

UGANDA / JUDGMENT

Musinguzi and Another v Yahya (Miscellaneous Application 10 of 2025) [2025] UGCommC 43 (4 March 2025)

[2025] UGCommC 43

COURT

Commercial Court of Uganda

BEFORE

Stephen Mubiru, J

CASE / FILE NUMBER

Miscellaneous Application 10 of 2025

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IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA COMMERCIAL DIVISION

Reportable Miscellaneous Application No. 0010 of 2025 (Arising from Civil Suit No. 0043 of 2021)

In the matter between

1. **MUSINGUZI YUSUF**
2. **RICHARD KARIISA APPLICANTS**

And**FEHER AHAMED YAHYA RESPONDENT****Heard: 3rd March, 2025.****Delivered: 4th March, 2025.**

Civil Procedure - setting aside a consent judgment on account of unilateral mistake - A mistake is palpable when it is obvious and refers to factual aspects of a consent judgment, such as errors in numbers, incorrect measurements, or misunderstandings of terms of the contract make it voidable- Mistakes arising from personal opinions regarding the quality or value of an item cannot make the consent judgment voidable.

RULING

The background;

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respondent pleaded that by virtue of the contractual rate of interest of US 1,800

per month, the applicants owed him US \\$ 178,400 in accumulated interest. Over a period of five years, he had received good as part payment in lieu of cash, worth US \\$ 29,894 which he offset from the accumulated interest to leave a balance of US \\$ 148,506 outstanding.

- [3] The trial began on 14th September, 2023 whereupon the respondent testified and closed his case. The applicants too led evidence of three witnesses and sought an adjournment to summon the rest of their witnesses. When the matter came up again for hearing on 9th November, 2023 they sought a further adjournment on grounds that they were negotiating with the respondent with a view to coming up with a settlement. On 27th November the parties filed a consent judgment by which the applicants acknowledged being indebted to the respondent in the sum of US \\$ 120,000 which they undertook to pay in five equal instalments of US \\$ 24,000 each by 30th December, 2024. As security for that undertaking, the applicants issued the respondent with post-dated cheques in respect of each of the five instalments. They also undertook to pay the respondents' costs in the sum of US \\$ 7,000. The applicant defaulted and this prompted the respondent on 24th January, 2024 to file an application for execution of the decree. A warrant of arrest was issued culminating in the arrest of the 1st applicant who regained his freedom by making part payment of the debt.

The application;

- [4] The application by Notice of motion filed on 7th January, 2025 is made under the provisions of section 33 of *The Judicature Act*, section 98 of *The Civil Procedure Act*, and Order 52 Rules 1 and 3 of *The Civil Procedure Rules*. The applicant is seeking orders that the consent judgment and/or order executed between the respondent and the applicants in Civil Suit No. 43 of 2022 be set aside for the suit to be determined on its merits, and that the costs be provided for.
- [5] It is the applicants' case that the suit was filed outside the time allowed in law and therefore time barred/ At the time of the respondent's filing of the suit, they had already paid to the respondent a sum of shs. 231,159,668/=. Following the signing of the consent judgment, they paid an additional sum of shs 63,000,000/= inclusive of costs of the respondent's lawyer. The consent judgment was contrary to the prayers contained in the plaint. The applicants were misled and or misadvised by their former lawyer to execute the aforesaid consent to their detriment when they had paid over and above the subject matter and the suit was time barred. The consent judgment and order executed constituted misrepresentation of the monies owed by the applicants. It was illegally and fraudulently executed with the intention of defrauding the applicants. It is therefore fair and equitable that this application is granted.

The respondent's affidavit in reply;

- [6] By his affidavit in reply, the respondent contends that the applicants are now illegally trying to reopen a matter rightly concluded by a Consent Judgement. The allegation that the plaint was for recovery of US \\$ 20,000 is false as the plaint was amended to reflect recovery of US \\$ 148,506. The consent judgment executed is consistent with the prayers made by the respondent in the summary suit and the orders contained therein were duly agreed upon by the parties. The consent judgment reflects the mutual agreement of the parties which was reached after considering all material facts. The applicants willingly entered into the Consent Judgment after negotiations, and they are estopped from making allegations of misrepresentation, which are unsupported by any evidence. The allegation by the applicants of having been misled by their former lawyers is unsubstantiated and has no merit as they both signed the consent after having participated in the negotiation processes as parties to the suit.
- [7] The suit is not barred by limitation as the debt was duly acknowledged and admitted by the applicants. The debt was acknowledged and admitted by the

applicants through the partial payments made as follows; shs. 5,000,000/= on 7th November, 2024; shs. 5,000,000/= on 24th November, 2024; shs. 5,000,000/= on 6th December, 2024 and shs. 5,000,000/= on 17th December, 2024. The applicants have not pleaded or demonstrated any real grounds warranting the setting aside of a valid Consent Judgment, as their claims are based on mere allegations without substantive proof. Granting this application will cause injustice as the applicants are using it as a delay tactic to frustrate the enforcement of a valid consent judgment.

The submissions of Counsel for the applicant;

- [8] Counsel for the applicant submitted the consent is vitiated by mistake. The suit was for recovery of US \\$ 20,000 yet the consent is for the sum of US \\$ 120,000. They are mistaken about the actual debt due. The correct figure should have been less than US \\$ 5,000. The applicants believed they were indebted in the sum of US \\$ 20,000. They were misadvised by their counsel. It arose from the misinterpretation of the agreement. The amount was shs. 61 million payable in one month. The agreement is dated 2nd June, 2015 but the rate of interest was stretched up to the time of the consent. It is an illegal contract. It was interpreted as continuous and at the time he still owed the respondent US \\$ 120,000. They paid two instalments. In December, 2023 they signed the consent based on legal advice. The amount reflects compounded interest over a period of eight years. In December 2024 they got a different legal opinion and hence this application. *Attorney General v. James Mark Kamoga, S. C Civil Appeal No. 8 of 2004* on the binding nature of agreements made in the presence of counsel. Section 14 of *The Contracts Act*, voids a contract when it is contrary to law in force. The consent violated the law of limitation.

- [9] Paragraph 11 of the application relates to illegality, the agreement is dated 2nd June, 2015 and performance was to be within one month. The breach occurred on 2nd July, 2015 and time began to run. The suit was filed on 21st January, 2022

meaning that it was filed six months out of time. *Eldad Otabong v. Attorney General, SC Civil Appeal No. 06 of 1990* where a period of limitation is imposed, it begins to run from the date of the cause of action accrues. Any further proceedings were incompetent and therefore the consent is void. There is no acknowledgement as required by section 22 (4) of *The Limitation Act*. The consent was signed after the suit had been filed and therefore does not qualify as acknowledgement. Illegality overrides all pleadings *Makula International v. Cardinal Nsubuga*. Limitation cannot be waived. Section 22 (4) is subject to section 23 (1) of *The Limitation Act* which requires the acknowledgement to be in writing and signed by the person. The exception must have been pleaded as a disability. The suit is based on specific documents and the Court cannot extend the interpretation.

The submissions of Counsel for the respondent;

- [10] Counsel for the respondent submitted that the applicants have not demonstrated any mistake. The applicants were to pay a monthly interest from 2nd June, 2015 of US \\$ 1,800. They referred to per "month" and it is open ended. The principal was payable in a month and in case of default the interest would continue for the period of default. There were subsequent oral agreements after the default. The WSD narrated the agreement between the parties. Subsequently there was a 2nd December, 2020 part-payment of US \\$ 10,000 and the applicants attached a video of the respondent receiving that part payment as per para 4 (f) of their defence. Items collected are specified from paragraph 7 of the rejoinder. Time did not begin to run until after breach of the extended period. The last extension was in December, 2020. The evidence on record should guide the construction of para 4 (e) of the original plaint as including subsequent amendments, acknowledgements, part payments which were all proof of attempts to recover the money. Interest was agreed by the parties and was also plead by the plaintiff. The application is an afterthought. The 1st applicant was arrested in execution and he undertook to pay in a month. The application should be dismissed.

The decision;

- [11] A Consent Judgment is a judgment of the court in terms which have been contractually entered into by parties to the litigation, validated by Court under O.50 rule 2 and Order 25 Rule 6 of *The Civil Procedure Rules* (see *Brooke Bond Liebeg (T) Ltd v. Mallya [1975] E. A 266*). A consent judgment once recorded or endorsed by the Court, becomes the judgment of the Court and binding upon the parties. It is however unique in that it is not a judgment of the Court delivered after hearing the parties. It is an agreement or contract between the parties. As such it can only be set aside for a reason which would enable the court to set aside or rescind on an agreement.

- [12] Historically, therefore, it was considered that a fresh action was necessary where a party sought to establish that a consent judgment was tainted by fraud or mistake (see **Jonesco v. Beard* [1930] AC 298* and **de Lasala v. de Lasala* [1980] AC 546*). The logic of this approach was that a fresh action would be required as the main proceedings were no longer extant, having been concluded, and could not be revived by an application made within the proceedings. Fresh pleadings would be required setting out the allegation of fraud, mistake or non-disclosure and seeking the set aside of the order by way of relief and the matter would proceed to a trial of the allegations. However, in **Hirani v. Kassam* [1952] EA 131,* followed in **Attorney General and another v. James Mark Kamoga and others*, S. C. Civil Appeal No. 8 of 2004*, it was held, inter alia, that;

Prima facie, any order made in the presence and with the consent of counsel is binding on all the parties to the proceedings or an action, and it cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court....or if the consent was given without sufficient material facts, or in general for a reason which would enable a court to set aside an agreement.... It is a well settled principle therefore that a consent decree has to be upheld unless vitiated by a reason that would enable Court to set aside an agreement such as fraud, Mistake, Misapprehension or Contravention of Court policy. The principle is on the premise that a consent decree is passed on terms of a new contract between the parties to the Consent Judgment.

- [13] Similarly, in **Babigumira John and others v. Hoima Council* [2001 – 2005] HCB* 116, it was held inter alia that a consent order can be set aside if it was given without sufficient material facts or in misapprehension or in ignorance of material facts or in general for a reason which would enable the court to set aside such an agreement. In **Pavement Civil Works Ltd v. Andrew Kirungi*, High Court Misc. Application No. 292 of 2002,* it was held that a consent Judgment and decree cannot be set aside by appeal but rather by a suit, or by an application for a review of the Judgment sought to be set aside. But that the more appropriate mode is by an application for review. The reasons that would enable court to set aside a consent judgment are fraud, mistake, misapprehension or contravention of court policy. In the instant application, the applicants advance a three pronged attack for seeking an order setting aside the consent judgment, in that; they were labouring under misrepresentation, mistake and that the suit was time barred.
- i. Vitiating on account of misrepresentation.
- [14] A misrepresentation is a false statement of fact or law which induces the other party to enter into the agreement. Generally, such statements have to be made before the contract is entered into. The statement must purport to be statement of fact or law, it must have induced the other party to enter the contract and it must have been a false statement. The effect of a misrepresentation is that the contract is voidable. This means the contract remains valid until the party who has suffered the misrepresentation seeks to end the contract. Rescission is a discretionary remedy available the courts, which treats the contract as if it never existed.

- [15] The applicants have not adduced evidence of any fact or law misrepresented to them by the respondent before the consent judgment was signed, on basis of

which they entered into the consent judgment. The applicants have argued that their previous counsel misrepresented to them the law regarding the applicable rate of interest beyond the agreed contractual period of one month. Legal advice given by an advocate is an opinion, not a statement of fact. A statement of opinion is not generally dishonest if the maker of the statement believes it to be true. If the opinion proves to be false it will not support a claim of misrepresentation.

- [16] It is only if the person who makes the statement knows it to be untrue, that it is a statement of fact not opinion (see **Smith v. Land and House Property Corp (1884) LR 28 Ch D 7**). If the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion. In the instant case, since it is they who were involved in the transaction, the applicants knew the facts of the transaction better than their former advocate. If he gave them legal advice at all of the nature they now claim, it has not been demonstrated that he did so dishonestly and that it was based on facts peculiarly within his knowledge. In any event, a person is not liable for the statements of others unless the third party is his/her agent. The respondent cannot be faulted for the misstatements of the applicants' former advocates. This ground therefore fails.

ii. Vitiating on account of mistake.

- [17] A mistake is an error, misunderstanding, misconception, or an erroneous (mistaken, wrong, untrue, incorrect, false) belief. It is an erroneous belief, at contracting, that certain facts are true. An operative mistake is one that is serious enough to prevent the contract from being considered legal. This includes common mistake (where both parties to a contract have made exactly the same mistake relating to the fundamental fact), mutual mistake (where both parties fail to understand each other and are at cross purposes as to the meaning of a contract or both don't understand the meaning or actually what the contract refers to) and unilateral mistake (where only one party to the contract is mistaken and not both parties).
- [18] Unilateral mistake occurs when one party holds an erroneous view in relation to the terms of the contract or as to the identity of the parties, and the other party is aware of the error. It is a mistake or misunderstanding, which results from one party's misinterpretation of the terms of a contract or one party's unintentional provision of erroneous information when forming a contract. If one party misinterprets a definition, term, word, quantity, or the subject matter in a contract, it becomes a unilateral mistake. A mistake of only one party that forms the basis on which he enters into a transaction does not of itself render the transaction voidable. One party must be aware of the mistake and must have taken advantage of the other party's error; one which the other party actually knew about but consciously decided not to draw to the attention of the mistaken party (see **Tamplin v. James (1880) 15 Ch. D. 215 at page 221**). One party must have actual knowledge that the

other party is mistaken, but gone ahead to conclude the contract.

- [19] A mistake is palpable when it is obvious and refers to factual aspects of a contract, such as errors in numbers, incorrect measurements, or misunderstandings of terms of the contract. Since these contract mistakes are easy to detect, the nonmistaken party is usually aware of them and could take unfair advantage of the contract terms. As a result, a contract becomes voidable. However, palpable, unilateral mistakes only make a contract voidable when the mistakes are mechanical errors such as mistakes in calculation or understanding. Mistakes arising from personal opinions regarding the quality or value of an item cannot make the contract voidable. A mistake is impalpable when it is based on a subjective opinion regarding the quality or value of an item.
- [20] Thus to succeed on the ground of unilateral mistake, the applicant needs to demonstrate the following: (i) the applicant mistakenly believed in a term,

definition, word, or provision that a contract did not contain; (ii) the other party was aware of or should have known the mistake, but took no action to bring it to the attention of the mistaken party; and (iii) the other party in not drawing attention to the mistake was taking advantage of it.

- [21] It has not been demonstrated that the respondent was aware of or should have been aware of any mistaken or erroneous view of any term of the consent judgment, held by the applicants, which he took unfair advantage of. The agreed quantum was bargained, based on the parties' respective pleadings and facts peculiarly within their respective knowledge. If there was any unilateral mistake, it was one based on personal knowledge and opinion regarding the outstanding balance. This ground therefore fails.

iii. Vitiating on account of limitation.

- [22] It is trite that statutory provisions imposing periods of limitation within which actions must be instituted seek to serve several aims. In the first place, they protect respondents from being vexed by stale claims relating to long-past incidents about which their records may no longer be in existence and as to which their witnesses, even if they are still available, may well have no accurate recollection. Evidence may largely depend on the recollection of witnesses, which deteriorates over time. It may depend on the preservation of written records which may be lost or destroyed.
- [23] Secondly, the law of limitation is designed to encourage claimants to institute proceedings as soon as it is reasonably possible for them to do so. Thirdly, the law is intended to ensure that a person may with confidence feel that after a given time he or she may regard as finally closed an incident which might have led to a claim against him or her (see **Birkett v. James* [1977] 2 All ER 801*). The legislature must be taken to have sought, and achieved, proper balance between all these competing interests in enacting that, if actions are to be heard at all, they must be

instituted within the various specified periods from the accrual of the cause of action.

- [24] Public interest has always been concerned that litigation should be brought within a reasonable time. This enables cases to be dealt with properly and justly. Moreover, the public interest requires the principle of legal certainty, respondents may have changed their position or conducted their businesses in the belief that a claim would not be made. It is for these and other reasons that limitation statutes have been described as "acts of peace" or "statutes of repose". Public institutions should be free to get on with their businesses without the threat of stale claims being made. Two major purposes underlie statutes of limitation; protecting defendants from having to defend stale claims, and requiring plaintiffs to diligently pursue their claims. Statutes of limitation are designed to protect defendants from plaintiffs who fail to diligently pursue their claims. Once the time period limited by *The Limitation Act* expires, the plaintiff's right of action will be extinguished and becomes unenforceable against a defendant. It will be referred to as having become statute barred.
- [25] Order 7 rule 11 (a) and (d) of *The Civil Procedure Rules*, requires rejection of a plaint where the suit appears from the statement in the plaint to be barred by any law. On the other hand, *Order 7 rule 6 of The Civil Procedure Rules* requires that *where a suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint should show the grounds upon which the exemption from that law is claimed. This requirement was* considered by the Court of Appeal in *Uganda Railways Corporation v. Ekwaru D. O and 5104 others, C. A. Civil Appeal No.185 of 2007 [2008] HCB 61,* where it was held that if a suit is brought after the expiration of the period of limitation, and no grounds of exemption are shown in the plaint, the plaint must be rejected (see also *Murome Sayikwo v. Kuko Yovan and another [1985] HCB 68*). That notwithstanding, the rules of procedure and justice are not synonymous.
- [26] The Court though should be mindful of the fact that rules are a means; justice is an end. Under article 126 (a) of *The Constitution of the Republic of Uganda, 1995* technical rules may be relaxed for the furtherance of justice and to benefit the deserving, in the interests of substantive justice as a means for releasing the liberating and equalising energies latent in the core values of the administration of justice.
- [27] According to section 3 (1) (a) of *The Limitation Act*, suits based on contract should not be brought after the expiration of six years from the date on which the cause of action arose. A cause of action was defined as a bundle of facts which if taken together with the law applicable to them give the plaintiff a right to a relief against the defendant (see *Attorney General v. Major General Tinyefuza, Constitutional Petition No.1 of 1997*). It is alternatively defined as every fact which is material to be proved to enable the plaintiff succeed or every fact which if denied, the plaintiff must prove in order to obtain judgment (see *Cooke v. Gull, LR 8 E. P 116* and *Read v. Brown 22 QBD 31*). The pleadings must disclose that; the plaintiff enjoyed a right known to the law, the right has been violated, and the defendant is liable (see *Auto Garage and others v. Motokov (No.3) [1971] E. A 514*).

- [28] A cause of action arises when a right of the plaintiff is affected by the defendant's act or omissions (see **Elly B. Mugabi v. Nyanza Textile Industries Ltd* [1992-93] HCB 227*). The pleadings therefore must disclose that; the plaintiff enjoyed a right known to the law, the right has been violated, and the defendant is liable. In the case of such claims founded on contract, time for limitation purposes runs from the date of breach (see **Gould v. Johnson* (1702) 2 Salk 422; 91 ER 367* and **Midland Bank Trust Co., Ltd. v. Hett, Stubbs and Kemp (a firm)* [1978] 3 All E. R. 571*). Breach of contract occurs where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract.
- [29] In determining issues of limitation, the Court only looks at the plaint and decides in light of the facts alleged and the prayer in the plaint, the allegations of fact being for the purpose assumed to be true (see **James Semusambwa v. Rebecca Mulira* [1992-93] HCB 177* and **Madhvani International SA v. Attorney General, C. A. Civil Appeal No. 48 of 2004; SC Civil Appeal No. 23 of 2010**). When the plaintiff pleads facts from which reasonable inferences can be made that the suit is not time barred, then the issue of limitation becomes a triable issue which should be tried and determined after hearing the evidence on the matter (see **Murome Sayikwo v. Kuko Yovan and another* [1985] H. C. B 68*).
- [30] In paragraph 4 (a) and (e) of the plaint, the respondent pleaded the fact of the applicants' borrowing that occurred on 2nd June, 2015 in the sum of US \\$ 20,000 and that "the plaintiff made various efforts to recover the above monies but the defendants refused/ ignored to pay the same and to date the same is not paid." The respondent could have particularised the "various efforts to recover" as having included the payment in kind and the part payments received, the last of which was on 2nd December, 2020 but did not. The law regarding the construction of pleadings has been undergoing changes in a bid to do substantial justice rather than uphold mere technicalities.
- [31] The Court is required to read the pleading as generously as possible. All material facts at this stage are to be taken as proven. This means that if a fact has been pleaded, the court is not supposed to engage in a fact-finding mission or to prove or disprove any fact. Courts should only strike claims in the clearest of cases. Generally, courts should allow parties to draft their pleadings in whatever manner they see fit, as long as the rules of pleading are not drastically overstepped, and the rights of the other party are not severely prejudiced. Hence when an issue of claim or defence, though not pleaded, is established by the evidence on record, which has not been objected to, the court would uphold the same. In this case, a generous and liberal interpretation of the plaint is appropriate because the applicants conducted the trial with the evident understanding of the claim, were not misled, and no unfairness resulted from the respondent's general pleadings.
- [32] In the same vein it is said that the court would give effect to the legal consequences following from the pleaded facts and not be held back by the formulation of the pleadings (see **In re Vandervell's Trust (No.2)* [1974] 3 WLR 256* and **Belmont Finance Corporation Ltd v. Williams Furniture Ltd* [1979] 1 All ER 118*). By virtue of article 126 (2) (e) of **The*

Constitution of the Republic of Uganda, 1995*) which enjoins courts to administer substantive justice without undue regard to technicalities, it is not desirable to place undue emphasis on form rather than the substance of the pleadings. Courts are not expected to construe pleadings with such meticulous care or in such a hyper-technical manner so as to result in genuine claims being defeated on trivial grounds. Courts have always been liberal and generous in interpreting pleadings. I thus find that the respondent pleaded facts from which reasonable inferences can be made that the suit is not time barred, rendering the issue of limitation to be a triable one determinable on evidence.

- [33] In any event, in paragraphs 4 (h) of the applicants' written statement of defence, the applicant pleaded that the respondent had over a period of five years recovered a sum of shs. 231,159,668/= and an instalment of US \\$ 10,000 on 2nd December, 2020. The suit was filed on 21st January, 2022. While the applicants contend that time for filing the suit ran out on 2nd July, 2021 being six years after the date of breach of the contract, the respondent contends that by virtue of the installment paid on 2nd December, 2020 the breach of 2nd July, 2021 was waived and that part payment constituted a fresh accrual of the cause of action.
- [34] According to section 22 (4) of *The Limitation Act*, except for payment of a part of the rent or interest due, where any right of action has accrued to recover any debt and the person liable or accountable therefor acknowledges the claim or makes any payment in respect of the claim, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment (see also

Tabitha Lalango Lutara v. Attorney General, C. A. Civil Appeal No. 26 of 2011 and *Finance Bank Zambia Limited v. African VSAT Systems Limited, CAZ Appeal No. 062/2022) [2023] ZMCA 389*). Therefore, if a debtor makes a payment toward the debt, then the cause of action accrues as at that date, essentially restarting the six (6) year countdown. In *Busch v. Stevens [1963] 1 QB 1*, the Court described this as "a notional birthday and on that day, like the phoenix of fable, it rises again in renewed youth, and also like the phoenix, it is still itself." Like the phoenix, the limitation period can be re-started at any time, even if the original limitation period has already expired. In the instant case, the applicant's part payment of 2nd December, 2020 restarted the six-year period such that the suit filed on 21st January, 2022 was not time barred. This ground too fails.

- [35] A consent judgment cannot be set aside on account of one of the parties having a change of heart. It can only be done if there are mistakes as to fact or law, fraud committed by the other party, or any mistake made at the time when the Consent Judgment was entered.

Final Orders;

[36] The applicants have not proved any of the grounds on which they sought to have the consent judgment set aside. It is in the interest of justice that the Consent Judgment be maintained and upheld by this Court in order to bring finality and closure to litigation between the parties. Consequently, the application is dismissed with costs to the respondent.

Delivered electronically this 4th day of March, 2025 ...Stephen Mubiru.....

Stephen Mubiru Judge, 4th March, 2025

Appearances;

For the applicant : M/s Byamugisha Gabriel & Co. Advocates, For the respondents: M/s Omongole & Co. Advocates.

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