THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NUMBER 56 OF 2015

5 MWENE-KAHIMA MWESIGYE.. APPLICANT

VERSUS

AMBO FINANCIAL SERVICES.. RESPONDENT

[An application arising from the High Court decision of Hon. Lady Justice Elizabeth Musoke on the 20th day of February 2015]

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CORAM: HON. LADY JUSTICE FAITH E. K. MWONDHA, J.A

HON. JUSTICE GEOFFREY KIRYABWIRE, JA

HON. LADY JUSTICE PROF. L. EKIRIKUBINZA TIBATEMWA, JA

15 **RULING OF THE COURT**

The brief facts of this matter are that the respondent, a limited liability company and carrying out business in Uganda, sued the applicant, an Advocate of the Courts of Judicature, for the recovery of eighty eight million six hundred thousand (Shs 88, 600,000/=) shillings only. It is alleged by the respondent that on the 24th 20 of November 2011, the applicant approached the respondent office and requested for financial assistance on a friendly basis like in their previous dealings. A sum of sixty four million (Shs 64,000,000/=) shillings only was given to

the applicant which he acknowledged receiving upon executing a loan agreement/promise to pay. The applicant then issued three postdated cheques together with a certificate of title; FRV 860 folio 2 Plot 43 Isingiro Block 4, land at Kaberebere, Mbarara District. He made a promise to pay back the loan on 7th January 2012.

By the time of filing the summary suit on the 12th of July 2012, the debt had allegedly accumulated to eighty eight million six hundred shillings (Shs 88,600,000/=) only. The cheques were presented for payment default but they were dishonoured /bounced. Subsequently, notices of dishonor and a demand for payment were served upon the applicant who did not pay.

The applicant filed a counter claim stating that on the evening of 24th November 2011 while going on about his work in his office, the respondent represented by Johnson Bosco Gumisiriza(second counter defendant) entered the applicant's office with four stout goons demanding to see him. The applicant was told that there was a lucrative deal which they wanted him to invest in and when he resisted, the second counter defendant alongside his goons threatened to inflict harm on the applicant. The second counter defendant proceeded to demand that the applicant signs cheques in their names, surrenders to them the land title comprised in Plot 43 Isingiro Block 4 together with transfer forms and other documents they had come with. The applicant, out of fear, issued postdated cheques dated 7th January 2012 in exchange for his freedom. He also surrendered to them a land title and signed transfer forms as well as the other documents they had come with.

At the time of hearing at the trial court, the applicant raised a preliminary objection of law that the plaint disclosed no cause of action due to lack of a money lending license and the defendant (the respondent in this appeal) therefore lacked locus standi in the matter. The Trial Judge overruled all the objections raised by counsel for the applicant and ordered that all issues raised be determined on evidence. The applicant, dissatisfied with the decision filed this appeal with sixteen grounds which upon hearing of this application were consolidated into three namely;

1. Whether the preliminary objections raised were not sufficient to dispose of the suit
2. That the applicant is entirely dissatisfied with the Court decision and thus seeks leave of Court to appeal the said decision
3. That the respondent is hastily moving to execute the orders of the lower Court irreparably threatens the applicant's constitutional right of appeal

Representation

Dr. James Akampumuza appeared for the appellants while Mr. Gerald Nuwagira and Mr. Ampiire Flex appeared for the respondent.

Ruling of the Court

The Court heard the application on the 28th May 2015 but given that the hearing of the main suit was coming up for hearing on the 1st June 2015 at the High Court the Court decided to give its decision shortly after the arguments of the two parties on the same day and decided that the detailed Ruling will be given on notice to the parties.

Our decision of the 28th May 2015 was as follows

"We have carefully listened to both counsel submissions on the application

a) For leave to be granted to the applicant to appeal the decision in civil suit No 215 of 2012

5 *b) That the proceedings in civil suit No 215 of 2012 be stayed*

c) That costs of the application be provided for

Having listened to them and carefully perused the motion and affidavits in support and against the same, we find that this is a fit and proper case to be granted leave to appeal. Accordingly, leave to appeal is granted.

10 *We also stay the proceedings in Civil Suit No 215 of 2012 until determination of the appeal.*

Costs will abide the outcome of the appeal.

Detailed reasons shall be given on notice."

We now give our detailed reasons for granting leave to appeal

15 **Detailed Reasons**

The Arguments of Counsel

Ground one

Whether the preliminary objections raised were not sufficient to dispose of the suit

20 **Arguments for the Applicant**

Counsel for the applicant submitted that the applicant complied with the procedural steps in bringing this present application by first applying in the High Court for leave to appeal and when leave was denied, the application was brought before this Court in compliance with rule 42 (1) and (2) of the rules of this Court.The applicant in his averments showed that illegalities were raised before the trial Court but the objections were over ruled holding that the Court would first hear the main suit on merits, which counsel argued was erroneous.

Counsel submitted that the essence of paragraph (g) of the applicant's Notice of Motion showed the need for this Court to guide lower courts on the issue of a case filed by a money lender who does not have a money lending licence given that the decision of the trial Court was a departure of a decision of this Court on a similar matter. This was the decision in **Ibaka Group CFI LTD Vs John Kasigeire Civil Appeal No 12 of 2003** wherein the lead Judgment of **Justice Twinomujuni, JA** (as he then was, to which the rest of the panel of judges concurred) upheld the decision of the High Court of **Justice Mugamba inJohn Kasigeire and Allen Kasigeire Vs Ibaka Group CFI LTD**. Counsel for the applicant submitted that the effect of that decision was that lending money without a money lender's license or on the basis of a licence issued by the town clerk is an illegality not curable under **Article 126 (2) (e)** of the **Constitution of Uganda 1995**.

Counsel for the applicant relied on Order 6 rule 28 of the Civil Procedure Rules which provides that a party may raise in their pleadings any point of law which the Court shall dispose of at or after the hearing except by the consent of parties or at the order of Court on application by either party except that by consent of the parties, or by order of the court on the application of either party, a point of

law may be set down for hearing and disposed of at any time before the hearing. Counsel for the applicant submitted that the essence of this provision is that once the Court has granted an application to deal with a preliminary point of law first, then it has to render a decision on the said point of law; which the Trial Judge did
5 not do. Counsel for the applicant argued that the Trial Judge allowed the applicant to raise preliminary points of law but when it came to ruling, she went back on her order and instead ordered that the matter be dealt with in another manner. Counsel submitted that this was a contradiction as the Trial Judge was bound to state whether or not there was an illegality.

10 Counsel for the applicant further relied on the case of **Attorney General v Uganda Law Society Constitutional Appeal No. 01 of 2006** where it was held that a court of law is bound to adhere to its own previous decision save in exceptional instances where the previous decision is distinguishable or has been overruled. He argued that the effect of that decision is the same as similar decisions of this
15 court which places a duty on the court to first make a conclusive and definitive determination of the point of law when it has been raised especially since it dealt with illegalities and then pronounce itself on them before making other kind of orders.

Counsel for the applicant argued that since the present transaction involved a
20 private limited company which admitted to being in the business of lending money then dealing in friendly loans would be ultra vires their business objectives.

Arguments for the Respondent

Counsel for the respondent submitted that there was no admission to the effect that the respondent lacked a money lending license but that that this was a case of a friendly loan which is not governed by the Money Lending Act. Counsel made reference to the ruling of the Court that not everyone who lends money is a money lender and that it could not be established at the preliminary stage whether or not the respondent fell within the definition of a money lender under Section 1 of the Act which requires a money lending license.

Counsel for the respondent submitted that the taking of evidence would be required in order to establish from the relationship of the parties and the loan terms set what kind of transaction this was. Counsel further submitted that this kind of friendly transaction has been recognized by courts of law in several cases therefore the Learned Judge did not depart from previous precedents. With specific reference to the **Ibaka case** (supra), counsel submitted that there was no departure from that decision as the Court further held that each case should be determined on its own circumstances and a decision would be reached after the parties have produced evidence.

Counsel for the respondent submitted that under Order 6 rule 28 a decision on a point of law may be made before or after the hearing of the suit and the Learned Judge having appreciated the circumstances of this case and in fairness to the parties decided the point of law be determined after hearing.

Counsel for the respondent relied on the authority of **Shine Pay (U) Ltd v Sarah Kagoro & Anor HCT-00-CC-CS-548 of 2004** where the issue of a friendly loan was discussed though we must point out at the outset that what was found in that case did not favour the existence of a friendly loan at all.

Counsel also made reference to the authority of **Ecumenical Churchloan FundEclof (U) Vs John Jwiza and Another HCT-00-CC-CS-614 of 2004** where it was held that until court listens to the evidence of both the plaintiff and the defendant, it is not in position to tell on which side of the line the present case
5 falls. Counsel submitted that the instant case is one in which the moral culpability of the parties should be tested to determine on which side justice should prevail because both parties participated in an illegality and now one of them is trying to jump out of it.

Ground two and three

10 **That the applicant is entirely dissatisfied with the Court decision and thus seeks leave of Court to appeal the said decision**

That the respondent is hastily moving to execute the orders of the lower Court which act irreparably threatens the applicant's constitutional right of appeal

Arguments for the Applicant

15 Counsel for the applicant submitted that if this Court granted leave, then it should also find it appropriate to stay the proceedings pending in the lower Court in light of the application still being heard and the possibility of appeal. Counsel made reference to the case of ***Ida Iterula Vs Joyce Mugutta Supreme Court Civil application No 2 of 2006*** which provides for the grounds upon which a Court will
20 grant stay.He further submitted that the Applicant met the legal criteria as provided for in that decision. Counsel for the applicant particularly argued that the appeal had a high likelihood of success.

Arguments for the Respondent

Counsel for the respondent submitted that the matter has not been heard on the merits and the threatened execution was therefore far from being reached because the ruling as to costs would come at the end of the case.

Counsel for the respondent also argued that the applicant had not shown what
5 irreparable damage he is going to suffer if the matter is heard *inter partes* and that the orders sought to stay the proceedings werethus only evidence by the applicant to further delay the hearing of this matter. Counsel for the respondent further submitted that this matter is still in the stage of infancy and as such, the Learned Judge should not be faulted for asking the parties to appear before her
10 and arguing their cases respectively.

Findings and decision of Court

To our minds, this application squarely revolves around a preliminary objection of law and how the Court should determine such an objection. A lot of the arguments presented to Court went wider than this, almost bordering on the
15 appeal itself.

On objections that are points of law Order 6 rule 28 of the Civil Procedure Rules provides as follows

"any party shall be entitled to raise by his or her pleadings any point of law, and any point so raised shall be disposed of by the court at or after the hearing; except
20 *that by consent of the parties, or by order of the court on the application of either party, a point of law may be set down for hearing and disposed of at any time before the hearing"*

Our understanding of this Rule is that a party may by their pleadings raise a point of law which may be disposed of

a) At or after the hearing **except**

i. By the consent of parties

ii. Or by Order of Court on application of either party

Thus, the point of law may be set down for hearing and disposed at any time before the hearing. There are two possible options and two possible exceptions all of which are distinct. However they boil ~~done~~ down to when an objection may be taken after the start of a hearing and when the objection may be taken before the hearing of the main matter.

In this case the Ruling of the trial Judge gives us some insight as to what transpired when the preliminary point of law was raised. At page 3 of her Ruling of the 4th July 2014 she writes

"...When the matter came up for hearing, the 1st defendant/counter claimant raised a preliminary objection of law that the plaint disclosed no cause of action due to lack of a money lending licence. Further, that the plaintiff lacked locus standi to institute this suit.

Court granted the 1st defendant/applicant leave to make written submissions on his preliminary objections which if upheld would have the effect of disposing of the case..."

The trial Court found at page 10 of her Ruling of the 4th July 2014 that as a point of law there are decision of court that hold that a person who enters into a money lending contract without a money lenders licence cannot recover on the

basis of the maxim "ex turpi causa" meaning *"no claim arises from a base (sic) [she meant "bad" other definitions state illegal or immoral cause]"*. Here she relied on the case **of NAKA Ltd V Kyobe Senyange**[1982] HCB 52 and **Litchfield V Dreyfus** [1906] 1 KB 584 at 588-589. The trial Judge however also noted that the

5 **Litchfield decision** (supra) also observed that not every person who lends money at an interest rate carries on the business of a money lender. The trial Judge however observes

"...in the instant case, it is not pleaded by the respondent that he lent money to the applicant as a money lender. The respondent stated that this was a case of a

10 *friendly advance loan, and not a loan governed by the Money Lenders Act..."*

The trial Judge then goes on to find

"...coming to the defense of ex turpi causa itself, it is true that the law on the point is far from being settled. There is no section in the Money Lenders Act (Uganda – addition ours) equivalent to the one in other jurisdictions stating that no contract

15 *for the repayment of money lent by unlicensed money lender shall be enforceable. If the section existed, there would perhaps be no room for debate on this point...until court listens to the evidence both from the plaintiff and the defendant, it's not in a position to tell on which line the present case falls..."*

Counsel for the applicants submitted that this Court in the **Ibaka Group case**

20 (supra) held on a preliminary objection that a money lender cannot lend money without a money lenders licence and so the trial Court was bound by the decision of this Court and that there was no need to call evidence to resolve the matter.

We find that the trial Judge in terms of Order 6 rule 28 on the application of one of the parties ordered that the preliminary point of law be set down for hearing and be disposed before the hearing. This falls under the exception in Order 6 rule 28. Once the exception has been taken and ordered by Court, then the objection
5 has to be heard and disposed before the hearing of the case. What happened in this matter is that instead of determining the objection immediately, the Learned Judge reverted to the pre exception provisions of Order 6 Rule 28 to determine the objection after the hearing. In essence she overruled herself which was a misdirection. In this regard we agree with Counsel for the applicant and hence our
10 decision supra that the leave be granted.

These now are our reasons and we so find.

Dated on this ......24th...... day of ......June...... 2015.

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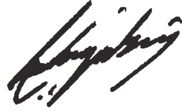
HON. LADY. JUSTICE FAITH E. MWONDHA, JA



HON. MR. JUSTICE. GEOFREY KIRYABWIRE, JA

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HON. JUSTICE PROFESSOR L.E. TIBATEMWA, JA

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