THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO. 792 OF 2022

MUSINGUZI WILLY TURIRUKWA .... PLAINTIFF

VERSUS

NDEMA THOMAS .... DEFENDANT

BEFORE: <u>HON. LADY JUSTICE PATIENCE T.E. RUBAGUMYA</u>

<u>JUDGMENT</u>

<u>Introduction</u>

This matter was filed on 16th September, 2022 by the Plaintiff for a declaration that the Defendant breached the terms of the Memorandum of Understanding executed between the Plaintiff and the Defendant on the 30th November, 2013 and the 1st August, 2014, an order for refund of UGX. 17,200,000= (Uganda Shillings Seventeen Million Two Hundred Thousand Only) as money had and received under the Memorandum of Understanding, payment of 36% interest per annum as agreed in the Memorandum of Understanding, general damages, interest at a commercial rate of 27% per annum on the general damages from the date of filing until payment in full and costs of the suit.

<u>Background</u>

On 30th November, 2013, the Plaintiff and Defendant executed a Memorandum of Understanding wherein the Plaintiff advanced to the Defendant UGX 15,000,000= (Uganda shillings Fifteen Million Only) at an interest rate of 36% per annum on the understanding that the Defendant was to purchase an estate belonging to Akright Projects Ltd through a Court guided process and in return the Plaintiff would be given the first right to purchase a plot from the estate. As security for the money borrowed, the Defendant deposited a postdated cheque No. 000053 to be cashed upon default. The Defendant requested for more money and the Plaintiff advanced to him UGX 2,200,000=. The cheque that had been deposited, was drawn on Equity Bank in favor of the Plaintiff and upon its maturity, the Defendant advised the Plaintiff not to cash it on grounds that the Court process was about to be concluded in favor of the Defendant.

The Plaintiff requested the Defendant to refund the monies advanced to him under the Memorandum of Understanding to no avail hence filing this suit seeking to recover the monies so advanced.

On 27th October, 2023, when the matter came up for hearing, Counsel for the Defendant admitted to the sum of UGX 17,200,000= being demanded. However, he contested the 36% interest per annum that was being charged by the Plaintiff as per the Memorandum of Understanding. To this, the Court requested the parties to further hold discussions and come to an agreement and that if they failed to agree on the interest in dispute, the matter would proceed solely for the determination of the interest to be charged and costs of the suit. The parties failed to come to an agreement and thus this Judgment is in respect of the interest and costs of the suit.

Representation

The Plaintiff was represented by M/S Anguria & Co. Advocates while the Defendant was represented by M/S Okello-Oryem & Co. Advocates.

Issues for Determination

Court rephrased the issues framed by Counsel for the Defendant pursuant to **Order 15 Rule 3 of the Civil Procedure Rules S.I No. 71-1 as amended,** to read as follows:

1. Whether the interest rate of 36% per annum stipulated in the Memorandum of Understanding between the parties is unconscionable and harsh?
2. Whether the Plaintiff is entitled to costs of the suit?

The parties were directed to file written submissions, which they did and the same have been considered by Court.

Issue 1: Whether the interest rate of 36% per annum stipulated in the Memorandum of Understanding between the parties is unconscionable and harsh?

Plaintiff's submissions

Counsel for the Plaintiff submitted that for a rate of interest to be lawful and conscionable, it must either be provided for by law or such as the Court could reasonably award if it were claimed in an action that may be before the Court. He went on submit that the rationale for provision of interest in a contract is for such interest to act as a preventive measure against breach of an agreement to pay back the money owed. Counsel relied on the cases of ***Premchandra Shenoi & Anor Vs Maximov Oleg Petrvich SCCA No. 9 of 2003*** and ***Olara Denis Micheal Vs Omony Stephen Khesmodel HCMA No. 1 of 2022.***

Counsel for the Plaintiff further submitted that the interest rate of 36% was equally agreed to as an undertaking that the Defendant would meet his obligations as agreed, which he did not and that thus the interest rate is reasonable. He averred that in the alternative, if the Court is inclined to reduce the interest rate, it should take into account the prevailing economic value of money and the ever-rising inflation.

Defendant's submissions

Counsel for the Defendant contended that **Section 26 (1) of the Civil Procedure Act, Cap. 71** prescribes that if Court is of the opinion that the rate agreed to be paid is harsh and unconscionable, then it may give judgment for payment of interest at such rate as it may think just.

He relied on the cases of ***Dembe Trading Enterprises Ltd Vs Welcome Impex Uganda Ltd HCCS No. 246 of 2006*** and ***Juma Vs Habiba (1975) E.A 108*** and stated that much as the parties had agreed to the interest rate to be paid, the Court is still empowered under **Section 26 of the Civil Procedure Act** to set the agreed interest rate aside.

Analysis and determination

Section 26 (1) of the Civil Procedure Act stipulates that;

> *"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".*

In the instant case, the Plaintiff advanced UGX 17,200,00= to the Defendant and this, the Defendant admitted. However, he contended that the 36% interest per annum as stipulated in the Memorandum of Understanding that was executed between the parties when the money was being advanced is harsh.

Court in the case of ***Alice Okiror and Michael Okiror Vs Global Capital Save 2004 Ltd & Anor HCCS No. 149 of 2010,*** held that:

> "*The Supreme Court of Uganda had earlier considered the principles that Courts should consider before awarding interest in* ***Sietco Vs Noble Builders SCCA No. 31 of 1995****. The general principle for the award of interest was stated to be premised on the fact that the defendant has taken and used the plaintiff's money. Consequently, the defendant ought to compensate that plaintiff for the money. Based on that principle, the plaintiffs should compensate the defendants for the use of their monies, the first defendant being in the business of money lending".*

Court went on to hold that:

> *"The question that now remains would be how much should have been charged*".

It is not disputed that the parties executed a Memorandum of Understanding wherein they agreed on the 36% interest per annum. However, would it be reasonable to enforce such an interest rate?

I am alive to the fact that in Uganda, there is no law that bars individuals from lending to other people and charging interest on the same. But should the individual lenders charge harsh and unconscious interest rates just because the borrower entered into an agreement? I think not.

In my opinion, such a scenario was envisaged by the law makers and thus the enactment of **Section 26 (1) of the Civil Procedure Act** which empowers Court to give judgment for payment of interest at a rate it thinks is just if it is of the opinion that the rate agreed to be paid is harsh and unconscionable and ought not to be enforced by the legal process.

In the instant case, my view is that the interest rate of 36% per annum being charged by the Plaintiff is harsh and unconscionable and thus I shall exercise the discretion bestowed up Court to award a reasonable interest rate.

Counsel for the Plaintiff submitted that if the Court is inclined to reduce the interest rate, it should take into account the prevailing economic value of money and the ever-rising inflation. I have taken Counsel's submission into consideration and the prevailing commercial interest rate.

In the premises, I find that the interest rate that was charged by the Plaintiff is harsh and unconscionable and instead exercise the discretion bestowed onto Court by **Section 26 (1) of the Civil Procedure Act** and award an interest rate of 24% per annum. I have also taken into consideration the fact that at the last hearing of this matter, the Defendant saved Court's time by admitting that the principal sum of UGX 17,200,000= claimed was due and owing.

<u>Issue 2: Whether the Plaintiff is entitled to costs of the suit.</u>

Section 27(2) of the Civil Procedure Act provides that costs of any cause follow the event unless otherwise ordered by Court. Further in the case of

***Uganda Development Bank Vs Muganga Construction Co. Ltd (1981) H.C.B 35,* Justice Manyindo** (as he then was) held that:

> *"A successful party can only be denied costs if it is proved, that but for his or her conduct, the action would not have been brought, the costs will follow the event where the party succeeds in the main purpose of the suit".*

The Plaintiff being the successful party in this case is therefore entitled to costs of this suit.

In the premises, I accordingly issue the following orders:

1. The interest rate stipulated in the Memorandum of Understanding between the Plaintiff and Defendant of 36% per annum is harsh and unconscionable.
2. An interest rate of 24% per annum is hereby awarded to the Plaintiff in respect of the transaction between the Plaintiff and Defendant.
3. Costs of the suit are awarded to the Plaintiff.

It is so order.

Dated, signed and delivered electronically via ECCMIS this **14th** day of **December**, **2023.**

Patience T. E. Rubagumya

JUDGE

14/12/2023