

UGANDA / JUDGMENT

I & M Bank Uganda Limited v Pluto Pharmaceuticals Limited and Others (Civil Suit No. 471 of 2024) [2024] UGCommC 388 (24 September 2024) [2024] UGCommC 388

COURT

Commercial Court of Uganda

BEFORE

Tumusiime Rubagumya, J

CASE / FILE NUMBER

Civil Suit No. 471 of 2024

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**5 THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION) CIVIL SUIT NO.471 OF 2024 I & M BANK UGANDA
LIMITED ::::::::::::::::::::::::::::::::::: PLAINTIFF 10 VERSUS 1. PLUTO
PHARMACEUTICALS LIMITED 2. MIRZA IRSHAD ALI BAIG 3. MUHAMMED ASLAM
ARFATH ::::::::::::::::::::::::::::::::::: DEFENDANTS**

BEFORE: HON. LADY JUSTICE PATIENCE T. E. RUBAGUMYA

15 JUDGMENT

Introduction

The Plaintiff instituted this suit on 23rd April, 2024 jointly and severally against the Defendants seeking recovery of UGX 128,158,278/= (Uganda Shillings One Hundred Twenty-Eight Million One Hundred Fifty-Eight 20 Thousand Two Hundred Seventy-Eight Only), being the outstanding sum due to the Plaintiff on account of the Defendants' breach of the loan terms, general damages, interest at the rate of 21.6% per annum and costs of the suit.

Brief facts

1 25 The facts constituting the Plaintiff's claims are that, on 2nd March, 2022 the 1st Defendant obtained an import invoice finance limit of up to UGX 100,000,000/= (Uganda Shillings One Hundred Million Only) repayable as a bullet repayment at the end of the tenor and an overdraft facility of up to UGX 100,000,000/= (Uganda Shillings One Hundred Million Only)

- 5 repayable on demand. The said facilities were released to the 1st Defendant for a period of 12 months and were to be repaid with interest at the rate of 21.6% per annum. The facilities were secured by a fixed and floating charge over the 1st Defendant's assets, business and undertaking, an upfront cash payment of UGX 40,000,000/=, subsequently monthly cash
- 10 buildup of UGX 20,000,000/= and personal guarantees executed by the 2nd and 3rd Defendants. The 1st Defendant breached its repayment obligations and even refused or failed to comply with the demand notices that were issued. To that end, the Plaintiff called on the personal guarantees executed by the 2nd and 3rd Defendants and still no payments
- 15 were made hence this suit. As of 8th August, 2023, the 1st Defendant owed the Plaintiff UGX 128,158,278/= being the principal sum and the accrued interest.

On 18th June, 2024, this Court issued the summons to file a defence in this suit which were served onto the Defendants on 21st June, 2024 as 20 evidenced by the affidavit of service deposed by Mr. Hyuha Philip Hiisa, an authorized Court Process Server working with M/s Ligomarc Advocates. However, the Defendants did not file a defence as required by law. On 21st August, 2024, an interlocutory judgment was entered and the matter was fixed for formal proof.

25 Representation

The Plaintiff was represented by **Learned Counsel Kwendo Cynthia** of **M/s Ligomarc Advocates**.

Counsel for the Plaintiff submitted orally and her submissions have been considered by the Court.

5 The Plaintiff called one witness, Ms. Peace Kanyonyozi (**PW1**) who proceeded by a witness statement and adduced documentary evidence contained in its trial bundle.

Issues for Determination

- 1. Whether the Defendants breached the terms of the facility agreement 10 entered with the Plaintiff?
- 2. What remedies are available to the parties?

Issue No. 1: Whether the Defendants breached the terms of the facility agreement entered with the Plaintiff?

15 Plaintiff's submissions

Counsel for the Plaintiff submitted that on 2nd March, 2022, the 1st Defendant applied for and was granted two secured loan facilities that is; the import invoice finance limit of UGX 100,000,000/= and an overdraft facility of UGX 100,000,000/=. That according to **PW1's** testimony, the 20 said facilities were to be repaid within twelve (12) months at an interest rate of 21.6% each. That the import invoice finance limit was to be repaid as a bullet installment at the end of the loan term while the overdraft was to be repaid on demand.

Counsel further submitted that the 2nd and 3rd Defendants secured the 25 repayment of the facilities by executing personal guarantee deeds, creating a fixed and floating debenture on the 1st Defendant's assets, paying a cash upfront of UGX 40,000,000/= and a subsequent monthly cash buildup of UGX 20,000,000/=. That the loan facilities were disbursed on 22nd March, 2022 and on 18th May, 2022. That as per PEX 3, the 1st Defendant's 30 statement of accounts, the 1st Defendant continuously breached the loan

5 and owing to that breach, the Plaintiff recalled the loan facilities and a notice of default was issued.

Analysis and Determination

When a Court sets down a suit for formal proof after a default order has been made, the Plaintiff is under the duty to place before the Court 10 evidence to sustain the averments in his or her plaint as was held in the case of **Kirungi and Another Vs Kabiya and Others [1987] KLR 347**. This is premised on the principles of evidence in civil matters that whoever desires any Court to give judgment as to any legal right or liability must prove the existence of the facts which he asserts. (See: **Sections 101, 102**

15 and 103 of the Evidence Act, Cap. 8). The standard of proof is on the balance of probabilities.

It is also trite that once an interlocutory judgment is entered, the issue of liability is settled, and cannot be reopened at the stage of formal proof. (See: **Hajji Asumani Mutekanga Vs Equator Growers (U) Ltd SCCA No.7* 20 *of 1995**).

However, as observed by the **Hon. Justice Stephen Mubiru** in the case of **Peter Jogo Tabu t/a M/s Ayume, Jogo Tabu & Co. Advocates Vs The Registered Trustees of the Church of the Province of Uganda*, *High Court Civil Appeal No.16 of 2017**, to which I agree, that, the case of

25 **Hajji Asumani Mutekanga Vs Equator Growers (U) Ltd (supra)**, did not postulate a rule of general application but one that applied to the facts of that case. He reasoned that in the case of **Hajji Asumani Mutekanga Vs Equator Growers (U) Ltd (supra)**, not only had an interlocutory judgment been entered but also the question of liability had been admitted. The 30 reason it was considered that the interlocutory judgment had settled the

5 question of liability for breach of contract which issue could not be reopened during the formal proof of the question of damages.

Therefore, the case before me requires evidence to be adduced regarding the Plaintiff's claim to secure the remedies sought.

The Black's Law Dictionary, 9th Edition defines a contract to mean an 10 agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.

Section 9(1) of the Contracts Act, Cap. 284 also defines a contract as an agreement made with the free consent of parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally 15 bound. On the other hand, a breach of a contract is

where one or both parties fail to fulfil the obligations imposed by the terms of the contract. (See: *Nakawa Trading Co. Ltd Vs Coffee Marketing Board Civil Suit No.137 of 1991*).

While relying on **Section 91 of the Evidence Act**, **Hon. Lady Justice C. 20 K. Byamugisha** (as she then was) in the case of *William Kasozi Vs DFCU Bank Ltd HCCS No.1326 of 2000*, stated that:

"Once a contract is valid, it creates reciprocal rights and obligations between the parties to it. I think it is the law that when a document containing contractual terms is signed, then in absence of fraud or* 25 *misrepresentation the party signing it, is bound by its terms."*

Therefore, as stated by **Hon. Justice Stephen Mubiru** in the case of *Meridiana Africa Airlines (U) Ltd Vs Avmax Spares (EA) Ltd Civil Suit No.111 of 2017*, a breach of contract is a violation of any agreed-upon terms and conditions of a binding contract, and this includes 30 circumstances where an obligation that is stated in the contract is not

5 completed on time. It is a failure, without legal excuse, to perform any promise that forms all or part of the contract, which includes failure to perform in a manner that meets the standard of the industry.

In the matter at hand, **PW1** testified that the 1st Defendant applied for and obtained two secured loan facilities, that included an import invoice 10 finance limit of UGX 100,000,000/= and a bank overdraft facility of UGX 100,000,000/=, from the Plaintiff. That, the import invoice finance limit facility was to be repaid within a period of twelve (12) months at an interest rate of 21.6% per annum with the principal amount repayable as a bullet instalment at the end of the loan term and the bank overdraft facility was 15 to be repaid within a period of twelve (12) months with an interest at the rate of 21.6% per annum and the principal amount payable on demand. In evidence, **PW1** adduced **PEX 1**, an offer letter dated 2nd March, 2022.

According to **PEX 1**, the 1st Defendant obtained two secured facilities that is; an import invoice finance limit and a bank overdraft of UGX 20 100,000,000/= each. These were disbursed to the 1st Defendant's account number 51644402010119 on 22nd March, 2022 and on 18th May, 2022 as per **PEX 3**, the 1st Defendant's statement of accounts from 1st February, 2022 to 28th August, 2024. **PW1** further testified that however, the 1st Defendant defaulted on paying its monthly loan instalments to which a 25 notice of default (**PEX 6**) dated 26th April, 2023 was issued.

PW1 further testified that the 2nd and 3rd Defendants also executed personal guarantees in favour of the Plaintiff as security for the loan facilities. In proof, **PEX 4** and **PEX 5**, Guarantee Deeds signed by the 2nd and 3rd Defendants respectively, were adduced. According to **PEX 4** and 30 **PEX 5**, the 2nd and 3rd Defendants guaranteed to be liable for any outstanding amount in case of default by the 1st Defendant.

- 5 According to **Section 67 of the Contracts Act**, a contract of guarantee is defined as a contract to perform a promise or to discharge the liability of a third party in case of default of that third party, which may be oral or written.

- **Section 70 of the Contracts Act** also places liability on a guarantor to the extent to which the principal debtor is liable and such liability takes effect upon default by the principal debtor. This was emphasized by the Court of Appeal in the case of **Bank of Uganda Vs Banco Arabe Espanol*, CACA No.23 of 2000* wherein it was stated that:

"*The law relating to the duty of the guarantor or surety to repay a loan* 15 *is that once the principal borrower defaults the guarantor has a duty to repay the loan.*"

In the instant case, the 2nd and 3rd Defendants executed **PEX 4** and **PEX 5** respectively wherein they guaranteed to pay the Plaintiff all sums of money which may become due or owing anywhere from or by the 1st Defendant. To that extent, it was **PW1**'s testimony that upon default by the 1st Defendant, the Plaintiff made a call on the personal guarantee on the 2nd and 3rd Defendants individually. In proof, the Plaintiff adduced **PEX 7** and **PEX 8** both dated 8th August, 2023 addressed to the 2nd and 3rd Defendants respectively. According to **PEX 7** and **PEX 8**, the Plaintiff's lawyers individually informed the 2nd and 3rd Defendants about the 1st Defendant's default and requested them to pay the then outstanding amount of UGX 128,158,278/= however, as testified by **PW1**, the said monies are still unpaid.

In the premises, the Defendants are found to have breached the terms of the facility agreement and accordingly, the Plaintiff is entitled to recover

5 UGX 128,158,278/= (Uganda Shillings One Hundred Twenty-Eight Million One Hundred Fifty-Eight Thousand Two Hundred Seventy-Eight Only), being the outstanding sum on account of the Defendants' breach of the loan terms.

In the premises, Issue No. 1 is resolved in the affirmative.

10 Issue No. 2: What remedies are available to the parties?

According to the plaint, the Plaintiff seeks recovery of UGX 128,158,278/=, general damages, interest at the rate of 21.6% per annum on the decretal sum, general damages and costs of the suit.

a) General damages

15 Counsel for the Plaintiff submitted that general damages are compensatory in nature and arise out of the inconvenience suffered by the Plaintiff. That as was held in the case of **Uganda Commercial Bank Vs Deo Kigozi* [2002] 1 EA 305*, while assessing the quantum of the general damages to be awarded, Court has to consider the extent of the inconvenience suffered and that damages need to place the Plaintiff in a position they would have been, had it not been for the injury suffered.

Counsel then prayed to Court to consider the inconvenience suffered by the Plaintiff in relation to filing the case in Court and the correspondences since there was a point when the parties had agreed on a repayment plan

25 which the Defendants later neglected or failed to comply with.

5 Analysis and Determination

In the case of **Kabandize John Baptist and 21 Others Vs Kampala Capital City Authority CACA No.36 of 2016**, the Court of Appeal held that:

"The general rule regarding the measure of general damages is that, 10 *the award is such a sum of money that will put the party who has been injured or who has suffered as adjudged by Court in the same position as he or she would have been had he or she not sustained the wrong for which he or she is getting the compensation."**

As was held in the case of **Takiya Kashwahiri and Another Vs Kajungu**

- 15 **Denis, CACA No.85 of 2011,** general damages should be compensatory in that they should restore some satisfaction, as far as money can do, to the injured Plaintiff. The Plaintiff should however lead evidence as to what damage he or she suffered at the instance of the Defendant.
- In the matter at hand, Counsel for the Plaintiff submitted that the Court 20 should consider the inconvenience suffered by the Plaintiff in relation to filing the suit and the correspondences since at some point the parties had agreed to a repayment plan that was later abandoned by the Defendants. This Court takes cognizance of the above and in the premises, general damages amounting to UGX 10,000,000/= (Uganda Shillings Ten Million 25 Only) are hereby awarded to the Plaintiff.
- b) Interest

Section 26(2) of the Civil Procedure Act, Cap. 282 is to the effect that the Court has the discretion to award interest. As was held in the case of **Milly Masembe Vs Sugar Corporation (U) Ltd and Another SCCA No.1**

5 **of 2000,** the guiding principle is that interest is awarded at the discretion of the Court. Still, the Court should exercise the discretion judiciously taking into account all the circumstances of the case.

The Plaintiff seeks for interest on the decretal sum as well as interest on the general damages.

10 i) Interest on the decretal sum

The Plaintiff prayed for interest at the rate of 21.6% per annum on the decretal sum. In the case of **Omega Bank PLC Ltd Vs O. B. C Limited [2005] 8 NWLR (pt. 928) 547,** it was held that it is not the function of the Court to make contracts between the parties but rather to construe the 15 surrounding circumstances to effectuate the intention of the parties.

A perusal of **PEX 1** shows that the parties had agreed on the interest rate of 21.6% per annum to be charged on the loan facilities; which is not excessive in my view.

In the premises, this Court awards interest at the rate of 21.6% per annum 20 on the decretal sum from the date of filing this suit until payment in full.

ii) Interest on the general damages

The Plaintiff prayed for interest at a rate of 21.6% per annum on the general damages. In my opinion, it would be very harsh and unconscionable to impose such an interest rate on the general damages.

25 **Section 26(1) of the Civil Procedure Act** provides that where an agreement for the payment of interest is sought to be enforced and the Court is of the opinion that the interest agreed is harsh and

5 unconscionable, the Court may give judgment for the payment of interest at such a rate as the Court may consider just.

In the premises, this Court awards interest at the rate of 6% per annum on the general damages from the date of judgment until payment in full.

c) Costs of the suit

10 **Section 27(2) of the Civil Procedure Act**, provides that costs of any action shall follow the event unless otherwise provided. In the case of *Uganda Development Bank Vs Muganga Construction Co. Ltd [1981] HCB 35,* **Hon. Justice Manyindo** (as he then was) held that:

"A successful party can only be denied costs if it is proved, that but 15 *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."*

Since there is no reason to deprive the Plaintiff of the costs, they are hereby awarded to it. Therefore, the costs of this suit are awarded to the Plaintiff.

- 20 In the circumstances, the following orders are issued:
- 1. It is hereby declared that, the Defendants are jointly and severally liable for breach of the terms of the loan facility agreement between them and the Plaintiff.
- 25 2. The Defendants shall pay to the Plaintiff UGX 128,158,278/= (Uganda Shillings One Hundred Twenty-Eight Million One Hundred Fifty-Eight Thousand Two Hundred Seventy-Eight Only), being the outstanding sum due to the Plaintiff on account of the Defendants' breach of the loan terms. 30
- 3. The Defendants shall pay to the Plaintiff general damages amounting to UGX 10,000,000/= (Uganda Shillings Ten Million Only).
- 10 4. Interest is awarded on the sum in (2) above at the rate of 21.6% per annum from the date of filing this suit until payment in full.

- 5. Interest is awarded on the sum in (3) above at the rate of 6% per 15 annum from the date of judgment until payment in full.
- 6. Costs of the suit are awarded to the Plaintiff.

I so order

Dated, signed and delivered electronically via ECCMIS this **24th** day of **20 September, 2024**.

Patience T. E. Rubagumya **JUDGE** 2524/09/2024 6:45am

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