**THE REPUBLIC OF UGANDA**

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

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**CORAM: HON. JUSTICE S.G. ENGWAU, JA**
**HON. JUSITCE A. TWINOMUJUNI, JA**
**HON. JUSTICE S.B.K. KAVUMA, JA**

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**CIVIL APPEAL NO.80 OF 2009**

15 **NATIONAL FOREST AUTHORITY……..…………APPELLANT**

**V E R S U S**

**BEACHSIDE DEVELOPMENT**
20 **SERVICES LTD…………………………………..…RESPONDENT**

**(Appeal from the Judgment of the High Court of Uganda**
**at Kampala (Murangira, J)**
25 **dated 16th September 2009 in HCCS No. 3 of 2009)**

**JUDGMENT OF TWINOMUJUNI, JA:**

30 This is an appeal from the judgment of the High Court of Uganda in which the respondent was awarded damages of US$1,612,171 with interest at court rate from the date of judgment till payment in full and the costs of the suit. The background of the suit as can be ascertained from the judgment of the learned trial judge dated 16$^{th}$ September 2009 is as follows:-

**"The plaintiffs claim against the defendant is for general damages for breach of contract and loss of prospective business and profits, interest and costs of the suit. That by letters dated 26th September, 2005 and 19th January, 2006. Charles Twagira offered to rehabilitate and develop 209 hectares of Kyewagga Forest reserve in Entebbe, Wakiso District as an ecology and ecotourism facility. That the defendant accepted the application by Charles Twagira on condition that:-**

**(a) The plaintiff is incorporated to carry out the proposed project.**
**(b) The company undertakes an Environment Impact assessment for the project.**
**(c) The company pays licence fees.**

**That the plaintiff thereafter took over the negotiations with the defendant, carried out the required Environment Impact Assessment (EIA) and obtained a certificated of approval of the project from the National Environment Management Authority (NEMA). That the defendant accepted the plaintiff's feasibility study and Environment Impact Assessment report, recalculated the plaintiff's income projections and fixed annual licence fees based on the defendant's income projections for the envisage licence period of 25 years and allowed the plaintiff to take possession of the subject reserve on 8th June 2006 pending preparation of the licence a draft copy whereof was given to the plaintiff by the defendant.**

**That the plaintiff took possession and started carrying developments as authorized by the defendant until 8th June, 2006 when a different set of persons claimed licenses over the same area of the forest reserve and commenced criminal prosecution against the officers of the plaintiff.**

**That the plaintiff had at the commencement of the development entered an agreement with M/s BCR Construction Ltd to carry out developments and made payment thereof.**

**That inspite of repeated demands by the plaintiff, the defendant who was always aware that the plaintiff was putting up the facility in time for the CHOGM meeting and had fulfilled most of the legal requirements for the licence has in breach of contract refused and/or neglected to issue to the plaintiff the agreed licence.**

**That the defendant's said refusal or neglect to issue the licence to the plaintiff thereby occasioned loss and damage to the plaintiff of the entire project including all money for general and special expended on the project and prospective business and profits and reduced it impossible for the plaintiff to utilize the conditional licences provided by NEMA and the Fisheries Department and has caused the plaintiff prospective financiers to decline funding the project thereby dealing a fatal blow to the plaintiff. The defendant filed a Written Statement of Defence in time. And the plaintiff filed in court a reply to the Written Statement of Defence and a rejoinder to the plaint.**

**After the closure of the pleadings in the suit, the court set down the suit for scheduling conference. On 21st April 2009, the parties filed in court a joint scheduling memorandum of the agreed facts and issues. On 5th June 2009 when the suit came up for hearing, Counsel for the plaintiff, Mr. Barata Enock, and that of the defendant Ms Molly Kyepaaka Karuhanga entered a consent settlement and on 12th June, 2009, this court pronounced the judgment in open court as agreed by both parties. Most of the plaintiff's concerns in the plaint were settled by the consent judgment, a part from the issue of damages." (sic)**

I deem it necessary to reproduce the consent judgment which was agreed to by the parties on 12th June 2009.

**"JUDGMENT BY HON. MR. JUSTICE JOSEPH MURANGIRA**

**The parties, on 21st April 2009, filed in court joint scheduling memorandum of agreed facts and issues. The agreed facts are:**

**1. On 26th September, 2005 the plaintiff applied to the defendant through its Director, Mr. Charles Twagire for a 50 year Management licence of the 209 hectares of Kyewaga Forest Reserve in Entebbe in Wakiso District and to develop the same as an ecology and ecotourism facility under the name white sands Eco-lodge.**

**2. Various meetings were held between the said plaintiff's Director and officers of the Department, including among others Mr. Andura, Mr. Langoya, Mr. Nsita and Mr. Kamugisha.**

**3. The plaintiff was required to submit a project feasibility study/project plant, to carry out an Environmental Impact Assessment study of the proposed project, to carry out a topographic re-survey of the whole forest reserve, and to obtain a certificate of approval of the Environmental impact Assessment.**

**4. The plaintiff performed all the condition.**

**5. The defendant then used the plaintiff's feasibility study to assess the viability of the project and developed its own projection of the plaintiff minimum expected income upon which a licence fee was computed.**

**6. The defendant then used the said projected income to determine a licence fee which was attached to the proposed licence agreement as schedule to the licence.**

**7. By the plaintiff's own calculations submitted to the defendant, the plaintiff was projected to make profits of U$87, 188,093 over 25 years period. The defendant on the other hand through their own conservative estimates projected the plaintiff's profits at US$8,559,250 over the same 25 year period.**

**8. The plaintiff thereafter paid the sum of US$6,000 as annual licence fee.**

**9. The plaintiff thereafter commenced work with a view to being ready for trade at the beginning of 2007.**

**10. A tree farming licence performance audit was carried out by the defendant on 20th and 21st June, 2006 targeting licences in land proposed for allocation to white sand Eco-lodge. The said Audit was**

**conducted by seven of the defendant's officers who were on the visit day accompanied by the defendant's Executive Director, Mr. Olar.**

**11. The defendant's audit team made findings took photographs (which are in defendant's possession) and made conclusions as to what actions were to be taken by it to facilitate the plaintiff's licence free of squatters.**

**12. At the time of the performance audit, the defendant's team found that the plaintiff had completed restoration of the degraded area, landscaping of the project site and had completed construction of 10 charlets while the administration building and 40 charlets were still under construction. These developments were evidence by photographs taken by the defendant's audit team.**

**On 5th June 2009, when the suit came up for hearing counsel for the plaintiff Mr. Barata Enock and counsel for the defendant Ms. Molly Kyepaaka Karuhanga were in agreement and agreed to have the matter settled as herebelow.**

1. **The defendant agrees to issue a licence in Kyewagga Central Forest reserved for the land measuring 2.6. hectares, in accordance to National Forestry Authority Eco-tourism guidelines, with access to Lake Victoria Shoreline within two (2) months form today.**
2. **The defendant to handle over vacant possession of the said land to the plaintiff as soon as the license is issued.**
3. **The damages be awarded to the plaintiff and be assessed by this court.**
4. **The plaintiff drops its claims of prospective profits, loss of business which was at US$8,559,250.**
5. **That each party will bear its own costs.**

**Accordingly, judgment is entered in the terms and orders as agreed upon by the parties' hereinabove mentioned.**

**Dated at Nakawa this 12th day of June, 2009.**

**Signed Murangira Joseph**

**Judge." (sic)**

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Thereafter the suit was set down for hearing on the question of damages only. The respondent adduced the evidence of PW1 Charles Harry Twagira who is one of the four Directors of the respondent Company. The appellant did not adduce any evidence. After the parties fully presented their submissions, the learned trial judge 10 delivered his judgment in which he assessed the damages at US$1,612,171 with interest and costs of the suit as aforesaid at the beginning of this judgment, hence this appeal. The Memorandum of Appeal contains six grounds of appeal as follows:-

1) **The learned trial judge erred in law and fact when he awarded $1,020,186 15 as damages for loss of user for three years yet the respondent had dropped claims for prospective profits and loss of business at the scheduling conference.**
2) **The learned trial judge erred in law and fact when he awarded excessive damages of $1,020,186.**
3) 20 **The learned trial judge erred in law and fact when he awarded special damages which had not been strictly pleaded and proved.**
4) **The learned trial judge erred in law and fact when he relied on documents which had not been exhibited.**
5) **The learned trial judge erred in law and fact when he shifted the burden 25 of proof to the appellant.**
6) **The learned trial judge erred in law and fact when he awarded the respondent costs yet parties had agreed at the scheduling conference that each party would bear its own costs.**

30 At the trial of the appeal, the appellant was represented by Mr. David Nambale assisted by Mr. Richard Adubango. The respondent was represented by Dr. Akampumuza James assisted by Mr. Enock Balata. The parties had already filed written submissions and their counsel applied that the court disposes of the petition on

the basis of those written submissions which request the court granted. I now proceed to consider the appeal on its merits.

5 GROUND ONE

**The learned trial judge erred in law and fact when he awarded US$1,020,186 as damages for loss of user for three years yet the respondent had dropped claims for prospective profits and loss of business at the scheduling conference.**

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Counsel for the parties filed written submissions. We have carefully perused the arguments raised on both sides on this issue. I wish to state from the outset that I disapprove the unfortunate conduct of counsel for the appellant both here and in the High Court where they tried to mislead the court by misinterpreting the consent
15 judgment which was signed by the trial judge on 12th June 2009. They tried to argue that the issue before the court was not the quantum of damages payable to the respondent but whether the respondent was entitled to any damages at all. I have read the consent judgment as a whole and I agree with the learned trial judge that it was agreed by both parties that the respondent was entitled to damages and that the High
20 Court should assess and award the damages payable. It was also agreed that the claim for prospective profits and loss of business be dropped. It follows therefore, that this first ground of appeal is misconceived. The trial judge did not award any damages for prospective profits or business. That claim was dropped as had been agreed. He only assessed and awarded damages suffered from the time the parties signed a contract to
25 the time when the consent settlement was reached. That covered a period of three years before the date of the consent settlement. The trial judge awarded US$1,020,186. That award is not in any way for prospective profits or loss of future business.

30 The appellant should note that there is a difference between damages suffered before the parties reached the consent settlement and the damages (prospective) that would arise from loss of projected profits and loss of business. The trial judge awarded the former. The latter was dropped from consideration by the terms of the consent

agreement and the trial court did not make any such an award. This ground of appeal must fail.

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GROUNDS 2, 3, 4 AND 5

I find it convenient to handle these four grounds of appeal together as they all relate to the manner the trial court arrived at the award of damages.

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In this ground of appeal, the appellant complains:-

- That the judge awarded special damages which were not pleaded and were not strictly proved.
- That the award was excessive.
- That court relied on documents which were not exhibited.

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The law as to how parties to a suit should proceed after reaching a consent settlement is well settled. It was considered in the case of **Peter Mulira vs Mitchell Cotts Civil Appeal No.15 of 2002 (CA).** The court stated:-

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***"When a party says that he has disagreed and later says that he has now agreed, the judge takes the latter view that there is a change of mind and the party has agree" [*****Per Kitumba, J.A as the Honorable JSC then was]….**

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***"In my view that agreement superseded the pleadings and whatever evidence has been tendered in court in this suit. Even the procedural issues regarding the manner the suit had been instituted were also suspended by the agreement. Therefore the whole suit was settled by agreement save for costs. This court cannot interfere with such a consent judgment. It has no power to do so. This is the principle enunciated in Hasanli v City Motors Accessories Ltd & Others (1972) EA 423:. [Per Okello, JA as he then was].***

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In the instant case, the parties agreed that **'damages be awarded to the plaintiff and be assessed by the court".** This agreement superseded all previous pleadings on the

matter of damages. The damages would be assessed not on the basis of pleadings but on the basis of evidence adduced before the trial court. Therefore, it is no longer relevant whether the damages were specifically pleaded or not. However, they had to be proved to the satisfaction of the court. It should also be noted that what was awarded was not special damages. In fact the trial judge was specific about his mandate derived from the consent agreement. He stated:-

> **"…but it should be understood that in this case, special damages are not in issue as counsel for the defendant is trying to portray to court…. The claim of the plaintiff as agreed by the parties is the assessment of damages and not special damages."**

Therefore, the complaint that the trial judge awarded special damages which were not pleaded or strictly proved does not arise. Only damages were awarded and it remains to see whether they were proved on a balance of probabilities.

I have observed that the respondent gave both oral and documentary evidence to prove the damages he had suffered. The evidence was indeed not challenged. The documents relied on were tendered in court and I am at a loss to understand what counsel for the appellant means when he claims that the documents were not exhibited or which documents were not exhibited. In my view, after a careful evaluation of all the evidence that was adduced before the court, I find that the respondent adduced cogent evidence to justify the award of US$1,612,171. The evidence was not challenged and the appellant did not adduce any evidence to challenge the accuracy of the evidence that supported the claim.

The appellant did not argue his original claim that the trial judge had shifted the burden of proof. I am unable to make any meaningful finding on the matter. I consider that the appellant dropped the assertion. I find that the complaints raised in grounds 2, 3, 4 and 5 of this appeal have no merit and they should fail.

GROUND SIX

**The learned trial judge erred in law when he awarded the respondent costs yet parties had agreed at the scheduling conference that each party would bear its own costs.**

It is a fact that by the consent agreement reached at the scheduling conference, the parties agreed that each party would bear its own costs. In interpreting that consent agreement, the learned trial judge said:-

> "**In this instant suit, the whole suit was settled by consent judgment save for the damages, costs and interest on the same.**"

In his understanding of the consent, and in my understanding of the same, the costs referred to must have been those incurred before the consent date. This cannot be stretched to include all costs incurred during subsequent court proceedings to assess the correct damages due. Therefore, in my view, this ground of appeal has no basis. The trial judge only awarded costs incurred after the date of the consent agreement. This ground also fails.

In the process of evaluating the evidence, as is our duty under Rule 30 Court of Appeal Rules, we found that this was a typical commercial transaction. We noted that though the respondent had claimed 25% rate of interest, the court awarded the court rate which is 6%. The learned trial judge did not give reasons why he felt that a commercial rate was not awardable. In our view, this was a commercial transaction and the court should have awarded a commercial rate of interest. Though we consider that 25% is on the high side, an award of 6% is unproportionally too low in the circumstances. We set aside the award of court rate and substitute an award of 20% from the date of judgment in the High Court till payment in full.

In the result, I find that this appeal as a whole has no merits and should be dismissed with costs here and in the High Court to the respondent.

Since Hon. Justice Kavuma, JA agrees, this appeal is accordingly dismissed with costs to the respondent.

Dated at Kampala this…**12th** ...day of…**October**……2010.

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Hon. Justice Amos Twinomujuni

**JUSTICE OF APPEAL.**

10 **JUDGMENT OF S.B.K.KAVUMA, JA**

I have read, in draft, the judgment prepared by A.Twinomujuni, JA. I totally agree with it and the orders made therein.

15 Dated at Kampala on this …**12th** ...day of …..**October**…2010

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S.B.K.KAVUMA

Justice of Appeal

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