment against the Plaintiffs from one on admission pre-empting a case against the Defendants. Counsel cited the case of **John Nagenda vs. Monitor Publication Ltd SCCA No. 5 of 1994** where it was held that: **"**Court cannot give judgment in favour of the Plaintiff contrary to evidence that disapproves his claim."

Counsel further submitted that the said cheque fell within clause 3 thereof and it was within the Plaintiffs' knowledge it was not for cashing or presentation and so it's not surprising that it was marked with words "R/O" meaning refer to drawer. This cheque being a security within the meaning of clause 3 of the agreement was not governed by the Bills of Exchange Act. Without prejudice to the above, the Plaintiff having accepted the cheque from the 1st Defendant itself was enough to absolve the rest of the Defendants. He was guided by Section 113 of the Evidence Act which provides that:

"The court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events human conduct and public and private business, in relation to the facts of the particular case."

Thirdly and still without prejudice to the non-applicability of the Bills of Exchange Act in the circumstance of this case or of the agreement is that the cause of action relating to the cheque is barred in law as the Plaintiffs do not plead any notice of dishonor yet the wording of the cheque were clear that R/D refer to drawer. That deliberate omission has two implications:-

1. That the cheque was only as security.

1. That therefore reliance cannot be made on the bounced cheque because of the failure to issue a notice of dishonor as required under the Bill of Exchange Act.

That provision is statutory mandatory.

Section 19 of the Evidence Act provide as follows: "Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions" Under Section 28 Evidence Act, ‘Admissions are estoppels.”

In the premises, based on the foregoing submissions the cheque was not for payment of any monies and the 2nd Plaintiff acting in bad faith to revenge against the Defendants filled in the sums of UG SHS 900,000,000/= banking the same in an account which didn't have enough money only to frustrate the Defendants who didn't owe him any money.

Counsel further submitted that it was out of malice and greed that the 2nd Defendant filled in the figures and that although the cheque was signed by the Defendants, it was only a blank one and was not for payment of Uganda Shillings 900,000,000/=. He prayed that this honorable court be pleased to find this issue in the negative in favour of the Defendants as the bounced cheque is not pleaded as a particular of fraud under paragraph 11 of the plaint nor is it shown that the cheque was reflective of any supplies made.

**ISSUE NO.2:**

**Whether the Plaintiffs supplied the goods to the first to fifth   
Defendants as alleged in the plaint?**

The Plaintiff’s Counsel submitted that at the trial "PW1" testified that he supplied goods to the Defendants who did not deny having received them. He adduced evidence of the different agreements that were signed between the Plaintiffs and Defendants where the Defendants were acknowledging receipt of the goods and also the different statements that the parties signed.

Counsel submitted that all the defence witnesses acknowledged that the Plaintiffs supplied the Defendants with goods. "DW2" Stefan Okwalo testified in his examination in chief under paragraph 6 that they approached Mr. Arvind Patel for material support and financial assistance in early 2007 and that a number of memorandums of understanding and resolutions were signed to formalize the relationship. It is therefore very clear and admitted in evidence that the Plaintiffs supplied goods to the Defendants.

He further submitted that a clear look at the different memorandums of understanding between the parties you will realize that different amounts of monies remained due and outstanding to the Plaintiffs. Annexure "G3" which is on page 30 to the Plaintiffs' trial bundle is one of the many statements that were attached to the different memorandums of understanding that were entered into by the parties. The total outstanding on the said statement is Uganda Shillings   
969,065116 which is the suit amount being claimed by the Plaintiffs.   
This document was never denied by the Defendants during the trial.   
It is one of the statements showing the amounts due at a particular time. The Audit report as earlier submitted did not consider such   
documents and cannot therefore be used to disprove the Plaintiffs'   
claim since "DW1" testified that most of the documents were not   
available for him. Without wasting a lot of time on this issue Counsel submitted that the Defendants have admitted having received goods from the Plaintiffs and prayed that court find so.

In reply to this issue the Defendant’s Counsel submitted that concerning supply of goods, the Plaintiff under paragraph 5 of the plaint alleges and pleads that: "The Plaintiffs would supply goods and technical advisory/consultancy   
services on account to the Defendants upon request."

Counsel submitted that looking at the whole plaint particulars of item allegedly supplied and dates which supplied are not pleaded or set out in the plaint nor is any delivery note or invoice raised to that effect or documents. PW1 during cross examination on page 17 of the record stated that there had to be delivery notes for every supply made from the supplier. On page 18 that there were invoices made. That delivery notes is signed in his book by Richard, they generate account and sign the statement of account. That the book wasn't exhibited. DW1 in his testimony in chief testified that he could not get delivery and requisition notes for materials received by the 1st Defendant from the 1st Plaintiff. Full bank statement for the period in respect of bank account for the 1st Defendant and only received extracts of the statement. He did not receive full details of the transaction for the year 2007 as in the Exhibit D. Details of missing documents are also listed in page 6 of the report. The same report further reveals that all these documents were being held by the 1st Plaintiff yet the High Court had ordered for an audit to be done as seen in page 4, clause 1.2 and the schedule for materials supplied by the 1st Plaintiff. DW2 in his evidence in chief testified that they would many times pay him (Patel) for things not yet delivered. In paragraph 13 that they paid for things that would never be delivered all together and for things that didn't meet the client's specifications. The law places the burden of proof onto the Plaintiffs within the import and meaning of Sections 100, 101, 102 and 106 of the Evidence Act. This burden unless provided for under the law does not automatically shift to the Plaintiff per J.K Patel vs. Spear Motors Civil Appeal No. 4/9. The Plaintiffs merely averred in paragraph 10 of the plaint that: "As at end of April 2010, the Defendant's account with the Plaintiffs and indebtedness stood at Nine Hundred Sixty Nine Million Sixty Five Thousand Four Hundred Sixty One Shillings (Uganda Shillings 969,065,461) a photocopy of the statement of accounts dated 10th May, 2010 detailing the transaction is attached as annexure "E" and the signature cards as "E3".

According to Section 101 of the Evidence Act; the burden of proof is placed on he who asserts the existence of facts. Section 102 Evidence Act supra states that the burden lies on that person who would fail if no evidence at all were given on either side. Specifically on particular facts, Section 103 (supra) places the burden of proof on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any particular person. Further Section 104 (Supra) states that the burden of proving any fact necessary to be provided in order to enable any person to give evidence of any other fact is on the person who wishes to give that evidence. Section 106 (supra) states that the burden of proving any fact within the knowledge of any person is upon that person.

Counsel submitted that when you look at E3 it falls short of particular of supplies and when supplies if any were made. The statement ought to be based on particulars which ought to have been documented and tendered but these were never produced nor attached to the plaint and that omission in principle offends the burden of proof as the statement of account is merely the Plaintiffs’ creation in as much as its allegedly a statement of account of the 1st Plaintiff (Highland Agricultural Export Ltd) to only the 1st Defendant and having nothing to do with the rest of the Defendants. Based on the agreement which was written taken together with the requirement of request as set out by the Plaintiff, it follows that the dealing between the parties ought to be supported by formal/written documents and no perception of request for supplies can be   
made in absence of a formal request from the Defendants or in absence of an invoice (s) or delivery note (s).

In a nutshell Counsel submitted that no alleged supplies were made under the agreement, to the tune of Nine Hundred Sixty Nine Million Sixty Five Thousand Four Hundred Sixty One Shillings (Uganda Shillings 969,065,461) and the Defendant never made requests for the supplies Ref. paragraph 5 of the plaint within emphasis on ward request. In the result he prayed that issue   
to be resolved in the negative as it does not state the requirement of the law as to burden of proof and looking at the joint scheduling trial bundle no requests invoices or delivery notes are adduced. The law is settled in the case of John Nagenda vs. The Editor Monitor Publications Ltd SCCA No.5 of 1994: "No court can give judgment contrary to evidence that disapproves the claim".

Counsel reiterated that this being a court of law, it resolves issue No.2 in the negative against the Plaintiffs.

**ISSUE NO.3:**

**Whether the Sixth Defendant is liable to the Plaintiffs' claim** **by the   
fact that she was made Signatory to the First Defendant's Account   
No. 2215100344 with Centenary Bank?**

The Plaintiff’s Counsel submitted that the claim against the Sixth Defendant was withdrawn by consent of both parties and it is therefore not necessary to resolve this issue since it was never put to trial.

In reply, the Defendant’s Counsel also submitted that they abandon this issue because during the hearing, the 6th Defendant was withdrawn from this suit.

**ISSUE NO.4:**

**Whether cheque No. 000118 was issued by the First Defendant in   
payment of the Plaintiffs' Uganda shillings 900,000,000/= (Uganda shillings Nine Hundred Million Shillings?**

The Plaintiff’s Counsel submitted that this issue is similar to issue No. 1 and prayed that Court be pleased to consider the submissions of issue No.1 as those of this issue. Counsel submitted that the Plaintiffs have proved their case against the Defendants and prayed that Judgment be entered in their favour as prayed.

In reply, the Defendant’s Counsel submitted that the Plaintiffs having squarely failed on all issues, they are not entitled to any reliefs and prayed that their case be dismissed with costs.

**Judgment**

I have carefully considered the suit of the Plaintiffs as well as the defence and perused the written submissions of Counsel which have been set out above as well as the authorities cited.

The agreed issues are:

1. Whether the first Defendant issued a cheque number 000118 to the Plaintiffs for payment of 900,000,000/= Uganda shillings?
2. Whether the Plaintiff supplied the goods to the first Defendant and fifth Defendant as alleged in the plaint?
3. Whether the sixth Defendant is liable to the Plaintiffs by the fact that she was a signatory to the first Defendant's account number 2215100344 with centenary bank?
4. Whether cheque number 000118 was issued by the first Defendant in the payment of the Plaintiffs Uganda shillings 900,000,000/=?

Issue number 2 relates to goods allegedly supplied to the Defendants and is there intertwined with issue number 1 with reference to the question of whether a cheque was issued for payment. I have further considered issue number 4 which deals with the same cheque and is already covered by issue number 1 on whether the first Defendant issued cheque number 000118.

With reference to issue number 3, the Plaintiff's suit against the sixth Defendant was withdrawn with no order as to costs by the consent of the Plaintiff and the sixth Defendant.

While issue number 1 could have been handled independently on the ground that it is based on a bill of exchange issued in favour of the Plaintiffs, the issue has been juxtaposed against another question as to whether the Plaintiff supplied goods to the first up to the fifth Defendant as alleged in the plaint? While this issue seems to be isolated, it is intertwined with the question of whether the alleged 900,000,000/= in the cheque was a payment to the Plaintiffs for the supply of goods and services. This would require proof of the supply of goods and services to the amount claimed by the Plaintiff. On the other hand, the Defendant asserted in relation to issue number one that the cheque was issued as security and was not meant to be cashed.

The question is whether the cheque the subject matter of the suit of the Plaintiff should be considered on its own merits or should be considered according to the terms of a written agreement between the parties and the evidence as to whether it was payment for the goods or services supplied by the Plaintiff or security for payment of goods and services supplied by the Plaintiff. If the cheque is considered on the merits as a bill of exchange giving rise to a cause of action against the Defendant, then it would be unnecessary to consider the rest of the issues relating to the supply of goods and services by the Plaintiff.

In the submissions of the Plaintiff’s Counsel on the first issue of whether the first Defendant issued cheque number 000118 to the Plaintiffs for payment of Uganda shillings 900,000,000/=, the issue is restricted to a submission of the issuance of a bill of exchange in favour of the bearer. In fact learned Counsel for the Plaintiff relied on section 2 of the Bills of Exchange Act for the definition of a bill of exchange to mean an unconditional order in writing addressed to one person by another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum of money to or to the order of a specified person or to the bearer. He further submitted that a bill of exchange is not invalid by reason of not being dated or that it does not specify the value given or place where it was drawn among other things. Furthermore the Plaintiff's Counsel submitted that section 11 of the Bills of Exchange Act gives any holder of the undated cheque authority to insert the date. Finally the Plaintiff's Counsel submitted that section 46 (2) of the Bills of Exchange Act provides that where a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and endorser accrues to the holder. With reference to further authorities on the issue, the thrust of the submissions is that the Defendant issued the bill of exchange, it was dishonoured when presented and the Plaintiff is entitled to the face value of the cheque. Reference was made to Steel and Tube Industries versus Mwesigwa Titus HCCS number 446 of 2010; Sembule Investments Ltd versus Uganda Baati Ltd HCMA number 066 4009 and the Court of Appeal case of Kotecha versus Mohammed [2002] 1 EA 112. On the basis of the law, the Plaintiff’s Counsel submitted that the Defendants cannot have any reason which indeed they did not give as to why the cheque was not given for payment to the Plaintiffs. It follows that the issue of what consideration the cheque was for is immaterial since the cause of action arises from the issuance of the cheque itself.

I have carefully considered the contention of the Plaintiff and one of the ways of resolving the issue is to consider the plaint. In paragraph 4 of the plaint, the Plaintiffs claim against the Defendants jointly or severally is for recovery of Uganda shillings 969,065,116/=, interest thereon and costs of the suit. The facts in support of the claim in the plaint are that the five Defendants were joint customers of the Plaintiffs and the Plaintiffs would supply goods and technical advisory/consultancy services on the account to the Defendants on request. Furthermore in paragraph 6 of the plaint, the Plaintiff averred that on 19th of August 2008 the Plaintiffs and the Defendants executed an agreement for the Plaintiffs to provide credit facilities and a copy of the agreement was marked as Annexure "A" to the plaint. Paragraphs 7 and 8 are pertinent and I will them verbatim:

"7. As at 31st of January 2010, the Defendant indebtedness stood at shillings 920,465 372/= and the Defendants issued in favour of the second Plaintiff a Messieurs Barclays bank Uganda Ltd cheque number 000118 for Uganda shillings 900,000,000/= in payment of the account. A photocopy of the statement of account is attached as "B".

8. The cheque in paragraph 7 above issued by the first Defendant when presented for payment was returned unpaid. The photocopy of the cheque is attached as annexure "C".

In paragraph 9 it is averred that the Defendants will admit the second Plaintiff a signatory to our account number 0001102006 of Messieurs Barclays bank Uganda limited, in order to act as security and ensure payments to the Plaintiffs in breach of the agreement and unknown to the Plaintiffs secretary and fraudulently opened the account number 2215100344 and withdrew all monies paid for the judgment projects, paid by the Ministry of agriculture, animal industry and fisheries. The photocopy of the first Defendants special resolution of 20th of June 2010 was attached as annexure "D". The Plaintiffs case is that by the end of April 2010, the Defendants account with the Plaintiff's and indebtedness stood at Uganda shillings 969,065,461/=.

It follows that the basis of the alleged payment in paragraph 7 and 8 of the plaint is the supply of goods and technical/advisory/consultancy services to the Defendants. This is because immediately after paragraph 7 of the plaint, the Plaintiff averred that the indebtedness of the Defendant by 31st of January 2010 was Uganda shillings 920,465,372/= whereupon the Plaintiff's issued in favour of the second Plaintiff the controversial cheque number 000118 for Uganda shillings 900,000,000/=. If the court goes by the Plaintiffs submissions, there would be no need to consider the underlying transaction between the parties because the cheque itself gives rise to the cause of action. To do so would be to ignore the pleadings of the Plaintiff in the plaint that the Defendant was indebted to the Plaintiffs in the sum of Uganda shillings 920,465,372/=. Considered further in light of the contractual arrangement between the parties on the issuance of cheques in the course of business dealings, is it prudent or just to ignore the underlying transaction between the parties and go for the face value of the cheque?

In the circumstances of this case, it is not only prudent but just to investigate the transaction in light of the Defendant’s defence. The court has the mandate to investigate the payment especially in light of the submission of the Defendants Counsel that the giving of post dated cheques was a contractual arrangement between the parties and that the cheque in question was not supposed to be cashed.

The record demonstrates that an attempt was made by auditors to reconcile the accounts of the parties. For the moment I shall make no reference to the audit report concerning this matter. PW1 who is the second Plaintiff testified on 30th September, 2014 and 10th October, 2014 and was cross examined. He tendered in evidence two witness statements. On 30th September, 2014, he was not cross examined. On 10th October, 2014, the witness filed a supplementary witness statement and was cross examined.

The first witness statement is dated eighth of September 2014 in which the Plaintiff’s PW1 Mr Arvind Patel testified that on 28th of February 2007, his company, the first Plaintiff entered into an agreement with the Defendants number one up to number five for provision of credit facilities for goods and services. The Defendants acknowledged receipt of goods and services that had already been supplied. On 21st July, 2007 he entered into another memorandum of understanding with the first Defendant for the continuous supply of materials and logistics. Under the agreement he was to be made a signatory to the company's account number 110 2006 with Barclays bank Uganda limited for purposes of safeguarding his money invested in the project. It was further agreed that he would enjoy a 12% profit on turnover per month on blocked working capital from the date of signing the memorandum and till payment in full. He was also to be indemnified. The first Defendant executed a resolution and made him a joint signatory to the account of the first Defendant. On 8th February, 2008 the first Plaintiff company entered into a further agreement to provide credit facilities for goods and services which were an addendum to the agreement of 28th February, 2007 to the tune of Uganda shillings 250,000,000/=. On 19th August, 2008 the second Plaintiff and the first Plaintiff entered into another agreement to finance the goods and services to the tune of Uganda shillings 400,000,000/=. On 21st January, 2010 the Defendants were indebted to him and his company to the tune of Uganda shillings 920,465,372/= as to which the issue the same Barclays bank cheque of Uganda shillings 900,000,000/=. In the course of the transactions between the parties, statements of account were generated by the first Defendant showing the amounts due each time. When the cheque was presented for payment, it was returned unpaid and to date the Plaintiff has never been paid.

In the supplementary statement of PW1 signed on 3rd October, 2014, he testified that in the agreement of 19th August, 2008, the Defendant acknowledged indebtedness to him and his company to the tune of Uganda shillings 266,423,816/=. In paragraph D of the agreement, the Defendant further ordered for goods and services worth Uganda shillings 400,000,000/=. Attached to the agreement in paragraph 6 was an account statement duly signed by the Defendants which mentioned in the same amounts forming part of the agreement. In a bid to settle their indebtedness to him, the Defendants through the first Defendant issued a cheque for Uganda shillings 900,000,000/= which was presented for payment and was later returned unpaid. The Defendants kept updating the account and the statements of account were also admitted.

In cross examination he admitted that he first signed an agreement with the Defendants on 20th February, 2007 and another on 21st July, 2007. Another agreement was dated 8th February, 2008 and the last one dated 19th August, 2008. In total 4 agreements were executed between the parties. He further agreed that the agreement of 19th August, 2008 rendered previous agreements dormant except for historical purposes. Again on 19th August, 2008, earlier agreements were incorporated. By that time the outstanding amount was Uganda shillings 266,423,816/= comprising of the principal cash of Uganda shillings 80,263,800/= and Uganda shillings 186,160,016/= being profit as agreed on 30 July 2008. At the time of the memorandum there was an account statement dated 17th August, 2008 generated by the second Defendant. Interest rate on advances of money by the Plaintiffs to the Defendants was at 15% per month. PW1 further agreed that for every supply, there had to be a delivery note/invoice. Subsequently it was agreed that certain account statements would be generated from the book of the Plaintiff and the Plaintiff was supposed to extract copies of the relevant extracts to be exhibited without objection from the Plaintiff's Counsel and the suit was adjourned for further hearing on 25th of November 2014. For one reason or other the suit never came for hearing again and on various dates when it was mentioned the Defendant’s Counsel was absent on account of be engaged in other hearings. Finally further cross examination of PW1 was dispensed with hearing and resumed on 7th December, 2015 with hearing of defence witness DW1.

DW1 Mr John Kintu Kalonde relied on his witness statement dated 6th October, 2014 and was cross examined. He had been retained by the Defendants to carry out an audit of the dealings with the Plaintiffs. He was not able to get certain documents which were said to have been in possession of the first Plaintiff. However from his review of the documents, he was able to establish that the first Plaintiff owed the first Defendant Uganda shillings 15,070,100/= according to a copy of the report attached to the witness statement. He was cross examined and it was established that he did not sign the audit report. The witness was a partner in charge of staff and business development. The witness agreed that he could not access crucial documents such as cheque-books. He also agreed that the information had gaps. He admitted that the report could only be based on the information they had.

DW2 Okwaro Stephano who is also the fourth Defendant testified and was cross examined on 14th of December 2015. According to his witness statement dated 7th December, 2015 the first Defendant was a joint-venture formed and registered as a special purpose vehicle for the sale in the bidding for the construction of Adjumani District Farm Institute that was advertised by the Ministry of Agriculture, Animal Industry and Fisheries. It was a partnership between Alpha Builders and Constructors Ltd and Global 21st Engineering Ltd. They approached the second Plaintiff in early 2007 and after discussions executed a number of memoranda of understanding. He was also made the court signatory to the Barclays bank account number 0341102006. The arrangement initially worked well until the statute having a problem with Mr Patel. In December 2008 there were serious this agreements between the first Defendant and Mr Patel on the workings of the partnership. He testified that his demands were unrealistic and opposed to the project activities. Materials came at a high-cost laden with interest on top of interest in addition to profit mark-up already factored on the goods supplied by Mr Patel. Two payments made of Uganda shillings 54,000,000/= and Uganda shillings 23,000,000/= were recorded by Mr Patel as facilities advanced to the Defendants. They decided to audit the accounts and come up with a final statement of transaction. The problems between the parties came to a head when the Mr Patel decided to use one of the cheques in its custody which is signed and a fixed the figure of Uganda shillings 900,000,000/= and backdate well aware that there were no funds on the account with the sole motive of harassing the Defendants on criminal grounds of a bounced cheque. The second Defendant was arrested and accused with fraud. He was kept at central police station Kampala for seven days and DW2 was also arrested and detained in the same place. Furthermore, Sam Achoroi and Cosmas Elotu were also arrested from the premises of the commercial court after one of the court sessions by plainclothes officers. Despite release the bond and subsequent withdrawal of the earlier charges, DW2 testified that the continued receiving calls from other officers from Jinja road police station, SCADA economic crimes the suit as well as police legal Department. This were joined by officers from internal security organisations economic Department and the joint antiterrorism task force calling on them to report to the various offices to answer charges of defrauding and issuing a false cheque. Mr Patel also reported the matter to the Minister of security in the office of the president, Minister of state for economic monitoring in the office of the Prime Minister, the inspector general of police and also filed a complaint with the Inspectorate of government. He has also gone to the Ministry of agriculture, animal industry and fisheries as the rightful claimant of the balance of the contract that had not been paid to the Defendant.

DW2 was cross examined by the Plaintiff’s Counsel. He admitted that they signed many cheques in favour of the Plaintiff. He also admitted the signature on the question cheque. The witness testified that they were convinced that they had paid Mr Patel and were waiting for the final account. The witness in the re-examination he testified that they had signed a blank cheque. He testified that they were signing cheques as security waiting for the figure to be affixed as security. This team had many other cheques signed in custody of Mr Patel and all of them are still blank cheques. On the issue of whether Mr Patel signed this cheque, he admitted that Mr Patel did. The cheque book and all signed cheques were in the custody of Mr Patel. It still insisted that they were waiting for reconciliation of accounts to ascertain the exact figure. However the question put by the court as to whether they owed Mr Patel some money, he said that they did not owe him any.

A careful evaluation of evidence demonstrates that the issue before the court is about whether the entire amount of Uganda shillings 900,000,000/= indicated in the questioned cheque is due and owing to the Plaintiff at the time of filing the suit. I have consequently gone through the documents and particularly the last document which is an agreement to provide credit facilities for finance, goods and services between Mr Arvind Patel and Highland agricultural export Ltd on the one part and the Defendant's number one up to number five on the second part. The agreement is dated 19th August, 2008. The Plaintiffs were described as financiers carrying out the business of providing credit facilities including finance, supply of goods in the category of building materials such as cement and general hardware inter alia and other related services such as arranging and obtaining bank and insurance bonds and guarantees. Secondly the Defendants are said to have been desirous of obtaining further financial services and other goods and services from the financiers on credit terms upon terms and conditions in the agreement. Paragraph (d) of the recitals provides as follows:

"The financiers by agreement is dated 8th of February 2008 and 28 February 2007 advanced cash and supplied goods and services to the client and now Uganda shillings 266,423,816/= of which shillings 80,263,800/= is cash principal outstanding at Uganda shillings 186,160,016/= as agreed profits as at 30th of July 2008. The statement is attached hereto and forms part of this agreement."

The Plaintiff adduced in evidence statement of account by 17th August, 2008 exhibit G1. The statement runs from July 2008 up to December 2007 ought to put it in the right order from December 2007 To July 2008. That notwithstanding the above clause acknowledgement is as owing to the Plaintiff by 30th of July 2008 a sum of Uganda shillings 266,423,860/=. This document is admitted by the Defendants. By April 2010 the statement of account which is denied by the Defendant's witnesses shows that the amount owing comprising of the principal amount of Uganda shillings 223,320,780/= together with interest charged at 15% per month was Uganda shillings 745,744,336/= coming to a total of Uganda shillings 969,065,116/=. Most of the amount is the accrued interest charge over 15% per month.

Going back to the agreement dated 19th of August 2008 apart from giving the outstanding amount at the date of signing to be Uganda shillings 266,423,816/=, close two of the agreement indicates that the financiers agreed that they would obtain a credit line to the clients for whatever financial and consultant services and goods the required to the tune not exceeding Uganda shillings 400,000,000/=. Secondly, it is provided in clause 3 (a) that the client (the first Defendant) shall provide security for its services rendered by its financial services, provision of goods on credit and consultancy services etc. The security shall be by way of post dated cheques, promissory notes or certificates of title is completed by a memorandum of deposit to that effect inter alia or other document to show existence of security like mortgage charge/debenture or any other instrument. In addition to any other securities Mr Achilles Muwonge provided the financiers a certificate of title for his property comprised in LRV 324 unit 13, plot 87 Kampala Road, Entebbe disparity in the event of failure to pay the total indebtedness or any part thereof. He irrevocably authorised the financial year to sell the property to recover all that would be due. He was also required to execute a legal mortgage to that effect. The pertinent close is clause 4 of the agreement which provided that the principal sum of Uganda shillings 80,263,800/= shall make a monthly profit of 15% from 1st August, 2008 till the 30th November, 2008. Secondly it is provided that any further advances and supplies made to the clients shall make a profit of 15% per month thereof and total sums shall be paid before 30 November 2008. The amount advanced to the profit accrued would be regardless of whether they exceed the agreed credit line or not.

It is quite clear that the agreement was supposed to come to an end by 30th of November 2008 by which all the amounts ought to have been paid. The account on which the Plaintiff basis its claim grounds up to 16th of January, 2010.

An attempt was made at the reconciliation of accounts between the parties and there was no corporation between the various auditors despite the court order for the parties to reconcile the accounts relating to how much was supplied etc and what was owed if any. The Defendants produced an auditor's report by FELbright & Company Certified Public Accountants dated 1st August, 2013 on the subject of the transaction audit report. The auditors correctly stated that the amount in question was Uganda shillings 969,065,116/= which included interest computed by the Plaintiff for loss of profit on tied up capital. They noted that the first Defendant denied the extent of liability claimed by the first Plaintiff but acknowledged the existence of a working relationship between the two.

Before making reference to the audit report, the record indicates that the court agreed with the parties and directed that both parties would appoint an auditor and the two auditors would appoint a third auditor as the chairperson. The audit report was presumably ordered under section 27 of the Judicature Act. However because there was no corporation, it amounted to a reference to audit under section 26 of the Judicature Act which is not binding on the parties.

I have accordingly considered the report of the auditor appointed by the auditors of the parties. The auditors finding whether the total cash advances to the first Defendant was Uganda shillings 133,890,000/= while the total interest in cash advances was Uganda shillings 30,254,450/= together with the banking expenses this came to Uganda shillings 164,444,450/=. Total payments by the first Defendant between the period 2008 – 2010 amounts to Uganda shillings 68,540,000/= leaving a balance of Uganda shillings 95,904,450/=. The bulk of the transactions occurred in 2007 and 2008 when the construction work started. The findings indicated that the total value in relation to cash payments or advances to the first Defendant as well as materials supplied amounted to a total of Uganda shillings 662,453,900/=. On the other hand total payments made to the first Plaintiff by the first Defendant amounted to Uganda shillings 677,524,000/= leaving a deficit of Uganda shillings 15,070,100/= that was owing to the first Defendant. The auditors however did not consider the competition of interest or the effect of interest on the liability of either party and concentrated on the actual amount given and received by the parties. So they concluded that in the circumstances the Plaintiff owed the first Defendant Uganda shillings 15,070,100/=.

The auditors noted in the conclusions that the transactions, the subject matter were executed on a gentleman's understanding dated or non-which ought to trust. None of the parties funded important to strictly observe the record keeping rules in such transactions. They also noted that there was a conflict of interest because Mr Patel of the first Plaintiff was a signatory to the account of the first Defendant. By the time of the audit and making of the report the cheque books for the account of the first Defendant was in custody of the first Plaintiff (was director is the second Plaintiff). They also observed that the process of materials quoted appear to be loaded with some agreed profit on tied up capital already. For example to the supply of 1000 bags of cement on 23rd March, 2007 was that the total prize of one 39,500,000/= implying that it bug supplied at Uganda shillings 39,500/= which was above the average price then and they left the matter before the court to decide. Lastly they did not delve into the competition of the interest as it could not competent to comment on its genuine monies due to the visible conflict of interest in the whole matter and they left it to the court to give the conclusive formula for the computation.

In the submissions of Counsel, the pertinent issue of interest which constitutes a substantial portion of the Plaintiffs claim was not considered. Was the interest legal or illegal?

Notwithstanding the drawing of a cheque in favour of the second Plaintiff for the sum of Uganda shillings 900,000,000/=, I have deemed it prudent and just to consider the underlying contract between the parties. After all DW2 proved that Mr Arvind Patel who is the beneficiary to the cheque is also a signatory and indeed signed the cheque in question. Secondly the Defendant has raised a reasonable doubt as to whether they filled the cheques as to the amounts to be paid. Cheques were issued as security and kept in the custody of Mr Arvind Patel. The signature of Mr Arvind Patel is prominently displayed as having authorised the cheque of the Defendant to himself. The testimony of DW2 is that the issue blank cheques. These cheques together with the cheque books were in the custody of Mr Arvind Patel. The most crucial point to be noted is that Mr Arvind Patel is a signatory to the account and endorsed the cheque as the person issuing it together with another director. My resolution of the first Defendant Company dated 16th July, 2007 it was written that the account would be operated jointly by Mr Stefan Okwalo, Mr. Richard Senabulya and Mr Arvind Patel. The cheque leaf in question shows that it was endorsed by the three signatories. The cheque is dated 31st January, 2010 and was deposited with the Teller on 25th June, 2010. The cheque is the cheque of the first Defendant. However as one of the persons operating the account, Mr Arvind Patel jointly responsible for operating the account and therefore, if there was no money on the account, he cannot sue anybody unless he can show that he never knew that there was no money on the account by the time he deposed that the cheque or even signed it to himself. In the premises the submissions of the Plaintiff’s Counsel relating to the cause of action and that the Bills of Exchange Act and the authorities cited there under are clearly distinguishable. None of the authorities dealt with a situation where a signatory to the account, issued a cheque to himself which bounced. In the premises issue number one as to whether the first Defendant issued cheque number 20118 to the Plaintiffs for payment of Uganda shillings 900,000,000/= has no value in resolving the Plaintiffs suit. Such a cheque was issued and the second Plaintiff was a signatory to the cheque. Issue number four is also abandoned because the cheque was issued in the names of the second Plaintiff and it was not clear as to the distinction between him and his company which is the first Plaintiff. Issues number one and four are disallowed.

Issue number two is **whether the Plaintiff supplied the goods to the first to the fifth Defendant as alleged in the plaint?**

I have carefully considered the evidence and it is explicitly clear that the contract relied upon dated 19th August, 2008 is between all the parties as entitled in the plaint. It is between the Plaintiffs and the first up to the fifth Defendant. The supply of materials was admitted. As I have concluded above on issue number one, the major liability or substantial portion of the claim of the Plaintiff relates to an interest rate of 15% per month on materials and cash advanced. It does not majorly relate to materials supplied to the first Defendant. The above conclusion resolves the issue as raised. It is a question of fact as to how much of the amount claimed in the plaint relates to interest. It is my conclusion that the amount claim arises out of the agreement in which it was agreed that 15 % per month would be paid on outstanding monies. Even the auditors left the question for determination by the court. The opinion of the auditors is persuasive because they found that as far as advances of money were concerned, as a matter of fact all the monies advanced had been paid back and all monies for the materials had been paid back. In fact they concluded that what owed related to the rate of interest which they did not factor into their calculations. The Plaintiff merely relied on the cheque leaf to cover up the issue. Even though materials were supplied, they were paid for in theory. If interest is factored in, it cannot be concluded that the money paid was merely for materials and not for part of the interest. With those few remarks, issue number two can only be finally resolved if the question of the rate of interest is also determined to get the overall liability, if any, of the Defendants.

**Remedies:**

No issue was raised by the parties specifically to address the court on the question of remedies. It was just implied because the Plaintiff relied on the cheque leaf and sought for judgment on that basis in the written submissions. The submission of the Plaintiff's Counsel on issue one is that the court should find that the Defendants duly issued the cheque in issue towards payment of Uganda shillings 900,000,000/=. On issue number two he submitted that the Defendant admitted having received the goods from the Plaintiff and the court should find so. Finally on the resolution of issue number 4 the Plaintiff's Counsel submitted that the Plaintiffs proved that the case against the Defendants and prayed that judgment is entered in favour of the Plaintiffs as prayed. In paragraph 4 of the plaint the Plaintiffs claim against the Defendants jointly and severally is for recovery of Uganda shillings 969,065,116/=. In the prayers the Plaintiff seeks the same amount in special damages together with interest at 24% per annum from the 10th May, 2010 until full payment as well as general damages for breach of contract and costs of the suit.

The Defendant on the other hand sought for dismissal of the suit. He contended that this cheque was merely security and payment had been effected to the Plaintiff. On issue number two, the Defendants Counsel submitted that there was no evidence of the supply. I do not agree because the relationship between the parties is contractual and admitted. The question is what the remedy should be in the circumstances where the main contention as to whether there was any money owed as not been clearly resolved by the parties. The Defendant’s Counsel relied on the case of **John Nagenda vs. Editor Monitor Publication is Supreme Court Civil Appeal Number 5 of 1994** for the submission that no court can give judgment contrary to evidence that disapproves the claim. On the issue of remedies he submitted that the Plaintiff having squarely failed on all issues and therefore is not entitled to any reliefs. He prayed that the suit is dismissed with costs.

The only question left for consideration is **whether clause 4 (d) of the contract dated 19th August, 2008 is harsh and unconscionable.**

First of all issues arise from pleadings under Order 15 rule 1 of the Civil Procedure Rules. Secondly, the court has jurisdiction to amend issues at any time before judgment under Order 15 rule 5 and may strike out any issues not properly framed Order 15 rule 5 provides as follows:

“5. Power to amend and strike out issues.

(1) The court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

(2) The court may also at any time before passing a decree strike out any issues that appear to it to be wrongly framed or introduced.”

Thirdly, Order 21 rules 4 and 5 deal with the contents of a judgment and determination of the issues.

“4. Contents of judgment.

Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision on the case and the reasons for the decision.

5. Court to state its decision on each issue.

In suits in which issues have been framed, the court shall state its finding or decision, with the reasons for the finding or decision, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit.”

The finding of the court on issues 2 and 3 were not sufficient to determine the suit and therefore the question of whether interest charged under clause 4 of the contract is harsh and unconscionable will be considered before concluding the suit. Clause 4 of the contract reads as follows:

“4. The clients shall ensure prompt payment for the goods and services rendered as agreed at the time of obtaining the same and should there be any delay on the payment of the same.

i). The principal sum of shillings 80,263,800/= shall make a monthly profit of 15% from 1st August 2008 up to 30th November 2008.

ii). Any further advances and supplies made to the clients shall make a profit of 15% per month thereof and the total sums shall be paid before 30th November 2008. The amount advanced with profit accrued would be regardless of whether they exceed the agreed credit line or not.

iii). For the avoidance of doubt the financiers may also opt to cancel the credit line upon failure to pay promptly by the clients and on such cancellation all monies due and owing under the credit line shall be immediately payable on demand”.

The parties envisaged payment by 30th November, 2008. Delays attracted a charge of 15% per month which is described as a profit. It is my firm view that what the parties signed was not profit since profit is money made over and above the costs of the investment. It was an agreed amount to be paid on delay. The question therefore is whether the charge of 15% per month is harsh and unconscionable. In the case of **Lombard North Central plc vs. Butterworth [1987] 1 All ER 267** Mustill LJ considered principles for award of remedies where the parties have contracted specified damages for breach. The general principle is that where a breach goes to the root of the contract, both sides are relieved of obligations which remain unperformed. Generally the injured party is entitled to damages which occurred before the breach but they have to be a genuine pre-estimate of the loss and not a penalty for breach of a condition. He said at page 272:

“(7) A term of the contract prescribing what damages are to be recoverable when a contract is terminated for a breach of condition is open to being struck down as a penalty, if it is not a genuine covenanted pre-estimate of the damage, in the same way as a clause which prescribes the measure for any other type of breach. No doubt the position is the same where the clause is ranked as a condition by virtue of an express provision in the contract.”

He further elaborated on the principle at page 273 and held as follows:

“The seventh is uncontroversial, and I would add only the rider that when deciding on the penal nature of a clause which prescribes a measure of recovery for damages resulting from a termination founded on a breach of condition, the comparison should be with the common law measure, namely with the loss to the promisee resulting from the loss of his bargain. If the contract permits him to treat the contract as repudiated, the fact that the breach is comparatively minor should in my view play no part in the equation.”

In this case the interest charged for delay or the profit charged is 15% per month and amount to over 150% per annum. DW2 testified that this was the basis of the dispute between the parties. The true measure of damage ought to be the damages suffered as a consequence of breach and not an arbitrary figure. The principle is an equitable principle where the court may grant relief from a harsh and unconscionable term. In fact in the case of **Lombard North Central plc v Butterworth** (supra) Nicholls LJ referred to the equitable doctrine at page 275 and quoting from Lord Denning **Bridge v Campbell Discount Co Ltd** **[1962] 1 All ER 385 at 401** that where equity granted relief against a penalty it always required the recipient of its favours, as a condition of relief, to pay the damage which the other party had really sustained. In **Bridge v Campbell Discount Co Ltd [1962] 1 All ER 385** House of Lords Lord Denning held at page 401 that:

“When equity granted relief against a penalty, it always required the recipient of its favours, as a condition of relief, to pay the damage which the other party had really sustained. A quantum damnificatus was issued to determine it. On payment of the damage, equity granted an injunction to restrain the other party from proceeding to enforce the penalty at law.”

In Uganda the statutory law permits the court not to enforce interest that is harsh and unconscionable through legal process under section 26 of the Civil Procedure Act. Under Civil Procedure Act, section 26 (1) contractual interest is enforceable unless shown to the satisfaction of Court that the rate of interest is “harsh and unconscionable and ought not to be enforced by legal process”. According to Halsbury's laws of England, the rate of interest agreed to will be the measure of damages no matter what inconvenience the Plaintiff has suffered from the failure to pay on the day payment was due. In **Halsbury's laws of England fourth edition reissue volume 12 (1) paragraph 1065 at page 486:** it is written that:

"The parties to a contract may agree at the time of contracting that, in the event of a breach, the party in default shall pay a stipulated sum of money to the other. If this sum is a genuine pre-estimate of the loss which is likely to flow from the breach, then it represents the agreed damages, called liquidated damages, and it is recoverable without the necessity of proving the actual loss suffered."

The conclusion is that the rate of damage or profit or interest of 15% per month is not enforceable through legal process.

In the premises the Plaintiff was only entitled to interest on the principal amount claimed which had not been paid within the time agreed at a rate of 21% per annum from the due date till payment in full. The Plaintiff came to court after subjecting the Defendants to criminal proceedings for issuing a cheque to which he is a signatory. In the premises, he did not come with clean hands. That notwithstanding the Defendants are relieved of the charge of 15% per month under the principle in **Bridge v Campbell Discount Co Ltd [1962] 1 All ER 385** House of Lords per Lord Denning at page 401. The interest payable is accordingly substituted to 21% per annum from the date of breach in each transaction and which shall be assessed by Messrs FELbright Certified Public Accountants. The amount established shall be lodged in court and be enforceable as a decree of the court.

If there is any due money to the Plaintiff, it has been paid. The Defendants have no counterclaim.

Each party shall bear its own costs.

Judgment delivered in open court on 18th August, 2017

**Christopher Madrama Izama**

**Judge**

Judgment delivered in the presence of:

Charles Nsubuga holding brief for Kagoro Friday Robert for the Plaintiff

Abbas Bukenya for the Defendants

Parties are absent

Charles Okuni: Court Clerk

Julian T. Nabaasa: Research Officer Legal

**Christopher Madrama Izama**

**Judge**

**18th August 2017**