

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
HCT-00-CV-CS-0140-2007

WESTLINK UGANDA LIMITED :::::::::::::::::::::::::::::::PLAINTIFF

VERSUS

MAGEZI CHARLES ::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

JUDGMENT:

The Plaintiff's claim against the Defendant is for a liquidated amount of Shs.19,200,000/= interest thereon and costs of the suit. The suit is based on a loan agreement between the Plaintiff and the Defendant on which the Defendant defaulted.

Summons to file a defence were issued on 13th March, 2007. According to the affidavit of service of one Kikomeko J. Ssozi, a Process Server, he proceeded to the known address of the Defendant at his home in Kyebando with purpose of serving plaint and summons. He did not find anybody at that home and the information he received was that the Defendant had left the area.

From the records, following this failed service the same deponent received summons from court on 31/05/2007 to be served to the Defendant through advertising in New Vision Newspaper and putting a copy on the High Court notice board. He did so and the advertisement appeared in New Vision newspaper of 5th June, 2007 at p.49 thereof. On the strength of that advertisement and the Defendant's failure to file a defence in the matter, judgment in default of defence was entered against him by the Learned Registrar of this court on 11/07/2007. The matter was thereafter before me for formal proof to assess damages.

As to whether there was a contract between the Plaintiff and the Defendant, there is evidence that there was. The loan agreement dated 12/07/2003 is on record as Exhibit P3.

The loan amount was Shs.2,000,000/= repayable within one (1) month at the rate of 20% per month.

From the evidence of PW1 Jackson Mwesigye and PW2 Mwesigye Naome the Defendant failed to pay back the money and hence this suit.

It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, I would cite that of **Kampala City Council vs Nakaye [1972] EA 446.**

It has also time and again been held by the courts in this country that a claim for each particular type of special damage must be pleaded. In **Jivanji vs Sanyo Electrical Co. Ltd [2003] EA 98** at p. 103 the court observed:

“The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pendency.” The observation is extracted from **Ratcliffe vs Evans [1892] QB 542**, an English leading case on pleading and proof of damage. The principle applies to defended as well as undefended suits of the instant nature.

Turning to the instant suit, the Plaintiff’s head prayer is for Shs.19,200,000/=, being the principal sum of Shs.2,000,000/= and interest thereon at 20% to the date of filing the suit (13-03-2007). I have already noted that the fact of the loan advance in the sum of

Shs.2,000,000/= is well documented. In the absence of any evidence that the Defendant settled the whole of it or even part thereof, court is inclined to the view that the Plaintiff is entitled to a refund of that amount.

Having said so, it is clear to me from the records that the loan transaction had a specific period within which to be paid with interest. The parties agreed that for a period of one month the Defendant would pay interest on the loan amount at the rate of 20%. This in practical terms means that one month after the loan transaction the Plaintiff was entitled to a refund to him of the Shs.2,000,000/= with a profit of Shs.400,000/=. In those circumstances, the Plaintiff's claim which includes purported interest beyond the contractual period cannot be accepted as at the end of the contract period of one month the contract elapsed and the Plaintiff was entitled to sue for breach of contract in respect of the loan amount. I stated in **Lincoln Consultsam Ltd vs James Kiwanuka Walakira HCT-00-CC-CS-0414-2006** (un reported), and I don't hesitate to re-state the same position herein that if the Plaintiff wants interest beyond the contractual period, the solution lies in including a penalty clause in the loan agreement for delayed payments. It is otherwise the duty of the Plaintiff to take reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues. He cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a Plaintiff realizes that an interest of his has been injured by a breach of a contract or tort. He is then bound to act as best he may, not only in his own interests but also those of the Defendant.

See: **African Highland Produce Ltd vs Kisorio [2001] 1 EA 1.**

For the reasons stated above, in the absence of any such default clause in the loan agreement that would entitle the Plaintiff to an award of interest for the period between 12/08/2003 to 13/03/2007, court is unable to allow its claim beyond the amount proved herein of Shs.2,400,000/= as special damages. The difference between the claim (Shs.19,200,000/=), that is, Shs.16,800,000/= is therefore disallowed.

As regards interest outside the contract period, this is of course discretionary. The time when the amount claimed is done is normally the date from which interest should be awarded. And this should be the last time when the parties agreed on the total balance due: **J. K. Patel vs Spear Motors Ltd SCCA No. 4 of 1991.**

In the instant case, the presumed date as to when the parties agreed on the total balance due, in the absence of any evidence to the contrary, shall be the date when the contract period ended, that is, 12/08/2003. Given that the Plaintiff was entitled to file a suit at that point, interest shall be awarded to them on the special damages award at the rate of 25% per annum from the date of breach till payment is full.

As regards the Plaintiff's prayer for general damages for breach of contract, I think that the Plaintiff having been put in its proper position through the award to them of interest for the contract period and beyond deserves no more than nominal damages. I can do no better than awarding it nominal damages of Shs.500,000/= (Five hundred thousand only).

As regards the prayer for foreclosure on the property deposited as security, there is evidence that as security for the loan the Defendant pledged with the Plaintiff property comprised in Kyadondo Block 210 Plot 1105 at Kyebando and deposited a title deed for the said property together with a cheque, Exhibit P4. When presented for payment the cheque bounced.

Section 129 of the Registration of Titles Act enjoins an equitable mortgage to register a caveat on the mortgaged property. When the Defendant deposited the certificate of Title with the Plaintiff, the Plaintiff became an equitable mortgagee enjoined to register a caveat on the suit property failing while the equitable mortgage could not be enforced by foreclosure. From the records, a caveat was lodged on the suit property on 14/10/2005 under Instrument No. KLA 282529. However, the Plaintiff has preferred a more elaborate procedure of recovering the loan amount and damages by way of an ordinary suit as opposed to the less cumbersome procedure of seeking foreclosure by way of an originating summons. I do not fault the choice of procedure adopted by the Plaintiff,

more so since the property can be used to realize the decretal and sum (...../.....) costs herein. Accordingly, no order of foreclosure is granted.

The Plaintiff shall have the costs of the suit.

In the result judgment shall be confirmed in favour of the Plaintiff against the Defendant on the following terms:

- i). Special damages: Shs.2,400,000/= (Two million four hundred thousand only).*
- ii). General damages: Shs.500,000/= (Five hundred thousand only).*
- iii). Interest on (i) at the rate of 25% per annum from the date of breach of contract, that is, 12/08/2003 till payment in full; and on the same rate per annum on (ii) from the date of judgment till payment in full.*
- iv). Costs of the suit.*

Orders accordingly.

Dated at Kampala this 22nd day of September, 2008.

Yorokamu Bamwine

JUDGE

22/09/2008