

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Musoke & Obura, JJA)

CIVIL APPEAL NO. 06 OF 2011

(Arising from the judgment of the High Court of Uganda (Mukasa, J.), delivered on 20th July 2010)

BETWEEN

HOPE MUKANKUSIAPPELLANT

AND

UGANDA REVENUE AUTHORITY.....RESPONDENT

JUDGMENT OF HELLEN OBURA, JA

I have had the benefit of reading in draft the judgment of my learned brother Egonda-Ntende, JA. I agree with his findings on all the grounds of appeal and the conclusion that ground 3 be allowed and the rest of the grounds of this appeal be dismissed with three quarters of costs to the respondent.

Dated at Kampala this.....15th day of.....November.....2019.

.....

Hellen Obura

JUSTICE OF APPEAL

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
(Coram: Egonda-Ntende, Musoke and Obura, JJA)**

CIVIL APPEAL NO. 06 OF 2011

**(Arising from High Court (Commercial Court Division) Civil Suit
No. 438 of 2005)**

BETWEEN

HOPE MUKANUSI APPELLANT

AND


UGANDA REVENUE AUTHORITY RESPONDENT

JUDGMENT OF ELIZABETH MUSOKE, JA

I have had the benefit of reading in draft the lead judgment of my learned brother, Fredrick Egonda-Ntende, JA, and I agree with the decision proposed therein, that the appeal be allowed in relation to ground 3 alone, and dismissed in relation to grounds 1, 2 and 4, with nothing useful to add.

I also agree that the costs be paid in the manner proposed by my learned brother.

Dated at Kampala this^{15th} day of^{Nov.}.....2019


**Elizabeth Musoke
JUSTICE OF APPEAL**

THE REPUBLIC OF UGANDA

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
[Coram: Egonda-Ntende, Musoke and Obura, JJA]**

CIVIL APPEAL NO. 06 OF 2011

(Arising from High Court (Commercial Court Division) Civil Suit No. 438 of 2005)

BETWEEN

HOPE MUKANKUSI=====APPELLANT

AND

UGANDA REVENUE AUTHORITY=====RESPONDENT

(On appeal from the Judgment of High Court of Uganda, (Mukasa, J.,) delivered on 20th
July 2010.)

Judgment of Fredrick Egonda-Ntende, JA

Introduction

- (1) The appellant filed a civil suit in the High Court of Uganda against the respondent seeking specific performance of a sale by public auction, shs.147,907,390 as special damages, general damages for breach of contract, interest on special damage at 20% per week from date of filing till payment in full, interest on general damages at 25% per annum from date of auction till payment in full, interest on exemplary damage at court rate from date of filing till payment in full and costs of the suit.
- (2) The facts giving rise to the claim of the appellant are not in dispute. The respondent advertised in the New Vision newspaper of 12th January 2005 sale by auction of a Toyota Hiace vehicle. The appellant put in a bid for the same at the sum of Shs.6,000,000.00. She was successful. She paid the money. However, the respondent failed to deliver the said vehicle to her as apparently the importer for the same had reclaimed it successfully. The respondent offered to refund the bid price but the appellant rejected it.
- (3) The appellant contended that she had obtained a loan of shs.8,000,000.00 at the interest rate of 20% per week repayable in 30 days time to finance this

transaction. She had intended to sale the vehicle after purchase of the same and realise the then market price of Shs.16,000,000.00 only and presumably repay the loan. As the respondent failed to deliver the vehicle she was unable to pay back the loan and claimed principal and interest on the same at 20% per week that had accumulated to Shs.147,907,390.00. She further claimed general damages for non-use of the vehicle, inconvenience, mental anguish and trauma following the threatened sale of her residential home for failure to repay the loan.

- (4) The respondent in its defence acknowledged the sale of the said vehicle by auction to the appellant but that before the sale could be perfected the importer of the vehicle reclaimed it. The respondent offered to refund to the appellant the sum she had paid for the vehicle but the appellant rejected the offer. With regard to the claim for special damages, general damages and exemplary damages the respondent contended that the same were too remote from the aborted sale of the said vehicle.
- (5) The claim was heard and determined. The appellant was successful only to the extent of recovering shs.6,000,000.00 as special damages and shs.4,000,000.00 as general damages plus interest at commercial rate on special damages from date of judgment till payment in full and interest at court rate on the general damages from the date of judgment till payment in full and the costs of the suit. The appellant was dissatisfied with that judgment. She appealed to this court setting forth the following grounds.

'1. The learned trial judge erred in law and in fact when he failed to evaluate the evidence on record showing that the appellant tried to mitigate her damage thereby coming to a wrong conclusion that she had not acted reasonably to mitigate her damage.

2. The learned trial judge erred in law when he failed to award the appellant sufficient general damages on account of the wrong conclusion that the Appellant had not acted reasonably to mitigate her damage.

3. The learned trial judge erred in law when he failed to award the appellant commercial interest from the date of filing, as is the practice and in failing to specify the commercial rate applied, thereby making the computation of the decretal sum impossible.

4. The learned trial judge erred in law when he stated that the appellant's claim for special damages, save for auction fees, were not foreseeable merely because the respondent was not

aware of the source of the appellant's funding or nature of business thereby wrongly applying the law of foreseeability.'

Representation of Counsel

- (6) Ms Monica Kurwenza, holding brief for Mr Daniel Rutiba, appeared for the appellant at the hearing of the appeal while Mr Alex Saleh Alideki appeared for the respondent. Both counsel preferred to rely on their written submissions that were already on the court file which court accepted.

Duty of First Appellate Court

- (7) As a first appellate court, it is our duty to re-evaluate the evidence on record as a whole and arrive at our own conclusion bearing in mind that the trial court had an opportunity to observe the demeanor of the witnesses which we do not have. See Rule 30 of the Judicature (Court of Appeal Rules) Directions S I 13-10, Banco Arabe Espanol v Bank of Uganda [1999] UGSC 1, Rwakashaija Azarious and others v Uganda Revenue Authority [2010] UGSC 8. I shall now proceed to do so.

Ground 1 and 2

- (8) Counsel for the appellant's written submissions combined grounds 1 and 2 together. I will accordingly take them together. He submitted that there are only 2 instances in which an appellate court can interfere with an award of damages by the trial court. Firstly that is possible if the trial court acted on a wrong principle. Secondly if the award was so manifestly low or high that it had be interfered. He cited Robert Coussens v Attorney General SCCA No.8 of 1999 (unreported). The learned trial judge failed to properly appreciate the evidence that indicated that the appellant had done everything in her power to mitigate the loss by trying to negotiate with the respondent. However, the respondent's offer of a refund was insufficient to meet her losses. The learned trial judge wrongly recorded and or concluded that it was the respondent that had offered Shs.16,000,000.00 and Shs.21,000,000.00 to settle the case. Documentary evidence would show that it was the appellant who suggested these amounts so as to settle the case. Counsel therefore contended that the learned trial Judge had wrongly interpreted the evidence to reach the conclusion that the appellant had not mitigated her loss.
- (9) The measure of general damages, at Shs.4,000,000.00, was so low as to warrant interference by this court. What ought to have been granted were such damages that would reasonably have put the appellant in as good a position

had the contract not been breached. In this regard he referred to Esso Petroleum Co Ltd v Mardon [1976] 2 All ER 16. An order for refund of Shs.6,000,000.00 and general damages for Shs.4,000,000.00 does not compensate the appellant for the loss she suffered on account of breach of this contract. She had a loan at 20% per week on account of this contract which at the time of judgment had accumulated for 5 years and now it is over 13 years. The damages should include this item.

- (10) Counsel for the respondent submitted that counsel for the appellant had properly set out the law with regard to what instances an appellate court may interfere with an award of damages by a trial court. He contended, however, that counsel for the appellant had misapplied the rules to the facts of this case. He supported the holding of the trial judge that the appellant had failed to mitigate her loss. What she was seeking to recover was unrecoverable as it was avoidable loss. In support of his arguments he referred to Iron and Steel Waves Ltd v G W Matryrs & Company 7 ULR 146; Thai Airways International Public Co Ltd v KI Holdings Co Ltd & Anor [2015] EWHC1250 (Comm) and Uganda Development Bank v N.I.C & Anor [1996] UGSC 5.
- (11) With regard to the contention that the damages awarded were too low counsel for the respondent submitted that on the evidence available the award of damages was adequate. He referred to Celtel (U) Ltd v Proplan Partners CACA 82 of 2003 (unreported), arguing that it was not enough that another court could reach a different decision, for a decision of the lower court to be upset.
- (12) The learned trial judge discussed the issue of mitigation in the following words,

'It is trite law that an injured party is under a duty to minimize the damages. That is to mitigate his / her loss. The defendant's counsel cited the case of The Iron & Steel Wares Ltd v GW Martyrs & Company 7 [ULR] 146 wherein the plaintiff had contracted to buy bicycle forks from the defendant, but what was delivered did not form the frames. The defendant even offered to replace the faulty parts but the plaintiff refused. Court held that the plaintiff ought have mitigated their loss by accepting the defendant's offer. Counsel submitted, and I agree, that the rationale of the holding in the above case is that the injured party should not recover more than he / she would have suffered if he acted reasonably because any further damages do not reasonably flow from the defendant's breach. In the circumstances the plaintiff is awarded interest on the general damages only at the court rate and only from date of this judgment.'

- (13) I am unable to fault the learned trial judge for the foregoing analysis.
- (14) The appellant was offered to be refunded the money she had paid to the respondent. She rejected this offer. This was both unreasonable and unwise. She could have received this money and then filed an action to recover what she thought would rightly be due to her. She would have received her capital back and chosen what to do with it. If it was to pay back the loan that would have ensured that she did not have to incur interest for the period the loan remained unpaid. Nor would she have had to claim the interest of 20% per week on special damages from the date of filing till payment in full.
- (15) The appellant contends, in relation to ground 2, that the learned trial judge failed to award her sufficient general damages for her loss. This is what the learned trial judge stated.

'General damages for breach of contract are compensatory for the loss suffered and inconveniences cause (sic) to the aggrieved party (sic) so that the aggrieved part (sic) is put back in the same position as he would have been in had the contract been performed and not a better position. Court tries to restore the aggrieved party to his / her condition before he / she entered the transaction. The evidence adduced by the plaintiff is that the vehicle was auctioned because the importer had not paid taxes. By the time the plaintiff was announced the highest bidder the defendant had not rescinded the auction. The plaintiff following being declared the highest bidder proceeded to pay the bid price in full. All formalities were completed and the release letter – exhibit P2, issued. The plaintiff even received a motor vehicle verification form Exhibits P1 and P14, only pending issuance of a Log Book for the vehicle. Despite all that the vehicle was not released to the plaintiff. The plaintiff parted with shs.6,000,000.00, which she would have otherwise utilised, to pay the defendant for the vehicle. All her expectations were frustrated by the defendant's breach of contract. She must have suffered inconveniences as a result. Counsel for the plaintiff stated that the plaintiff would have sold the vehicle at ushs.16,000,000/=, she would have repaid her loan with interest at Shs.9,400,000/= together with a release of her leasehold title in Nsambya. As I have already stated there is no evidence to show that the loan was for the purpose of purchasing a vehicle. She could not have agreed with anybody to sell what she did not yet have. Even if there could have been an offer, there was no evidence adduced of any offer by any person for the purchase of the vehicle. All the same whatever was the intention, she lost alternative utilisation of the sum of shs.6,000,000/=, of the

anticipated ownership, enjoyment and utilisation of the vehicle. For such inconveniences I find an award of Shs.4,000,000.00 as general damages appropriate.'

- (16) I am unable to fault the learned trial judge's reasoning and assessment of the facts before determining the amount of general damages to award. I am unable to see an error either on the facts or the law for which he can be faulted. The judge did not take into account matters that were pleaded like mental anguish and trauma as there was no evidence on the record to support the same. No evidence was adduced to suggest that she had lost income either from a possible re-sale of the said vehicle or in being unable to put the said vehicle to business. The learned trial judge did the best he could on the available evidence and determined that an award of shs.4,000,000.00 was sufficient as compensation in general damages for the loss that the appellant had suffered.
- (17) I would dismiss grounds 1 and 2 of the appeal.

Ground 3

- (18) Under this ground the appellant is complaining of two things. Firstly, that the interest rate on special damages was held by the learned trial judge to be due from the date of judgment rather than from the date of filing of the suit contrary to the usual practice in such cases. Secondly that the interest rate itself was not pronounced by the trial court leaving it impossible for the appellant to claim and enforce the same.
- (19) Counsel for the appellant submitted that though the learned trial judge had properly referred to the principle set out in Ecta (U) Ltd v Geraldine Namubiru and Anor (supra) he had failed to correctly apply the same and failed to specify the actual interest rate that was to apply to the award for general damages. In this regard he prayed that this court should establish interest to be applied at 20% per annum. With regard to the question as to when should the interest payments commence counsel for the appellant referred to Omunyokol Akol Johnson v Attorney General [2012] UGSC 4 and argued that this should be from the date the loss was suffered or expense incurred.
- (20) Counsel for the respondent supported the decision of the learned trial judge. He contended that it was the duty of the Bank of Uganda vide section 39 of the Bank of Uganda Act to set the commercial bank interest rates rather than the duty of the trial judge. Secondly, he submitted that under section 26 of the Civil Procedure Act the award of costs is discretionary and the learned trial

judge in this case properly exercised his discretion providing reasons for that decision.

- (21) I agree with the complaint in relation to the latter point. The learned trial judge ought to have specified the interest rate that he was ordering the respondent to pay to the appellant. Commercial rates vary from bank to bank and even in the same bank the rates vary according to the nature or purpose of borrowing and whether or not the principal is secured or unsecured. Section 39 of the Bank of Uganda Act is unhelpful in this regard as it only relates to the setting up of minimum or maximum interest rates that banks may impose.
- (22) The Supreme Court in Omunyokol Akol Johnson v Attorney General (supra) discussed this question of when would interest rate commence. Odoki, Ag. JSC, writing for the majority of the court, stated in part, as follows:

'It is well settled that the award of interest is in the discretion of the Court. The determination of the rate of interest is also in the discretion of the Court. I think it is also trite law that for special damages the interest is awarded from the date of the loss, and interest on general damages is to be awarded from the date of judgment. In the present case, the respondent has conceded that the trial judge erred in awarding interest on general damages from the date of dismissal. It does appear to me that the error was caused by the trial judge in lumping special damages together with general damages. The appellant never pleaded or prayed for such a high interest. Therefore, the trial judge should have awarded the appellant interest on general damages at the Court rate from the date of judgment. The rate of interest of 20% should have been awarded on special damages from the date of interdiction or dismissal till payment in full.'

- (23) From the foregoing exposition of the law on this point by the Supreme Court it is clear that much as the award of interest is discretionary interest rates on special damages should be with effect from the date of the loss till payment in full while with regard to general damages this should be from the date of judgment as it is only ascertained in the judgment.
- (24) In the instant case special damages were awarded in the sum of Shs.6,000,000.00 which was the bid price that the appellant paid to the respondent. This sum shall attract interest at the rate of 20% per annum from the date it was paid to the respondent till payment in full. With regard to general damages this will attract an interest of rate of 8% per annum from the date of judgment in the court below till payment in full.

Ground 4

- (25) Under this ground the appellant is complaining that the learned trial judge erroneously refused to award her the claim for special damages being the interest rate she had claimed at 20% per week on the sum of shs.8,000,000.00 from the time loan was granted up to the date of filing the suit totalling to Shs.147,907,390.00.
- (26) Counsel for the appellant submitted that the test to be applied here is foreseeability. He cited Hadley v Baxendale (1854) 9 Exch 341 and Koufous v C Czarnikow Ltd [1967] 3 All ER 387 to support his argument that a party need not know of the event at the time of making the contract which forms the claim for special damages. The event may be unlikely but foreseeable as in this particular case. The respondent may not have known of the loan and its terms that the appellant took in order to perform the contract. However, it was clearly foreseeable. He therefore prayed that this sum of Shs.147,907,390.00 should be awarded as special damages to the appellant on account of the breach of contract by the respondent.
- (27) Counsel for the respondent supported the decision of the learned trial judge on this point when he rejected the appellant's claim for special damages save the bid price that she paid. He was in agreement with the reasons provided by the learned trial judge in rejecting this claim. He prayed that the decision of the lower court be upheld.
- (28) Special damages are such damages that a claimant suffers on account of a breach of contract and must flow directly from the breach of contract by one of the parties thereto. In Uganda Telecom Ltd v Tanzanite Corporation [2005] UGSC 9 the Supreme Court considered what amounts to special damages arising from a breach of contract. Though the court found that in fact no contract had been agreed between the parties it went on to consider an award for special damages which it held to be unforeseeable. The respondent wanted to sell a big number of telephone sets to the appellant. Negotiations commenced and a proforma invoice was issued by the respondent to the appellant. Both parties signed on this document. The appellant wrote to the Cooperative Bank Ltd informing it that they were in contract negotiations with the respondent and in case they advanced money to the respondent the contract proceeds would substantially pay off the loan amount.
- (29) The respondent obtained a loan from the Cooperative Bank Ltd and at the time it brought the action against the appellant it claimed that there was an outstanding sum of Shs: 108,683,330/= that remained unpaid on that loan

which the respondent claimed as loss on account of the breach of the contract by the appellant. Oder, JSC, in the lead judgment of the court stated in part,

'The Court of Appeal awarded to the respondents Shs: 108,683,330/= as loss for the unpaid loan they owed the Cooperative Bank. According to Kitumba, JA in her judgment, this was because the appellants encouraged the respondents to take the loan, because Exhibit P5 was to induce the bank to advance the money to the respondents for the purpose of acquiring materials to assemble the phones, and because the respondents produced exhibit P.10, a letter dated 27.4.2000 from the Cooperative Bank demanding from them repayment of the loan. I have already held that exhibit P.5 was not evidence of a contract between the appellants and the respondents because, first it did not mention the amount allegedly guaranteed, and second, the demand to the respondents to pay the loan was not linked with the telephone transaction and was not addressed to the appellants. In the circumstances, I am with the greatest respect; unable to agree with the learned Justices of Appeal that default by the respondents to repay the loan was an event foreseeable by both the parties when the appellants wrote exhibit P.5.'

- (30) Taking guidance from the above decision the question that must be answered in relation to the appellant's claim for special damages before the trial court was whether the payment or non-payment of a loan, of which the respondent was unaware of could be said to be an event that was foreseeable by both parties? Could it have been reasonably contemplated by both parties when they entered into the contract which was breached? In my view there was no way the respondent could have reasonably foreseen or contemplated that the appellant had a loan with interest of 1,040% per annum to finance this contract!
- (31) The purpose of an award of damages, and in particular special damages, is to put the appellant in the position he or she would have been in had the contract been performed. It is compensatory in relation to the loss that he or she suffered on account of the breach of contract.
- (32) The contract that was breached by the respondent was for the sale of a vehicle or none delivery of a vehicle sold to the appellant by the respondent. The damages, especially the special damages, had to arise from a breach of that contract. In this case on the plaint it had been alleged that the appellant intended to re-sell the vehicle, presumably at a profit. In the plaint a sum of shs.16,000,000.00 was mentioned as a possible re-sale value of the said vehicle. No proof was adduced to show that to have been the case. Neither, as

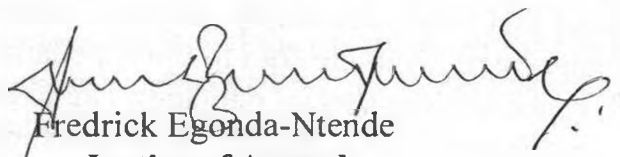
the learned trial judge noted, was the appellant in that kind of business so as to be seized with knowledge as to know what was happening in that area of trade. If the appellant had proved the re-sale value of the vehicle the loss that would have been recoverable would be special damages for lost income. That would be reasonably foreseeable by both parties.

- (33) The claim for interest at 1,040% per annum or 20% per week is simply preposterous on a loan the appellant had obtained to do business. It had nothing to do with the breach of contract in question. Whichever way the appellant obtained her capital it could not have been contemplated by the respondent that the appellant had got a loan with interest at 1,040% per annum. It is so unreasonable that it is impermissible to grant it. It is too remote to the breach of this contract.
- (34) Secondly even if I was wrong and it was not too remote the appellant had a duty to mitigate her loss. In this case it had been offered to be refunded its payment for the vehicle. The appellant refused the offer. The offer would have enabled the appellant to have enough money to pay back the principal sum probably within the time she had been given to pay back her loan. The refusal of the offer of repayment was unreasonable and in breach of the appellant's duty to mitigate her own loss. She cannot recover the special damages claimed in this regard.
- (35) I am unable to fault the learned trial judge in rejecting this claim. I would dismiss ground 4.

Decision

- (36) As Musoke and Obura, JJA, agree this appeal is allowed, in part, in relation to ground 3 and dismissed in relation to grounds 1, 2 and 4. The appellant is awarded one quarter (1/4) of the costs on appeal and the respondent is awarded three quarters (3/4) of its costs in this court.

Dated, Signed, delivered at Kampala this 15th day of November, 2019


Fredrick Egonda-Ntende
Justice of Appeal