

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO. 455 OF 2013

5 **1. UGANDA ACADEMIC ENHANCEMENT CO. LTD**
2. NANCY TWASHABA RWABURINDORE PLAINTIFFS/DEFENDANTS

VS

MICRO FINANCE SUPPORT CENTRE
LIMITED.....DEFENDANT/PLAINTIFF

10 **BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN**

JUDGMENT

The Plaintiffs filed this suit against the Defendants seeking an injunction to restrain the Defendants, its servants or agents from selling the Plaintiff's properties, general damages and costs of the suit.

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The Plaintiffs entered into a loan agreement with the Defendants where they were advanced Shs. 280,000,000/-. The loan was secured by mortgaging of the Plaintiffs' properties comprised in Busiro Block 338, Plot 210, Kiwatule, Mugongo Zone (A) Kyengera. LRV 4154, Folio 20, Plot 196, Kyadondo, Block 186 Gayaza, and LRV 932, Folio 3, Plot 156, 20 Kyadondo Block 262, Makindye, Kampala.

The loan was granted for a period of three years (36 months).

25 It is the Plaintiffs contention that monthly installments were paid as agreed. But that contrary to the parties agreed position; the Defendant without any written or verbal communication to

the Plaintiffs recalled the entire loan facility and further instructed bailiffs who have since threatened to sale the above described mortgaged properties.

5 That the recalling of the loan without giving the Plaintiff a chance to recover moneys from its projects was high handed, premature and a breach of contract on the part of the Defendant.

Further that, the Plaintiffs' interest were not calculated as per the terms and conditions of the facility offer in relation to the existing loan. That this resulted into inflation of the entire loan hence the need for revision downwards.

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The particulars of alleged bad faith were set out in paragraph 6 of the plaint (a) – (c).

15 The Plaintiffs prayed for judgment against the Defendants seeking the injunction already referred to herein, a declaration that the Defendant's actions were premature and high handed, an order of specific performance compelling the Defendant to stick to the terms of the loan agreement, costs of the suit and any other relief the court deems fit.

20 The Defendant filed a defence denying the Plaintiffs claims contending among other things that the Plaintiffs despite several demands failed and or refused or neglected to pay the amounts due under the loan agreement.

And that it was a term of the said agreement that in event of default in payment of any installment, the entire loan balance would become due and payable.

25 And that according to the mortgage deed, in event of default, the Defendant could recall the loan, realize the security pledged and exercise its statutory power of sell.

30 The Plaintiffs was given notice of default reminding them of their obligations to pay the outstanding amounts immediately – Annexure "C" and "D" respectively. Despite the notice, the payment was not forthcoming and hence the advertisement of the properties for sale.

The Defendant also accused the Plaintiffs of fraud contending that they knowingly caused the survey and valuation of another property not being part of the mortgaged property. It was then prayed that the Plaintiff's suit be dismissed adding that the Plaintiffs had no cause of
5 action against the Defendants and the suit was therefore frivolous and vexatious.

The Defendants also filed a counter claim against the Plaintiffs now counter Defendants, seeking a declaration that the entire loan balance was due and payable. They also sought special damages of Shs. 274,991,856.72/- being the outstanding balance on the loan of
10 15.08.13, together with interest at the rate of 13% per annum, general damages for breach of contract and costs of the counter claim.

The Plaintiffs/Counter Defendants did not file a defence to the counter claim.

15 The Plaintiffs/Counter Defendants suit had been filed on 14.08.13 but no efforts were made to fix the same for hearing. Court was informed that the Plaintiffs had on 23.08.13 got an interim order of injunction in a similar matter filed in the Land Division by a Third Party.

Counsel for the Defendants/Counter Plaintiffs applied for dismissal of the Plaintiffs' suit for
20 want of prosecution and also prayed that the counter claim be set down for hearing exparte under 0.9 r 11 (2) C.P.R.

The suit was dismissed for lack of prosecution and the counter claim was fixed for hearing on
25 25.08.15.

On that date a representative of Uganda Academic Enhancement Co. Ltd appeared in court and sought to be allowed time within which to settle the matter. The parties were accordingly given two weeks within which to meet and report back to court on 17.09.15.

On 17.09.15, Counsel for the Plaintiff/Counter Defendants informed court that a proposal for settlement had been made and forwarded to the Defendant/Counter Plaintiff.

5 On agreement of both Counsel, the matter was adjourned to 22.10.15, to enable parties conclude the settlement.

On 22.10.15, court was informed that the matter was 99% settled but that the parties needed a few more days to conclude the talks.

Court adjourned to 02.11.15.

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Both Counsel were in court on 02.11.15, when court was then informed that, that the parties were still engaged in talks with a view of holistically settling the matter if the suit/counter claim was withdrawn.

15 Counsel for Defendant/Counter Plaintiff agreed to a last date for mention. Suit was then adjourned to 23.11.15.

20 The matter did not surface again until 25.02.16. Counsel for the Plaintiffs/Counter Defendants was absent. Counsel for the Defendants/Counter Plaintiffs informed court that settlement had failed and applied for a date for hearing the counter claim.

Hearing of the counterclaim was fixed for 14.03.16 and court directed service on Counsel for Plaintiffs/Counter Defendants.

25 On 14.03.16, Counsel for Plaintiffs/Counter Defendants was absent. Since there was an affidavit of service on record and no reasons had been advanced for absence of Counsel of the Plaintiffs/Counter Defendants- hearing proceeded ex parte.

The witness of the Defendant/Counter Plaintiff Mariam Ndibuuza, Manager Legal Services identified her written statement dated 21.08.15 and confirmed it was her evidence before court.

- 5 The statement was admitted as the evidence of the witness and the attachments A-G were exhibited as Exhibits P₁ – P₇ respectively.

The evidence is in essence a reproduction of the defence to the main suit and the claim to the counter claim.

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The witness sought the remedies earlier referred to in this judgment plus interest on all sums sought together with costs of the suit.

Counsel for the Counter Plaintiff pledged to file submissions by 18.04.16.

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Surprisingly on that date, both Counsel appeared in court. Counsel for the Plaintiff/Counter Defendant informed court that the matter had been settled and so far Shs. 80,000,000/- had been paid to the Defendant/Counter Plaintiff. Further that a total of 31 post dated cheques had been issued and given to the Defendant/Counter Plaintiff and that therefore any continued litigation was therefore in bad faith.

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Court directed all parties and Counsel to appear in court on 25.04.16 at 2pm.

On that date, court was informed by Counsel for the Plaintiff/Counter Defendant that the matter had been settled although not in writing. That by then eight (8) installments of Shs. 10,000,000/- each had been made. And that proceeding with the counter claim would be misleading as to the actual amounts. Further that 31 post dated cheques had been given to the Defendant/Counter Plaintiff. The cheques were of Shs. 110,000,000/- each.

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On the other hand, Counsel for the Defendant/Counter Plaintiff insisted that the matter had not yet been settled. He pointed out that the loan has three mortgages. The Plaintiff/Counter Defendants wrote to the Defendant/Counter Plaintiff asking for rescheduling of the loan in 2015.

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The Defendant/Counter Plaintiff agreed to reschedule the loan on condition that all suits emanating from the loan facility be withdrawn. But that up till then, no rescheduling had been done and the agreement had never been signed by any of the parties.

10 That the letter referred to by the Plaintiff/Counter Defendant and the cheques mentioned were in the names of Tiptone Hotel, which is not a party to the suit.

Further that, some of the cheques bounced. At the time of the request for rescheduling the loan outstanding amount was Shs. 310,000,000/-. By the date of these proceedings, the
15 amount outstanding was Shs. 274,000,000/-.

Also that, all the properties mortgaged by the Plaintiff/Counter Defendant have disputes and there is therefore no security for the loan. The reason that the Defendant/Counter Plaintiff wanted the Plaintiff/Counter Defendant to sign the loan rescheduling, Counsel stated, was for
20 them to provide other security or for the Defendant/Counter Plaintiff to retain the securities already given and the Plaintiff/Counter Defendant to withdraw the suits. But that was not done and no rescheduling had been filed.

By 25.04.16, court was informed the loan balance due and owing from the Plaintiff/Counter
25 Defendant was Shs. 264,090,620/-. The Defendant/Counter Plaintiff had stopped calculating interest on the loan, when the suit was filed.

It was emphasized that, the suit was filed in 2013 by the Plaintiff/Counter Defendant. Several appearances had been made as already indicated in this judgment. Hearing of the

counterclaim was fixed for 23.06.15, since the main suit had been dismissed for want of prosecution.

5 No defence was ever filed on the counter claim. It was emphasized that the Plaintiff/Counter Defendant had no audience at this stage and it was prayed that Counsel's submissions be dismissed, and the Defendant/Counter Plaintiff allowed to file submissions out of time as earlier directed.

10 At this point, Counsel for the Plaintiff/Counter Defendant submitted that the counter claim was not disputed as long as the Shs. 80,000,000/- already paid by the Plaintiff/Counter Defendant was offset.

While Counsel for the Defendant/Counter Plaintiff agreed to that position, he prayed court to decide on the damages and other costs.

15 Judgment was accordingly entered on the counter claim on admission by the Plaintiff/Counter Defendant with orders that the amount of money already paid by the Plaintiff/Counter Defendant be offset.

20 It was further directed that submissions to be filed in respect of the general damages, interest and costs of the suit.

Interest:

25 The Defendant/Counter Plaintiff claimed interest on the admitted sum at the contractual rate of 13% per annum from the date of filing the suit until payment in full.

Under S.26 (2) of the CPA - "*Court has power to award interest on the decretal sum*". See also the case of **Charles Lwanga vs. Centenary Rural Development Bank Ltd [1999] EA**
30 **175 CACA 30/1999 Okello JA**

From the evidence available in the present case, the parties agreed that *“interest would be charged at the prevailing bank rate of 13% per annum. And that the interest would accrue on the outstanding loan balance on a monthly basis and was payable in accordance with schedule “A” attached to the agreement”*. – See Annexure A- Loan Agreement.

The mortgaged deed Annexure “B” also provided that *“interest was to be paid on that agreed rate as long as the principal sum or any part thereof remained unpaid”*.

It was also agreed that interest was to accrue also during the grace period.

Since the agreed interest rate was 13% per annum and was to be paid on the amount of the loan that remains unpaid until payment in full, court finds that the Counter Defendants are liable to pay interest at that rate.

Interest at the rate of 13% per annum to be paid by the Counter Defendant on the balance of the counter claim due and owing after offsetting the Shs/ 80,000,000/- already paid by the Plaintiffs/Counter Defendants. The interest is to be paid on the balance from the 15.08.13 till payment in full.

General Damages:

The Defendant/Counter Plaintiff sought general damages for breach of the loan and mortgage agreement.

The Counter Defendants/Plaintiffs admitted defaulting in the repayment of the loan and that they owe the Counter Plaintiff/Defendant the amount due and owing as of 15.08.13 less the Shs. 80,000,000/- admitted as already paid.

It was accordingly apparent that the Counter Defendants/Plaintiffs breached the contract with the Defendant/Counter Plaintiff and that they are liable to pay general damages for breach of contract.

5 Under S.61 (1) of the Contracts Act, ***“where there is a breach of contract, the party who suffers the breach is entitled to receive from the party who breaches the contract compensation for any loss or damage caused.”***

10 Court also takes into account that ***“general damages are given for losses that court will presume are the natural and probable consequences of a wrong complained of”***. **Hadley vs. Bavendale (1854) LR 9 ExCh341:156 ER 145.**

15 And that in regard to the proof of general damages for breach of contract, ***“damages are what the court may award when it cannot point out any measure by which damages are to be assessed except the opinion and judgment of a reasonable man”***.

20 It was the undisputed evidence of the Counter Plaintiff/Defendant in the present case that they have been deprived of the use of the amounts claimed from the Counter Defendant/Plaintiff yet they are engaged in business of lending money. As a result, they Counter Plaintiff/Defendant has been made to suffer loss and inconvenience.

The Counter Plaintiff/Defendant is therefore entitled ***“so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed”***. – Refer to the case of **Henry Dhushime vs. S.M Tours & Travel Ltd HCCS 23/97** Ntabgoba
25 J (as he then was).

Counsel for the Counter Plaintiff/Defendant proposed that the figure of Shs. 200,000,000/- should be awarded as general damages. However, this court finds that, this figure is on the high side considering that the Counter Plaintiff/Defendant has already been awarded interest

on the accrued sum at the agreed rate of 13% from the date of filing the suit until payment in full.

5 This is because under S.61 (4) of the Contracts Act, court is enjoined *“in estimating the loss or damage arising from breach of contract, to take into account the means of remedying the inconvenience caused by the non-performance of the contract, which exists”*.

By granting interest at the agreed rate as already indicated herein, part of the inconvenience caused to the Counter Plaintiff/Defendant is already remedied.

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The sum of Shs. 50,000,000/- will therefore suffice as general damages for the continued loss and inconvenience.

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Interest on the General Damages:

20 Counsel for the Defendant/Counter Plaintiff prayed for interest on the general damages at the rate of 23% per annum. He relied on S.26 (2) of the CPA- which grants the court discretionary powers to award interest – See also the case of **Sietico Co. vs. Noble Builders Ltd SCCA 31/95**

25 In determining this issue, court takes into account the principle that *“an award of interest on general damages is only compensatory in value, while an award arising out of a commercial transaction normally attracts a higher interest”*. – See **Star Super Market (U) Ltd vs. Attorney General CACA 34/2000**.

This court finds that the interest rate of 23% on general damages applied for by Counsel for the Defendant/Counter Plaintiff is very high. More so as interest has already been granted on

the outstanding sum. The interest on the general damages should therefore be reasonable. It is accordingly granted at the court rate of 6% from the date of judgment until payment in full.

5 **Costs:**

The Defendant /Counter Plaintiff prayed for costs of the counter claim.

Under S.27 (2) CPA- costs follow the event unless for good cause court orders otherwise.

10 Refer also to **Grofin East African Fund LLS vs. J K Investec (U) Ltd, James Katarikawe and Harriet Katarikawe HCCS 374/2011.**

Costs are therefore allowed to the Defendant/Counter Plaintiff both for the main suit and the counter claim.

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The main suit was dismissed with costs to the Plaintiff/Counter Defendant.

Judgment on the counter claim is entered for the Counter Plaintiff/Defendant against the Plaintiff/Counter Defendant in the following term:-

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I. The Counter Defendant to pay the Counter Plaintiff the sums of Shs. 264,090,620/- that was due and owing on the counter claim as of 25.04.16 less the Shs. 80,000,000/- that was admitted to have already been paid.

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II. Interest of the sum at the rate of 13% per annum from the date of filing the suit until payment in full.

III. The Counter Defendant to pay the Counter Plaintiff Shs. 50,000,000/- as general damages.

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IV. Interest on the general damages at the rate of 6% per annum from the date of judgment until payment in full.

V. Costs of the counter claim and of the main suit are granted to the Counter Plaintiff.

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Flavia Senoga Anglin

10 **JUDGE**

12.06.17