THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[*Coram: Aweri Opio, Buteera, & Egonda-Ntende, JJA*]

Civil Appeal No. 93 of 2010

[Arising from HCCS No. 398 of 2002 & HCCS No. 336 of 2006 (Commercial Division)]

BETWEEN

1. Christopher Kisembo

2. Provia Kisembo

T/A Ishaka General Hardware==========Appellants

AND

The Cooperative Bank Ltd in Liquidation==========Respondent

[Appeal from the Judgment of the High Court of Uganda (Commercial Division) Kiryabwire, J., (as he then was) delivered on 26 August 2009 in HCCS No.398 of 2002.]

JUDGMENT OF THE COURT

Introduction

1. The appellants were the defendants in the High Court of Uganda where they were sued by the respondent, under summary procedure, for the recovery of Shs.149,263,069.00 with interest at the rate of 21% per cent per annum from the 26 July 2001 until payment in full and costs of the suit. It was contended for the respondent that this was the outstanding sum of money on the appellants' consolidated account with the respondent which up to the time of the filing of the suit the appellant had failed to pay.

2. The appellants, applied for leave to appear and defend, in Misc App No.520 of 2002. In the supporting affidavit to that application, sworn by the first appellant, he stated,

'2. That I am not indebted to the Respondent/ Plaintiff in the sum of Shs.149,263,069.00 as alleged in the plaint.

3. That at the time the Respondent/ Applicant closed its banking branch of Ishaka Town where the cause of action arose, I was indebted to it to the tune of Ug.Shs.82,006,859 only. See Annexure A and B.'

3. Leave to appear and defend was granted.

4. In their written statement of defence the appellants denied they owed the respondent any sums of money as they had fully paid all outstanding sums of money well before the suit was brought. In the alternative the appellants contended that at the time of the closure of the respondent bank, the appellants' indebtedness to the respondent was not in the sums of money claimed in the plaint but the records show that the overdraft balance was Shs.23,150,167/= by the 30th September 1998, and this was substantially reduced by the date of the closure of the bank on 19th May 1999.

5. In another suit, High Court civil suit No.336 of 2006, which was consolidated with this one the appellants had claimed that the respondent had wrongfully withheld its various certificates of title it had provided to secure the overdraft and loan facilities from the respondent and demanded their return with damages. The respondent responded that they had a lien over the same until all outstanding sums of money had been paid by the appellants which they had not paid.

6. The learned trial judge after hearing the parties gave judgment for the respondent, finding that the appellants were indebted to the respondent in the sums claimed together with interest at 8% per annum from 26th July 2001 until payment in full. The learned trial judge also found that the respondent had a lien over the certificates of title that had been deposited with them by the appellants until all outstanding sums of money due to them had been paid. The learned trial judge ordered the appellants to pay costs of the proceedings.

7. The appellants, dissatisfied with the decision of the High Court, appealed to this court, and set forth the following grounds of appeal:

'1. The learned trial judge erred in law and fact when he ruled that the Appellants were indebted to the respondent.

2. The Learned Trial Judge erred in law and fact when he ordered the Appellants to pay Shs.149,000,000.00 (one hundred and forty nine million shillings) plus 8% interest to the Respondent YET THE APPELLANTS ARE NOT INDEBTED TO THE RESPONDENT TO THAT TUNE.

3. The Learned Trial Judge erred in law and fact when he consolidated Civil Suit No. 336 of 2006 together with Civil Suit No. 398 of 2002 and did not rule on the merits in the consolidated Civil Suit No.336 of 2006.'

8. The appellants seek that this appeal be allowed with costs, judgment of the trial court set aside; the respondent ordered to release the appellants' certificates of title in their possession and that Civil Suit No. 336 of 2006 be separately heard and determined on its own merits.

Duty of first Appellate Court

9. It is the duty of a first appellate court to subject the case below to a re evaluation of the evidence adduced in the case so as to reach its own conclusions. See Fredrick J K Zaabwe v Orient Bank Ltd and others SC Civil Appeal No. 4 of 2006 [unreported].This is in line with Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions, hereinafter referred to as the Rules of this Court. It provides,

'1. On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may--

(a) reappraise the evidence and draw inferences of fact; and '

The Case for the Respondent in the Court below

10. The respondent called one witness Mr Ssekabira, the Bank of Uganda coordinator for liquidation of the Cooperative Bank. He testified that the appellants operated 3 accounts with the Cooperative Bank. These accounts were at Ishaka Branch of the bank. There were 2 overdraft accounts and one loan account. The first 2 accounts were in the joint names of the appellants. And the third account was in the names of the first appellant only. At the time the bank was closed on 19 May 1999, all the said accounts had a total outstanding sum of Shs101,456,303.00. As

of February 2008 the total outstanding amount inclusive of interest and other charges was Shs.261,847,490. This money is still due and owing as it has never been paid by the appellants.

11. The witness stated that the bank held securities and had only so far sold one, land comprised in Block 39 Plot No. 1224 at Ishaka, Ankole. The sale realised Shs.22.2 million of which the net sum credited to the appellants' account was Shs.19,888,570.00 only.

12. With regard to annexure 'B' to the defence which was an audit report he testified that this document was not produced by the Bank. It was produced by Auditors, Ernest and Young. And it was not correct. He produced the statement of account between the appellants and the bank which reflected the correct state of affairs with regard to the appellants' accounts with the bank.

The Case for the Appellants in the Court below

13. The appellants called only one witness, the first appellant, Christopher Kisembo. He testified that he was a customer of the respondent bank and was running an overdraft facility. He would be granted an overdraft facility for 12 months. He would pay off the facility and then apply for a new one the following year. The last facility he had ended on the 31 March 1999 and he had applied for a new one. He had already paid off the outstanding facility. He was not indebted to the Bank at all. He had a loan account with the Bank but he had paid it off too.

14. The Bank then offered him a new facility as shown in exhibit P4. He was planning on going to consult with the Headquarters of the Bank about this facility when the bank was closed on 19 May 1999 before he accepted the facility. He did not get the money offered in exhibit P4.

15. The witness was shocked when one day court brokers came to his home and claimed that they were selling it off as he was indebted to the Bank. All his securities are still with the bank in spite of the fact that he was not indebted to the bank.

16. In cross examination the witness was referred to 2 affidavits that he had sworn and were filed in different applications before the High Court where he had admitted to owing the Bank Shs.82 million and Shs. 78 million respectively. He denied knowledge of the affidavit of 3 August

2002 stating that he never presented it to court. He admitted swearing the affidavit of 27 August 2004 in which he admitted owing the bank Shs.78 million. Nevertheless he denied that he owed the bank any money.

17. He admitted further in cross examination that he had written to Adriko and Karugaba Advocates a letter dated 22nd August 2002 in which he admitted that he owned money to the Bank and promised to make some payment without fail. Nevertheless he still denied that he owed the respondent any money.

Judgment of the Trial Court

18. The learned trial judge reviewed extensively the evidence adduced in the case. The learned trial judge found the evidence of the appellant no.1 inconsistent and not credible. He accepted the evidence of the respondent that the appellants were indeed indebted to the respondent in the sum claimed. He entered judgment for the respondent as aforesaid.

19. With regard to the claim for the return of the titles the learned trial judge found that the respondent had a lien over the same until all outstanding sums of money had been paid. He refused to order their release.

The case for the Appellants in this Court

Grounds 1 and 2 can be taken together as there are almost to the same effect. It is contended for the Appellants that the appellants are not indebted to the respondent in the sums adjudged. Mr Abaine, learned counsel for the appellants submitted that at the time the bank was closed the appellants had paid off the previous overdrafts and had no outstanding amounts as against them. The respondent had offered them new facilities which the appellants had not yet accepted by the time respondent was closed. In the result the appellants were not indebted to the respondent at all.

20. Mr Abaine further attacked the learned trial judge for accepting the statement of account tendered in by the PW1, the liquidator of the respondent. He claimed that this should have been tendered in evidence by the bank official but none was called to testify. With regard to the affidavit in which the appellant no.1 had admitted to owing money to the respondent he said these do not amount to admissions of liability in light of the fact that the appellants denied owing any money in their written

statement of defence. Secondly on this point the affidavit was made under pressure as the appellant's properties had been attached. The affidavit did not prove that the appellants were indebted to the respondent, especially after the respondent failed to adduce sufficient evidence to show indebtedness as claimed. PW1 was incompetent to prove indebtedness of the appellants to the respondent.

21. With regard to ground no.3 of the memorandum of appeal Mr Abaine submitted that 2 suits had been consolidated. However, the learned trial judge had failed to resolve the issues raised in the second suit with regard to the detention of the appellants' titles by the respondent. This occasioned a miscarriage of justice. He prayed that the appeal be allowed and that this court finds that there was no indebtedness by the appellants to the respondent. He prayed that this court should order the release of the appellants' titles in the possession of the respondent.

The Case for the Respondent in this court

22. Mr Adriko, learned counsel for the respondent, submitted that this appeal had no merit. Mr Adriko submitted that the case for the respondent lay in the exhibits submitted by the respondent, exhibits P1 to P5 as well as ID2, 3, and P6. The crux of the case is the bank statement exhibit P1 which details the appellants' indebtedness to the respondent. At the time of the closure of the bank the outstanding sums on all the 3 accounts held by the appellants was Shs.101, 456,303/=. In the appellants' application supporting affidavit for leave to appear and defend, the appellant no.1 admitted to owing at least Shs.82,006,859.00 to the respondent.

23. There was exhibit P3 dated 20 January 1999 in which the appellants requested the respondent to allow the appellants reduce interest on the outstanding amount and at the same time combine both overdraft accounts to allow the appellants step up his business. In exhibit P6 the appellants stated that they shall settle part of their indebtedness before the 16 October 2002. The appellants were therefore aware all along that they owed money to the respondent. The learned trial judge was right to conclude that the appellant no.1 was not truthful in his testimony.

24. With regard to ground no.3 Mr Adriko submitted that the learned trial judge had found that the appellants were indebted to the respondent and that the securities that the appellants had deposited with the respondent

was rightly held by the respondent as it had a lien over the same until liquidation of the indebtedness of the appellants. He therefore submitted that this ground of appeal had no merit and the appeal ought to be dismissed with costs.

Analysis

Grounds No.1 and 2

25. The case for the appellants is based mainly on oral evidence if not entirely on oral evidence given by the appellant no. 1 at the trial in the court below. While the case for the respondent is substantially based on contemporaneous records made during the relevant period in the relationship between the parties here to. We take the words of Leggat J, in the case of Gestmin SGPS S.A. v Credit Suise (UK) Limited and Anor [2013] EWHC 3560 as particularly instructive as to how a court should evaluate evidence especially in commercial matters. He stated,

> '**Evidence based on recollection**
> 15**.**An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.
>
> 16.While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.
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> 17. Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is

true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).

18. Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

19.The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after

the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.

21.It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.

22. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of

> what the witness recalls of particular conversations and events. **Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.** It is in this way that I have approached the evidence in the present case. [Emphasis is ours.]

26. We propose to review the case before us taking a similar approach to that enunciated by Leggat, J., above. Namely that we shall prefer the evidence of contemporary records rather than oral testimony in ascertaining the facts in dispute covering the relevant period and issues in this case.

27. On a fresh review of the evidence on record it was the case for the respondent, in light of the testimony of PW1, and the documentary evidence adduced in the case that the appellants were indebted to the respondent in the sums claimed. The appellants had 2 overdraft facilities as well as a loan account which combined, led to the sum claimed with interest. Exhibit P1 was produced which was a statement of account that the respondent maintained for the appellants' accounts with it. It detailed all transactions as they occurred at the time. It reflected that all three accounts were combined and there was an outstanding balance of Shs.101, 456,303.00 as of the 31May 1999, just after the closure of the respondent bank. In addition to exhibit P1, exhibits P2 to P6 were produced to support the case for the respondent that the appellants owed the respondent the money claimed in this suit.

28. The appellant no.1 had contended that he had paid all outstanding sums of money. The appellant no.1 denied making one affidavit in which he had admitted to be owing the respondent Shs.82,000,000.00. This affidavit was filed in support of the application for leave to appear and defend and indeed the application for leave to appear and defend was allowed. The appellant was then able to file a written statement of defence. To deny this affidavit left the appellant No.1's credibility in tatters.

29. In any case, the appellant no. 1 admitted making another affidavit in which he had admitted owing Shs.78,000,000.00 to the respondent. He was unable to explain why he now claimed that he did not owe the respondent any money.

30. The appellants essentially relied on the oral testimony of the appellant no.1 to prove their version of the case. The only contemporary record that he refers to in his evidence in support of his version of events was exhibit D1, a letter from the external auditors of the respondent that had suggested that the appellants were indebted to the respondent in a sum of approximately Shs23 million and seeking the appellants to confirm or deny that this was the case. The appellants did not respond to this letter.

31. This letter does not support the version that the appellants were not indebted to the respondent. On the contrary it suggests that they were actually indebted to the respondent but probably to a lesser amount than has been claimed. In its written statement of defence this is set up as a defence in the alternative that should the appellants have been indebted to the respondent it was for substantially lesser sums of money than claimed. It would have been incumbent on the appellants to show which sums of money they admitted to owing rather than provide an evasive response to the claim. Pleading in this manner is not permitted. Order 6 Rule 8 of the Civil Procedure Rules requires a denial of a fact to be specific. See Joshi v Uganda Sugar Factory Ltd [1969] E A 570 [as per Spry, JA, at page 572]. This must mean that where the defence alleges payment of the claim against him the defence must state the particular sums of money that it paid to discharge its liability and when it did so. Or where the defendant claims to be owing less than the sum claimed the defence must indicate what sum is admitted to be owing.

32. The majority of contemporary records made both by the appellants and respondent point to the indebtedness of the appellants to the respondent. Several records made by the appellants, including affidavits sworn long after the closure of the bank show that the appellants were aware of their indebtedness in substantial amounts of money to the respondent. This would collaborate exhibit P1 which is a statement of account between the appellants and the respondent kept by the respondent which detailed the transactions on the appellants' accounts with the respondent for the relevant period. The appellants did not attack the substance of the statement in anyway.

33. Exhibit P5 is one of the records available made prior to the closure of the respondent. It is dated 19 April 1999. It is addressed to the appellant No.1, trading as Ishaka Gen. Hardware. It is entitled 'RE:

RESTRUCTURING OF A FACILITY OF SHS.40M/= ON TRADING A/C - MERCHANDISE.' It then states, in part, at the beginning,

> 'This is to inform you that the Loans Committee which sat on 16/4/99 restructured your overdraft facility of Shs.40m/= into an instalment loan of Shs.20m/= and overdraft limit of Shs.20m/= under the following terms and conditions.
>
> 1. Interest rate shall be 21% p.a. calculated monthly.
>
> 2. Commitment fee of 2.5% payable before disbursement.
>
> 3. The overdraft shall run for a period of 12 months. The instalment loan will be payable in 15 months. (Repayment programme is hereby attached.). However management reserves the right to recall it anytime during the loan term on account of unsatisfactory performance.'

34. The last paragraph of exhibit P5 is similar to the last paragraph of exhibit P4 which was the respondent's letter renewing an overdraft facility for the appellants' petrol station of Shs.40 million. It states,

> 'If you accept our terms and conditions of offer, please proceed to the Bank Legal's Department for the necessary documentation. The funds will not be released until after completion of all legal requirements and advised so by head office.'

35. The appellants contend that they did not accept the said terms in respect of exhibits P4 and P5 and that the respondent did not release the funds to them. PW1 stated that in fact these were already existing obligations and the overdrafts were just rolled over and partly restructured into a loan account.

36. Prior to exhibit P4 and P5 the appellant No.1 had written to the bank about his financial position in a letter dated 20 January 1999 which was marked exhibit P3. It states in part,

'So with all these problems I havent enjoyed any of these facilities because what I thought would benefit my business of the Petrol Station plus the commercial business, instead weakened it all for the last 6 months. Therefore I could not perform as always do.

Sir my humble request would be:-

1. To allow me [is] pay the Principal amount and leave the interest of the remaining amount and give me more time of payment period.

2. Since my overdraft of the combined business is ending 31-3-99 I would request my Od also to be step up so that I could improve on my business after all these problems

I am hoping to work hard since all these problem of the truck, I have been pushing on with strive.

Hoping that your good office will meet my request.'

37. It appears indeed that the respondent responded positively to this request and hence exhibits P4 and P5 that resulted in restructuring of one existing facility into loan account and an overdraft facility and a separate overdraft facility for the petrol station business. It is clear from exhibit P3 that by early 1999 the appellants were not in a position to pay the outstanding sums of money due to the respondent as they had performed poorly.

38. The claim by the appellant no.1 that they had paid off all outstanding sums of money to the respondent by the end of March 1999 is not credible, in light of the contemporary records available at the time, including documents originated by both the appellants as well as the respondent. That claim is clearly false and we cannot fault the learned trial judge in rejecting it. In January 1999 the appellants were asking for more time within which to pay the outstanding sums of money as they could not meet the deadline of 31 March 1999.

39. In response to a statutory notice sent by the respondent's advocates to the appellants the appellants responded in writing by a note dated 22 August 2002 which stated,

> 'Re: Statutory Notice
>
> We wish to notify you that we have received your statutory notice today the 22-8-2002 regarding the loan repayment notice. We shall settle some amount before the 16th October 2002 without fail.
>
> Your cooperation in this matter is highly appreciated.'

40. Clearly, the appellants were aware that they were indebted to the respondent in 2002 and promised to settle part of the outstanding sums of money. Such position is in startling contrast to the claim now that the money had been paid off by the 31 March 1999. The version of the appellants presented to the court below and re agitated in this court can only be false.

41. According to section 103 of the Evidence Act the burden of proof for a particular fact is upon the person who wishes the court to find such fact proved. In this case the appellants had asserted that they had discharged their obligations to the respondent by the 31 March 1999, leaving nothing outstanding. The burden of proof was upon them to show that they had discharged such obligations as existed. Section 103 of the Evidence Act states,

> ' **Burden of proof as to particular fact.**
>
> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.'

42. The appellants produced no evidence, other than the oral claim of the appellant no.1, to show that they had discharged the liability to the respondent. They were engaged in running various enterprises. Books of accounts and other documentary proof ought to have been available to back up these claims. Secondly the fact that they had allegedly discharged their obligations would be a fact that is especially within their own knowledge which would again impose the burden of proof upon them to

prove discharge of obligations in accordance with section 106 of the Evidence Act. They did not discharge this burden.

43. We dismiss grounds 1 and 2 of the memorandum of appeal.

Ground No 3

44. The learned trial judge made the following finding in his judgment after a review of the authorities on the point.

> 'I am satisfied that the circumstances of the instant case do satisfy the requirements of all the above quoted legal positions. The defendants' titles were left with the plaintiff bank as security. The defendants however failed to pay the money that was lent to them by the plaintiff. That being the position, the plaintiff bank was at liberty to perfect the security and fall back on it in the event of none payment. I therefore find that the bank had lien over the property as well as the right of possession until the indebtedness of the defendants is paid or discharged.'

45. It is clear that the learned trial judge, after consolidating the suits and hearing the same, ruled on the merits of the original civil suit no. 336 of 2006. The claim that he did not do so in this ground is absolutely without merit. This ground must fail.

Decision / Order

46. We dismiss this appeal with costs here and below.

47. Before we take leave of this matter we must comment on the very poor preparation of the record of appeal by Counsel for the Appellant. Several exhibits were missing from the record. The exhibits on the record of appeal were not filed in any particular order or sequence. It is important that counsel and the Registrars of the court below make serious effort to ensure that the record of appeal that is filed reflects the record of the trial court in full to enable this court have the same material that was before the trial court while considering and determining the appeal. That record must be properly indexed to allow easy navigation through the same. Anything short of this imposes more work on this court than is due.

Signed, dated and delivered this 21st day of May 2015

R Aweri Opio
Justice of Appeal

R Buteera
Justice of Appeal

FMS Egonda-Ntende
Justice of Appeal