THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[*Coram: Egonda-Ntende, Barishaki Cheborion & Tuhaise, JJA*)

Civil Appeal No. 207 of 2016

(*Arising from High Court Civil Suit No. 383 of 2012*)

BETWEEN

Attorney General==========Appellant

AND

Dr. Maj.(Rtd) Anthony Jallon Okullo==========Respondent

(*On Appeal from a judgment of the High Court, (Musota, J.,) delivered on 9th September 2012.*)

Judgment of Fredrick Egonda-Ntende, JA

Introduction

[1] The respondent filed a claim in contract in the High Court. He was successful. He was awarded the sum of US$ 3,066,400.44 as compound interest at the rate of 15% per annum on the sum of US$93,150.00, which was the principal sum due on the contract; Shs.500,000,000.00 as general damages for breach of contract; interest at 6% per annum on the awarded interest and general damages from the date of judgment until payment in full; and costs of the suit.

[2] The facts of this case are fairly simple and straight forward. In 1988 the Ministry of Defence and the Army contracted the respondent, a medical practitioner, and retired army officer, to provide medical services to a high value officer of the army. Services were rendered, notwithstanding which the officer died. A bill of US$93,150.00 was rendered to the Ministry of Defence / Army in 1989. The bill remained unpaid from 1989 until 2011 and 2012 when it was paid in 2 instalments. Prior to its payment the Permanent Secretary of the Ministry of Defence, in 1989,

agreed that the bill will carry compound interest of 24% per annum. The respondent brought an action in the High Court to recover the said interest in the sum of US$ 19,362,821, general damages, interest on interest and on general damages awarded and costs of the action. He was successful in part as noted above.

[3] The appellant was dissatisfied with that judgment and now appeals to this court on 3 grounds.

[4] I shall set forth the grounds of appeal below.

> '1. The learned trial judge erred in law and in fact when he awarded a sum of Ug. Shs. 500,000,000.00 as general damages which was inordinately high in the circumstances to constitute an entirely erroneous estimate of damage to the respondent.
>
> 2. The learned trial judge erred in law and in fact when he exercised his discretion injudiciously by reducing this interest rate from 24% to 15% which was still manifestly harsh and unconscionable in the circumstances.
>
> 3. The learned trial judge erred in law and in fact when he awarded a certificate of two counsel when he was *functus officio*.'

[5] The respondent opposed the appeal and cross appealed on the following grounds:

> '1. That the learned trial judge erred in law and fact in awarding the sum of Ushs.500,000,000/= as general damages which is much lower than the sum prayed for by the respondent.
>
> 2. That the learned trial judge erred in law in failing to awarded the 8% interest pleaded on the general damages awarded.
>
> 3. That the learned trial judge erred in law and fact in reducing the agreed compound interest of 24% to 15%.'

[6] The respondent sought the following relief on appeal:

> '1. That court awards the respondent the sum of 3,800,000,000/= (shillings three billion, eight hundred million only) as general damages as pleaded and admitted;

2. That court awards 8% interest on the general damages awarded; and

3. That the 15% compound interest awarded by the trial court be adjusted back to 24% as agreed by the parties.'

Submissions of Counsel

[7] Ms Imelda Adong, State Attorney appeared for the appellant while Mr Ben Wacha and Mr Davis Ndyomugabe appeared for the respondent. Ms Adong told court she was not prepared to present the appellant's case and requested to be allowed to file written submissions. Mr Wacha for the respondent did not have any objection to proceeding by way of written submissions. The appellant was given 7 days within which to file their written submissions and the respondent was likewise given 7 days after receipt of the appellant's submissions to file their written submissions. As I write this judgment only the respondent had filed their written submissions on the 20th February 2019. The appellant had not filed their submissions. In the result I shall proceed on what is available.

[8] The respondent's counsel raised a preliminary objection to ground 2 of the appeal. They submitted that ground 2 raised a new issue that was neither pleaded nor canvassed at the trial and that it ought to be rejected. It should not therefore be raised unless with permission of the appellate court. They relied on the authority of Tifu Lukwago v Samwiri Mudde Kiiza [1998] UGSC 9 in support of their objection. In the alternative, even if this court was to consider this ground it was for the appellant to prove that the interest rate granted was unconscionable. The appellant had not shown that the interest rate of 24% was unconscionable.

[9] The respondent's counsel further submitted that this court should take judicial notice of the commercial bank interest rates for 1991 and 1992, the years closest to 1989. They referred this court to SI No 11 of 1991 and 12 of 1992. 24% was not unconscionable. It was the agreed rate between the parties.

[10] In relation to ground 1 of the appeal and the cross appeal the respondent's counsel submitted that the learned trial judge did not use his discretion correctly when he awarded the respondent general damages of Shs.500 million rather Shs.3.8 billion. The general damages of shs.3.8 billion had been pleaded in paragraph 6 of the plaint and were proved in evidence. The refusal by the learned trial judge to award the sum claimed was not justified. They cited the decision of the Supreme Court in Habre International Co Ltd v Ebrahim Alarakia Kassam and

Others, SCCA No. 4 of 1999 (unreported) in support of their submission.

[11] With regard to ground 3 the respondent's counsel submitted that the record of the proceedings before the trial court show that the respondent was represented by two counsel and therefore a certificate for two counsel was proper in the circumstances. The certificate for two counsel was provided after judgment, as a separate order, and that is as it should be. The order for a certificate of two counsel could not therefore be *functus officio*.

[12] Turning to ground 2 of the cross appeal the respondent's counsel submitted that the respondent had claimed 8% interest on the award of general damages which the learned trial judge ought to have awarded. It is close to the 6% that is referred to in section 26 of the Civil Procedure Act. The award of interest is discretionary and should accrue from the date of judgment. It is generally known that Government delays payment of awards and therefore an award of interest would take care of the inflationary pressure in case of delayed payment. Counsel referred us to the authorities of Fernandes v The People [1972] EA 62 and Begumisa Financial Services Ltd v General Moldings Ltd and anor [2007] (1) EA 28, in support of this ground.

[13] Turning to ground 3 of the cross appeal the respondent's counsel submitted that the learned trial judge exercised the wrong principles in reducing the interest rate from 24% as agreed between the parties and claimed in the plaint to 15%. As this was agreed interest the court had no discretion in the matter but to enforce it unless it had been shown that it was illegal, unconscionable or harsh under section 26 (1) of the Civil Procedure Act. They referred to the decision of Shan v Guilders International Bank Ltd [2002] (1) EA 269 and Captain Harry Gandy v Caspar Air Charters Ltd [1956] 23 EACA 139 in support of this submission.

[14] It was further contended that the learned trial judge applied the wrong principles in reducing the interest rate on the principal amount. Applying the principles enunciated in Attorney General v Goodman Agencies Ltd [2015] UGSC 2 with regard to the court adopting some level of rectitude with regard to public funds. It was submitted that this would amount to discrimination between Government and private entities as Government would be treated differently and with some preference. In any case the facts in Attorney General v Goodman Agencies Ltd (supra) were distinguishable from the facts in the present case. Government should

not be protected when it is in fact denying its own citizens what they are entitled to.

[15] It was further contended that the learned trial judge's decision of re-adjusting the interest amounted to a re writing of the contract for the parties contrary to the court's correct role which was to enforce the contract made by the parties. Reference was made to 2 decisions from Kenya on the point. Jinaji v Jinaji [1968] EA 547 and National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd and Anor, Civil Appeal No. 95 of 1999 (unreported).

[16] The learned trial judge was attacked for suggesting that 'it was not clearly explained how this figure rose up to US$19,362,821 even at compound interest of 24% per annum.' And for introducing his own formulae for calculating interest at 15% per annum. It was submitted that the evidence of PW3 and documents E1and E2 formed updated claims which provided a clear basis for the sum claimed.

[17] Finally it was submitted that the actions of the respondent saved the country another war and therefore substantial public resources for which he should be commended.

Analysis

[18] As a first appellate court, it is our duty to re-evaluate the evidence as a whole and arrive at our own conclusions of law and fact bearing in mind that the trial court had an opportunity to observe the demeanour of the witnesses and this court has not. See Banco Arabe Espanol v Bank of Uganda [1999] UGSC 1; Rwakashaija Azarious and others v Uganda Revenue Authority [2010] UGSC 8; and Selle & Another v Associated Motor Boat Company Ltd & Others [1968] EA 123. I now proceed to do so.

[19] I must begin by considering the preliminary objection raised by the respondent. The respondent contends that ground 2 of the appeal is wrongly brought as it raises matters that were never pleaded or canvassed at the trial. In the alternative that it is for the appellant to show that the interest rate is unconscionable.

[20] I am not persuaded that this objection has merit. The thrust of ground 2 is that the learned trial judge erred in imposing an interest rate of 15% rather than a lower one. The thrust is not raising new matters in that sense but complaining against the decision of the learned trial judge.

The appellant is entitled to do that and whether or not he succeeds will depend on the merits of his assertions. Secondly if it is the duty of the appellant to demonstrate that the interest awarded is unconscionable this matter can be considered when the merits of the ground 2 are being considered rather than not to be considered at all.

[21] Thirdly the respondent / cross appellant has himself assailed this decision of the learned trial judge in ground 3 in which he seeks to vary the order of interest from 15% to 24% for reasons he has advanced. If the respondent can attack the decision of the learned trial judge on that point why not the appellant?

[22] I would reject the preliminary objection.

Ground 1

[23] 1 will consider ground 1 of the appeal together with ground 1 of the cross appeal as both grounds, flay the learned trial judge's award of general damages of shs.500 million for different reasons. The appellant contends it is too high. The cross appellant contends it is too low. For the appellant I do not have much to go on as no submissions on this or any other ground were made.

[24] An appellate court will not ordinarily interfere with an award of damages unless the trial court acted on a wrong principle of law or the award was too high or too low as to be wholly erroneous estimate of the damage suffered by a party. See Robert Cuossens v Attorney General [2000] UGSC 2.

[25] The learned trial judge referred to this award of shs.500 million as nominal. I am not sure whether this was in jest. As counsel for the respondent points out, quoting Black's Law Dictionary, 'nominal damages' mean something 'token', or 'a trifling sum' awarded if there is no substantial injury. It must mean something of little value. Whether in Uganda of today or 1989 a sum of shs.500 million cannot, in my view, be nominal. It is substantial.

[26] The respondent agitates for a sum of shs.3.8 billion as general damages. He contends that the respondent was compelled to sell his personal palatial house in 1998 to pay his debts and had not quite paid all debts. He comes to the measure of shs.3.8 billion because he assumes that this was market value of his property. In the plaint it is suggested that he had to take a mortgage on the property and eventually sell it to pay off his

debts. No connection is really made between his contract with the appellant and his obtaining of a loan from Housing Finance Company Ltd in 1996, 8 years after entering into a contract with the appellant to provide medical services to one officer. Neither is the sale which was voluntary rather than a forced sale on account of his indebtedness rationally connected with the breach of contract.

[27] Whatever losses the respondent suffered on selling his property for which there was no proof provided had nothing to do with the contract or breach thereof between the appellant and the respondent. In paragraph 5 of the plaint it is averred that 'His property was sold off.' Suggesting that it was sold off by his creditors. This is contradicted by the supporting document for this averment 'F2' which is a letter from Housing Finance Company Ltd which indicates that it was sold off by the respondent himself.

[28] General damages are in the discretion of the court upon proof of injury which could not be particularised and measured unlike the case of special damages which is capable of exact assessment.

[29] I would not fault the learned trial judge for not accepting the figure proposed by the respondents. The figure has no rational connection with the injuries for which general damages can be awarded. However, I part company with the learned judge on whether the sum of shs.500 million is a nominal amount. In my view it is not. I agree with the appellant that this was inordinately high for breach of contract that was about worth shs230 million, and whose principal sum had been paid by the time the suit was filed. I take it that the respondent must have suffered some inconvenience as he tried to get paid. It must have been frustrating for him. Nevertheless the sum awarded is so inordinately high that I would interfere with the award and reduce it to shs.50 million. Damages are compensatory in nature.

[30] I would allow ground 1 of the appeal and dismiss ground 1 of the cross-appeal.

Ground 2 of the appeal and Ground 3 of the Cross Appeal

[31] I will consider these 2 grounds at the same time given that the contention is over the decision of the learned trial judge to vary the interest rate of 24% to 15% which is assailed from different directions.

[32] I agree that the learned trial judge in applying section 26 (2) and (3) of the Civil Procedure Act, while dealing with the question of interest rate applied the wrong provisions of the law. The correct provision to take into account should have been section 26 (1) of the Civil Procedure Act which permits a court to interfere with interest agreed by the parties if in the view of the court such interest is unconscionable. I will reproduce the whole section,

> '26. Interest.
>
> (1)**Where an agreement for the payment of interest is sought to be enforced, and the court is of opinion that the rate agreed to be paid is harsh and unconscionable and ought not to be enforced by legal process, the court may give judgment for the payment of interest at such rate as it may think just.**
>
> (2) Where and insofar as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.
>
> (3)Where such a decree is silent with respect to the payment of further interest on the aggregate sum specified in subsection (2) from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 percent per year.'

[33] I am aware that in the court below the appellant did not attack, on the pleadings, interest as unconscionable and it is right to say that this was not in contest at the trial. However, the provision grants the discretionary power to the court, if in the opinion of the court, such interest rate being sought to be enforced is 'harsh and unconscionable', to give judgment for such interest rate 'as it may think just.'

[34] Of course I agree with counsel for the respondents' submission that it is not for the court ordinarily to write a new contract for the parties. However, under section 26 (1) of the Civil Procedure Act, court has the power specifically to deal with the issue of interest being sought to be

enforced, if it is of the opinion that the rate agreed is harsh and unconscionable, to give judgment at such rate as it will think just.

[35] The respondent's counsel referred us to Blacks Law Dictionary, 9th Edition for the meaning of unconscionable.

> '……having no conscience, unscrupulous… showing no regard to conscience; affronting the sense of justice, decency or reasonableness.' Page 1664 of Black's Law Dictionary.

[36] Unconscionable agreement was defined as,

> 'As an agreement that no promisor with any sense, and not under a delusion, would make, and that no honest and fair promisee would accept…' Page 79 Black's Law Dictionary.

[37] PW2, a witness for the respondent, who testified that he committed Government to pay 24% compound interest testified that it was no big deal. This is somewhat incomprehensible to me given that this witness was the accounting officer of the Ministry of Defence at the time, who was supposed to ensure that the Ministry met its obligations, and in fact for unexplained reasons, failed to meet its obligations in this regard. PW2 chose instead to commit Government to this new obligation of 24% compound interest which he regarded as no big deal. I am not too sure if he was dealing with his own resources that he would take this cavalier attitude that he took in relation to public resources.

[38] The principal sum was denoted in United States Dollars and so is the interest now claimed. If the principal sum had been in Uganda shillings the interest claimed may be would pass muster. However, the debt in this case, was expressed in the United States dollars, a currency that is more stable and given less to fluctuations of the kind that compel interest rates to be rather high for the Ugandan shilling. I am prepared to take judicial notice of the fact that interest rates in Ugandan banks for the US dollars are rarely outside single digits.

[39] Secondly this claim had become stale and was only revived after the respondent paid the appellant the principal debt in 2011 and 2012. The respondent had otherwise sat on his claim for 22 years without taking any action to enforce it. Had the claim been filed in 1989 or 1991maybe the claim would not look so outrageous as it is now.

[40] Taking into account all circumstances surrounding this agreed interest I am satisfied that it is harsh and unconscionable and would not enforce it. It is clearly unreasonable and imposes a harsh burden on the public purse. I would enter judgment of simple interest at 6% per annum on the principal debt of US$93,150.00 from the time interest was agreed to be paid to the filing of the suit. In the result I would allow ground 2 of the appeal and dismiss ground 3 of the cross appeal.

Ground 3

[41] I agree with counsel for the respondent that ground 3 of the appeal has no merit. Obviously the certificate for 2 counsel can only be issued after the court has delivered judgment. It is then that an application is made for 2 counsel if the successful party has been awarded costs. It may have made sense if the decision to allow costs for 2 counsel had been attacked on its merits which it was not. This was fairly a simple case that did not call for two counsel. However, as this is not the challenge to it I would reject this ground.

Ground 2 of the Cross Appeal

[42] The respondent and cross appellant is assailing the decision of the learned trial judge in awarding interest of 6%, rather than the claimed interest rate of 8%, on the general damages awarded. It is asserted that 8% is not far off from 6% which is permitted under section 26 (2) of the Civil Procedure Act.

[43] It was held, in Begumisa Financial Services Ltd v General Holdings Ltd and Another [2007] 1 E A 28, that:

> 'An award of interest is discretionary and the basis of an award of interest is that the defendant has kept the plaintiff out of his money and defendant has had the use of it himself, so he ought to compensate the plaintiff accordingly.'

[44] The respondent fails to point out the error made by the trial judge and would just rather have what he asked for than what he obtained. He will have to content himself with what the learned trial judge awarded. He has not been able to show that the learned trial judge abused his discretion in any way. He has not shown that the learned judge applied a wrong principle of law or that the rate is so low as to be unjust in the circumstances of this case. I would reject this ground.

Decision

[45] I would allow the appeal in part and dismiss the cross appeal for the reasons given above. I would set aside the judgment of the High Court awarding the appellant Shs.500 million in general damages and substitute it with an award of shs.50 million only as general damages. I would set aside compound interest at 15% per annum on the principal debt. I would substitute it with simple interest at 6% per annum from date of agreement to pay interest till the filing of this suit. And thereafter interest shall paid on the whole decretal amount at the rate of 6% per year from the date of judgment till payment in full. Each party shall bear his own costs on appeal given that the appellant did not argue the appeal and cross appeal (by filing written submissions in court as ordered by court at her request).

[46] As Barishaki Cheborion and Tuhaise, JJA, agree this appeal is allowed in part and judgment is entered as proposed above with each party bearing its costs. The cross appeal is dismissed.

Dated, signed delivered at Kampala this 26th day of June 2019

Fredrick Egonda-Ntende
Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMAPLA

(Coram: Egonda-Ntende,Barishaki Cheborion & Tuhaise, JJA)

CIVIL APPEAL NO. 207 OF 2016

(Arising from High Court Civil Suit No. 383 of 2012)

ATTORNEY GENERAL ..... APPELLANT

VERSUS

DR. MAJ. (RTD) ANTHONY JALLON OKULLO.....RESPONDENT

(On Appeal from a judgment of the High Court, (Musota, J) delivered on 9th September 2012.)

Judgment of Percy Night Tuhaise, JA

I have had the benefit of reading in draft the judgment of my senior brother Hon. Mr. Justice Fredrick Egonda-Ntende, JA.

I agree with his analysis of the evidence as well as the decisions and conclusions in the judgement that the appeal be allowed in part and the cross appeal be dismissed. I am also in entire agreement with his substitutions of the awards that were set aside in the judgment.

Dated at Kampala this....26th.....day of.....June2019

Percy Night Tuhaise
Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE APPEAL COURT OF UGANDA AT KAMPALA

(Coram: Egonda – Ntende, Barishaki Cheborion & Tuhaise, JJA)

Civil Appeal No. 207 of 2016

BETWEEN

Attorney General========== Applicant

AND

Dr. Maj. (Rtd) Anthony Jallon Okullo==========Respondent

(On appeal from a judgment of the High Court, (Musota J.,) delivered on 9th September 2012)

JUDGMENT OF BARISHAKI CHEBORION, JA.

I have had the benefit of reading in draft the judgment of my brother Egonda-Ntende JA and I agree that this appeal should succeed only in part and the cross appeal fails.

I take exception regarding the way in which the appellants counsel conducted this matter.

When the appeal was called for hearing on 11th February 2019, counsel for the appellant informed Court that she was not prepared to argue the appeal because the lawyer in personal conduct the case had not turned up. That she only stood in merely because she was from the same chambers. This was surprising because it's those same chambers which preferred the appeal and ought to have been eager that it was heard.

That aside, counsel requested for time to enable her prepare and file written submissions and the request was granted. The parties were each given seven days to do so. Court was categorical that if the parties did not comply with the given time schedules, it would in any event go ahead and dispose of the appeal. Even with this caution the appellant failed to file its written submissions.

I find the appellant's failure to file its submissions a clear indication of lack of seriousness on its part. It should do better in future.

Dated at Kampala this 26th day of June 2019

Justice Barishaki Cheborion

Justice of Appeal