

# THE REPUBLIC OF UGANDA IN THE SUPREME COURT OF UGANDA

[CORAM: ODOKI, CJ., TSEKOOKO, KATUREEBE, OKELLO AND TUMWESIGYE JJSC]

## *Civil Appeal No. 03 of 2010*

*BETWEEN*

CAIRO INTERNATIONAL BANK ..... APPELLANT

*AND*

SADIQUE M. JANJUA ..... RESPONDENT

{Appeal from the judgment of the Court of Appeal at Kampala [Mpigi - Bahigeine, Kitumba and Byamugisha, JA] dated 3<sup>rd</sup> November 2006, in Civil Appeal No. 76 of 2003}

### **JUDGMENT OF JWN TSEKOOKO. JSC.**

This second appeal arises from the judgment of the Court of Appeal which reversed the decision of the High Court (Okumu Wengi, J.) dismissing the suit of the respondent.

The facts of this case are as follows: On 3<sup>rd</sup> March, 1998, the respondent together with a company called Victoria Quarries and Aggregate (U) Ltd entered into a sale agreement (exhibit Pi) with another company called Ayosama Ltd. The agreement was for sale of land, developments and machinery comprised in Kyadondo Block 195, Plot 190 for a consideration of US\$ 500,000. Half of that money, namely US \$ 250,000, was paid by the second company Ayosama Ltd. The balance of USD 250,000 was to be

paid by the appellant in 12 months installments beginning from the 10<sup>th</sup> June, 1998 ending on 10<sup>th</sup> May, 1999 under a guarantee dated 6<sup>th</sup> March, 1998. The appellant gave the guarantee followed by an undated condition precedent for the payment of the money. Both documents are brief. I should reproduce them beginning with the letter of guarantee (Exh. Pi) which reads as follows—

*"06<sup>th</sup> March, 1998.*

*Sadique Masaud Janjua Plot 190, Kyanja KATALEMWA*

*Dear Sir,*

***RE: LETTER OF GUARANTEE NO. 37/9S***

*We Cairo International Bank, hereby guarantee our client M/SAYOSAMA to the extent of USD \$ 250,000 (US Dollars Two Hundred and Fifty Thousand Only.)*

*IN RESPECT OF: Payment towards cost of the quarry (land and equipment).*

*For the fulfillment of their obligation, the object of this guarantee we undertake to pay to you the above mentioned amount in 12 monthly installments from 10/06/98 to 10/5/99 as follows:*

*12 monthly installments of US \$ 20, 800 (US Dollars twenty thousand eight hundred only) and a final installment of US \$ 21,200 (US Dollars Twenty One Thousand Two Hundred Only) in the final month upon your first demand notwithstanding any contention regarding the schedule of payment."*

*Yours faithfully*

***CAIRO INTERNATIONAL BANK KAMPALA -U G A  
ND A."***

The condition precedent (Exh.D1) states thus:—

**“RE: CONDITION PRECEDENT FOR PAYMENT  
IN RESPECT OF LETTER OF GUARANTEE**

*The letters of guarantee issued to Sadique M. Janjua and Victoria Quarries and Aggregate (U) Ltd shall be paid only:*

*1. If Sadique M. Janjua and Victoria Quarries and Aggregate (U) Ltd produce written clearance from Uganda Revenue Authority of all taxes payable in respect of the quarry (ASSETS).*

*2. After 3 calendar months from today.*

**(SIGNATURE)"**

It would appear that the principal debtor defaulted and so the respondent demanded for payment from the appellant which declined to pay. Consequently the respondent instituted a summary suit to recover the money. The appellant sought and was granted conditional leave to appear and defend the suit. In its written statement of defence, the appellant averred in paragraph six thereof that it had no liability under the guarantee sued upon on the basis that the guarantee was subject to a condition precedent requiring both the respondent and M/S. Victoria Quarries and Aggregate (U) Ltd to produce tax clearance

certificates indicating that taxes payable in respect of the quarry business had been paid.

At the trial four issues were framed for determination by Court. The three relevant ones were:—

1. **Whether the guarantee is enforceable.**
2. **Whether the Plaintiff complied with condition attached to the guarantee.**
3. **Whether the guarantee expired.**

The fourth was about remedies. The learned trial judge answered all the issues in the negative. He dismissed the suit. The respondent appealed to the Court of Appeal and framed seven grounds of appeal the first of which complained that—

*‘ The learned judge erred in law and fact when he refused to give effect to the guarantee. ’*

The Court of Appeal allowed the appeal and reversed the judgment of the trial judge. The appellant has now appealed to this Court. The original memorandum of appeal against the decision of the Court of Appeal contains nine grounds.

Messrs Tumusiime, Kabega & Co., Advocates, lodged written statement of arguments in support of the appeal. In that written statement of arguments, counsel abandoned the ninth ground of appeal but reduced the remaining eight grounds into what is described as five issues. This was done without leave of Court. Messrs. Sekabanja & Co., Advocates also lodged a written

statement of argument on behalf of the respondent and in opposition to the appeal.

At the hearing of the appeal, Mr. Tumusiime appeared for the appellant. Counsel explained that the original grounds 1 and 2 have been reduced into issue No. 1 while the original grounds 3, 4 and 5 are now issues No. 2 and 3. He stated also that original grounds 6 and 7 are now issue No. 4 while the original ground 8 is now issue No. 5. Mr. Sekabanja appeared for the respondent.

I should comment on the change from grounds to issues. There is a growing practice among members of the bar to flout the Rules of this Court. According to Rule 79, an appeal is instituted within a prescribed period of time and the rule reads as follows:

*79(1) subject to rule 108 and subrule (5) of this rule, an appeal shall be instituted in the Court by lodging in the Registry, within sixty days after the date when the notice of appeal was lodged— a) A memorandum of appeal;*

This refers to the original memorandum containing the eight grounds. Further according to Rule 82(1)

*82(1) A memorandum of appeal shall set forth concisely and under distinct heads without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly*

*decided, and the nature of the order which it is proposed to ask the Court to make.*

It may sound semantics but this rule does not say that the appellant should frame issues after grounds are lodged in memorandum of appeal.

According to Rule 98 (a),

<sup>98</sup>*At the hearing of an appeal-*

*a) No party shall, without the leave of the Court, argue that the decision of the Court of Appeal should be reversed or varied except on a ground specified in the memorandum of appeal.*

Under Rule 17 documents lodged in Court are amended with leave of Court.

I therefore would not condone the practice whereby advocates or parties freely amend grounds of appeal without leave of court by describing the resultant amendment as issues or whatever the description. There is yet another matter which counsel for the respondent quite properly and correctly pointed out in his written arguments. It is clear from the record of appeal that the appellant filed a written statement of arguments in the Court of Appeal in addition to what is described as conferencing notes (whatever is meant by conferencing notes). Surprisingly the appellants' counsel did not include in the record of appeal the same statement of arguments which is a material part of the record of proceedings in

the Court of Appeal. According to Rule 83(3) exclusion of such a document can be done with leave of a Judge or the Registrar. No such leave appears to have been granted.

Be that as it may, as the respondent has responded to the arguments on what was described as issues, I will reluctantly consider them.

### ***ISSUE NO.1***

*Whether the learned Justices of the Court of Appeal erred in law and in fact in holding that the respondent and his company were not required to produce tax clearance certificates.*

As mentioned earlier, the complaint here was set out in the original grounds 1 and 2 of the memorandum of appeal. Counsel for the appellant relied on the definition of a “guarantee” appearing at page 56, Para 10 in ***Halsbury’s Laws of England, 4<sup>th</sup> Ed., Re — Issue***, and contended that since the appellant and the respondent entered into a contract, i.e., the guarantee, which is in writing, they must have both agreed to be bound by the terms of the guarantee one of which terms was that the Respondent and Victoria Quarries had to produce tax clearance certificates. That the tax clearance certificates were required not only for Victoria Quarries but also for the respondent himself. Counsel argued that the certificates produced were in respect of Victoria Quarries and even in the case of the latter, those certificates were produced out of time, that is to say, when the date of payment had passed. Therefore, counsel contended, the appellant was not liable to pay.

In reply, counsel for the respondent supported the decision of the Court of Appeal and contended that the condition precedent required the Respondent and his companies to produce tax clearance from the Uganda Revenue Authority of “all taxes payable on the Quarry (Assets). Counsel submitted that the respondent and his company had only sold the Assets and not the company itself. Counsel relied on section 166(7) of the Income Tax Act which provides that sections 18(1)(a) and 22(1)(b) of the same Act do not apply to business assets of a capital nature disposed of before 1<sup>st</sup> April, 1998. He argued that accordingly, the condition precedent was rendered inoperable and therefore superfluous.

Counsel also submitted that the respondent obtained Annual Tax Clearance Certificates dated 06<sup>th</sup> October, 1998 [Exh. P3^] and latter present other certificates [Exh.P3, P4 and P5^] to the appellant.

In my view, this is the most important ground in this appeal. Issue 1 complains about the decision of the Court of Appeal on what was ground five of the appeal in that Court. In that ground the present respondent (as appellant) complained that—

*'The learned trial judge erred in law and in fact when he ruled that the (now respondent) failed to satisfy the condition attending to the guarantee.'*

The effect of this complaint was that the trial judge was wrong when he decided that the respondent should have produced



clearance certificates before the present appellant could honour the guarantee.

The lead judgment in the Court of Appeal was written and delivered by Byamugisha JA. The other members of the Court concurred in her judgment. In my considered opinion the learned Justice gave considerable thought to and sound reasoning on this ground.

In a well reasoned judgment, the learned Lady Justice of Appeal referred to and considered the pleadings of the parties. She carefully reevaluated evidence adduced at the trial by each party to support the pleadings. She also carefully considered the judgment of the learned trial judge before concluding that the judge had failed to evaluate the evidence properly before he wrongly dismissed the suit. Again the learned Lady Justice of Appeal carefully considered the arguments of counsel for both sides in her court, she considered section 166 (7) of the Income Tax Act before she held that the appellant was liable to pay the money claimed in the suit.

This is how the learned Justice of Appeal considered the issues arising from that ground 5 of the appeal before her. At page 13 of her typed judgment she stated thus—

*‘In order to resolve the issue of the guarantee, one has to look at the sale agreement (exhibit PS) dated 3<sup>rd</sup> March, 1998, the guarantee deed (Exhibit Pi) dated 6<sup>th</sup> March, 1998 and the undated condition precedent*  
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*(Exhibit D1). The sale agreement provided in clause 2 (c) for the payment of balance of the purchase price of US \$ 250,000 in twelve equal monthly installments by confirmed letters of credit in favour of the vendors beginning after three months from the date of execution of the agreement or from the date of taking possession by the purchaser whichever is the latter. My understanding of this clause is that payment of the balance of the purchase price would begin three months after the purchaser had taken possession of the Assets. It is not clear from the evidence on the record when the purchaser took possession of the Assets. What is clear is that he did not pay the balance of the purchase price as agreed. As for payment of Taxes; Clause 6 of the sale agreement stated as follows:*

***The vendors hereby warrant and conform that all liabilities in respect of the business carried on by them including but not limited to payment of the tax liabilities up to the date of hand over shall be paid by the vendors. The vendors shall submit to the purchaser within 3 months from the date hereof written clearance from Uganda Revenue Authority of all taxes payable in respect of the Assets. If any taxes are outstanding the purchaser shall pay and deduct the same from the money owing to the vendor.***

The learned Lady Justice of Appeal then opined that the clause provided for payment of taxes by the vendors on the assets that were purchased by the Ayosama Ltd. In case any taxes remained outstanding the purchaser was supposed to pay them and deduct the money from that owed to the vendor. In her view the clause did not require the present respondent and his companies to produce tax clearance certificates for themselves. I respectfully agree.

As mentioned earlier, the learned Justices of Appeal considered the letter of guarantee (supra) as well as the condition precedent (supra) which were part of the evidence on the record.

She then stated—

*“Again the tax clearance certificates that were required according to my understanding of this condition were in respect of the assets and not of the appellant and his companies. The condition precedent was undated and therefore it is unclear when the three months would begin to run.”*

The appellant in his testimony at the trial stated that the guarantee was given to him after he had fulfilled certain conditions. The conditions included transferring land from the names of Kapkwata Saw Mills into his names and thereafter to obtain a lease in favour of Ayosama Ltd. He further stated that the exercise of doing that took some time. This would mean that the time frame in the guarantee must have been postponed. The appellant throughout the trial and in its application for leave to appear and defend asserted that the respondent failed to fulfill the condition precedent in that he did not submit clearance certificates of all taxes payable by himself and his companies and yet the condition precedent which the respondent was trying to enforce provided for clearance certificates in respect of assets only and nothing more. The main agreement of the sale had a fallback position in that it provided for the payment of any taxes due by the purchaser who in turn would deduct the amount from the balance due to sellers. This was not done.

Counsel for the respondent submitted in the Court of Appeal as he did in the High Court that the condition precedent was superfluous because of the provisions of the Income Tax Act. The learned trial judge did not comment on it.

Section 166 (7) of the *Income Tax Act* states as follows:

***“Section 18(1) (a) and 22(1)(b) do not apply to business assets of a capital nature disposed of before 1<sup>st</sup> April\ 1998 or to business debts of a capital nature cancelled or satisfied before 1<sup>st</sup> April, 1998”***

There is no dispute that the assets purchased by Ayosama Ltd were of a capital nature and therefore no taxes were due on them since they were disposed of before 1<sup>st</sup> April, 1998. Thereafter the learned Justice of Appeal considered the issue of whether the respondent made a demand. She noted that the guarantee did not stipulate what form the demand should take. Further in his evidence, the respondent testified that he went to the bank about thirty times demanding for payment. He was apparently meeting one of the bank officials (Mr. Abiery), who did not testify at the trial. Therefore the evidence of the respondent remained unchallenged. The Court of Appeal held, and I agree, that even if the respondent had made his demand in writing and in time the appellant would have refused to pay the guaranteed amount because of its insistence on the condition precedent which was superfluous. Again the Court of Appeal referred to the testimony of Hedgwig Banura Gariyo (D.W. 1) and Fathy Sebai Mansour (D.W.2) according to which the appellant demanded for tax clearance certificates from the respondent in person and his **12 of 18**

companies which were outside the condition precedent and in so doing it failed to honour the guarantee.

After reviewing the conclusions of the trial judge that the respondent should have made a demand as a way of enforcing the guarantee, the learned Justice of Appeal held, again correctly in my view, that whereas a demand should normally be in writing, the guarantee was silent as to whether the demand in this case was supposed to be in writing. The person to whom the respondent made an oral demand did not testify and therefore the respondent should have been believed. She concluded that the appellant misconstrued the condition precedent and the respondent had to spend a lot of time chasing tax clearance certificates that were not required in the first instance. She also held correctly that the learned judge did not evaluate the evidence properly and that had he done so, he would have come to the conclusion that the condition precedent was superfluous and the tax clearance certificates which the appellant was demanding were not necessary to operationalise the guarantee.

In my view the learned Lady Justice of Appeal ably considered the relevant pleadings, the relevant evidence to which she applied correct law. I find no fault in both her reasoning and conclusions. Issue No. 1 must therefore fail.

In my opinion this conclusion disposes of this appeal and I find it unnecessary to consider the rest of the issues except issue No. 5.

## **ISSUE NO. 5**

*Whether the learned Justices of the Court of Appeal erred in both fact and law when they held that the sum of US\$ 250,000 shall carry interest at 18% per annum from the date of filing the suit to the date of payment.*

Counsel for the appellant admits that in his plaint, the respondent claimed for interest at the rate of 18% from date of judgment. Similarly, he claimed for interest in his submission in the High Court but in the memorandum of appeal he never prayed for interest.

Appellant's counsel further contended no evidence was lead to support the claim for interest and that in the conferencing notes in the Court of Appeal, the respondent prayed for interest at Court rates from date of filing the suit. Therefore, learned counsel submitted that as no evidence was led to support the claim for interest of 18% or at all, the Justices of Appeal erred when they awarded interest at the rate of 18% p.a. from date of filing the suit.

In reply counsel for respondent supports the decision of Court of Appeal mainly for three reasons—

- ▶ The respondent had claimed for interest in the plaint and the omission to include a prayer for the interest in memorandum of appeal is immaterial.
- ▶ That there was no need to adduce evidence in support of the claim for interest because courts exercise discretion in awarding interest and therefore this Court should not interfere with the decision. He relied on *Twiga Chemical*

**Industries Vs. Viola Bamusedde t/s Tripple B. Enterprises -  
Supreme Court Civil Appeal No. 16 of 2004.**

- ▶ In effect that even if the plaintiff prayed for interest from date of judgment the Court of Appeal was correct in awarding interest from the date of filing the suit.

In rejoinder the appellant's counsel maintained that the respondent was not entitled to any interest or if at all he should get interest at 6% p.a.

There is no doubt that in the plaintiff's prayer for interest at 18% from date of judgment. Interestingly, although the interest claimed was high, at the trial no specific issue was framed about the rate of interest which seems to have been implied in the fourth issue which was about remedies. At the trial, the respondent prayed for "interest for (sic) date of judgment." There is nothing on the record indicating what the appellant or its counsel said about the respondent's prayer for interest at 18% p.a.

In the so called "joint conferencing memorandum," signed by counsel for both sides, the question of rate of interest was not alluded to. But in the respondent's (then appellant) part of the so called "joint conferencing notes" in the Court of Appeal, counsel for the respondent prayed for interest at "Court rates from the date of filing the suit." This was clearly a departure from his pleadings in the High Court although in effect it is a partial consent as to the rate of the interest.

In practice in commercial cases in this country (which this one is), or indeed in some Civil cases where there is evidence, a plaintiff can successfully claim for interest at higher rates and, from either the date of filing the suit or the date when cause of action arose. See section 27(2) of **Civil Procedure Act**, which reads—

*“Where and in so far as a decree is for the payment of money, the Court may, in 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. ”*

Where Court does not specify in a decree the rate of interest, subsection (3) comes into play so that the rate of 6% applies.

However since in the plaint the respondent had claimed for interest from date of judgment I think that any interest to be awarded had to conform to the pleadings which had not been amended. To that extent the Court of Appeal erred in awarding interest to run from date of filing the suit, particularly, since no reasons were given for asking for a higher interest rate. In this case I think that the rate of interest should run from the date when the High Court




dismissed the suit which is the date of judgment. This is because the Court of Appeal has replaced the judgment of the trial judge.

There is nothing on the record (whether by way of evidence or otherwise) showing that in this commercial dispute the respondent who claimed for interest from inception was not entitled to interest whatever the rate. There are a number of Court decisions from this country and elsewhere about rates of interest. See the decisions of this Court in ***Milton Obote Foundation Vs Kenon Trading (Sup. Court Civil Appeal No. 25 of 1995)***; ***Bank of Baroda Vs Kamugino (Sup. Court Civil Appeal No. 10 of 2004)*** and East African Court of Appeal case ***Kimani Vs Attorney General (1969) EA 503***. I had occasion to discuss section 27 of CPA and principles governing award of rate of interest in the case of ***Bank of Baroda***. I reduced the rate of interest from 26% awarded by the Court of Appeal to 10%. In the ***Kimani case*** the East African Court of Appeal confirmed the decision of the trial judge who had awarded the plaintiff interest at the rate of 8% on compensation damages from the date when the plaintiff was dispossessed of his land. To some extent the case of ***SIETCO Vs Noble Builder (U) Ltd- Sup. Court Civil Appeal*** in principle supports the respondent who suffered loss. From his own evidence, he demanded for payment of the debt very many times. His evidence is clear on this. He must be compensated for the unreasonable delay by the appellant to pay the money.

All in all, my inclination is that 18% p.a. rate of interest is too high especially where there is no evidence to justify it. I would allow the fifth issue in part. I would grant the respondent interest at the rate of 10% p.a. from the date of the decision of the High Court which has been replaced by that of the Court of Appeal. That would give justice to the parties.

Subject to my conclusion on ground described as *ISSUE NO. 5*, I would dismiss the appeal with costs to the respondent here and in the two courts below.

Delivered at Kampala this.....25th... day of January, 2011



**JWN Tsekooko**  
**Justice of the Supreme**

**Court.**

**THE REPUBLIC OF UGANDA**

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

**(CORAM: ODOKI CJ, TSEKOOKO, KATUREEBE, OKELLO, AND  
TUMWESIGYE, JJ.SC)**

**CIVIL APPEAL NO 3 OF 2010**

**BETWEEN**

**CAIRO INTERNATIONAL BANK ::::::::::::::: APPELLANT**

**AND**

**SADIQUE M JANJUA ::::::::::::::: RESPONDENT**

*[Appeal from the judgment of the Court of Appeal at Kampala (Mpagi-Bahigeine, Kitumba, and Byamugisha, JJ.A) dated 3<sup>rd</sup> November 2006, in Civil Appeal No 76 of 2003]*


**JUDGMENT OF ODOKI, CJ**

I have had the benefit of reading in draft the judgment prepared by my learned brother, Tsekooko JSC, and I agree with him that this appeal should substantially fail for the reasons he has given.

I concur with the orders he has proposed.

As the other members of the Court also agree, this appeal is dismissed with orders as proposed by the learned Justice of the Supreme Court.

Dated at Kampala this 25<sup>th</sup> ..... day of January



B J Odoki  
CHIEF JUSTICE

THE REPUBLIC OF UGANDA IN THE SUPREME  
COURT OF UGANDA

AT KAMPALA

[CORAM: ODOKI, CJ., TSEKOOKO, KATUREEBE, OKELLO AND TUMWESIGYE, JJSC]

**CIVIL APPEAL NO. 03 OF 2010**

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[Appeal from the judgment of the Court of Appeal at Kampala (Mpigi-Bahigeine, Kitumba and Byamugisha, JJ.A).]

**JUDGMENT OF BART M. KATUREEBE**

I have had the benefit of reading in draft the judgment of my learned brother, Tsekooko, JSC, and I fully concur with it. I have nothing useful to add.

Delivered at Kampala this.....25th.....day of January 2011.

**Bart M. Katureebe**  
**JUSTICE OF THE SUPREME COURT**

THE REPUBLIC OF UGGANDA IN THE SUPREME COURT OF UGANDA AT KAMPALA

(ORAM: \_\_\_\_\_ ODOKI, CJ, TSEKOOKO, KATUREEBE,

OKELLO AND TUMWESIGYE, JJSC).

CIVIL APPEAL NO. 03 OF 2010 B E T W E E N

CAIRO INTERNATIONAL BANK:.....:..... APPELLANT

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{Appeal from the judgment of the Court of Appeal at Kampala (Mpagi-Bahigeine, Kitumba and Byamugisha, JJA) dated 3<sup>d</sup> November 2006, in Civil Appeal No. 76 of 2003}.

JUDGMENT OF OKELLO, JSC:

I have had the privilege to read in draft the judgment of my learned brother Justice Tsekooko, JSC, and I agree with his conclusion that subject to issue No. 5 which he allowed in part, the appeal lacks merit and that it must be dismissed with Costs as he proposed.

Dated at Kampala this .. 25. day of January 2011.

**G. M. OKELLO**

**JUSTICE OF THE SUPREME COURT**