THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[*Coram: Musoke, Muzamiru Kibeedi, Gashirabake JJA*]

CIVIL APPEAL NO. 129 OF 2018

(Arising from High Court Civil Suit No. 469 of 2011)

PENINA KENSHEKA ..... APPELLANT

VERSUS

UGANDA DEVELOPMENT BANK LIMITED ..... RESPONDENT

(*Appeal arising from the High Court , Commercial Division, Civil Suit No 469 of 2011*)

JUDGMENT OF CHRISTOPHER GASHIRABAKE, JA

Introduction

The Appellant filed High Court Civil Suit No. 469 of 2011 against the Respondent seeking for a refund of UGX 84,000,000/= (Eighty four million shillings only), interest on the sum from the date of deposit with the defendant till payment in full, General damages and costs of the suit.

The facts set out in the plaint were that sometime in the year 2010, the Respondent entered a trade financing agreement with M/S ABA Trade International Limited under which trailer trucks and other accessories would be imported. The Appellant sought to purchase a Mercedes Benz Actros truck plus accessories from ABA Trade International Limited. It was the Appellant's allegation that she was advised by Mr. Stephen Opeitum, a Senior Banking Officer of the Respondent Bank to make a deposit payment with the Respondent bank in order to secure her "*position as a purchaser.*"

Mr. Stephen Opeitum then provided the Appellant with account details of the Respondent Bank where upon she deposited a sum of UGX 84,000,000/= (Uganda Shillings Eighty Four Million Only) by way of Real Time Gross System (RTGS) from her account in Stanbic Bank.

The trade financing agreement between M/S ABA Trade International Limited and the Respondent Bank failed as a result of which the right to possession of the consignment was taken over by the Defendant bank.

It was the allegation of the Appellant that she was not informed by the Respondent Bank when the trucks arrived in Uganda and the trucks were subsequently sold to 3rd parties by the Respondent Bank. The Appellant further stated that despite several demands from the Appellant the Respondent refused to refund the said money.

On the other hand, it was the Respondent's case that the Appellant is not entitled to the remedies sought. It stated that sometime between January and March 2010, the Respondent advanced a Trade Facility of Euros 1, 142, 056, 00 to a company called ABA Trade International Limited to finance its business of importation of tyres, containers and trucks.

Under the facility the Respondent was only responsible for the financing while ABA Trade International Ltd was responsible for the marketing, sale and delivery of the goods, as well as settlement of the credit facility. The contractual relationship was therefore between the Appellant and ABA Trade International Ltd in respect to the goods. The Respondent denied having entered any contractual obligation with the Appellant. The Respondent averred that the UGX 84,000,000/= (Eighty four million shillings only) received by the Respondent was for fulfilling the obligation under the Trade finance facility.

The learned trial judge in his decision found that the Appellant was working hand in hand with the officials of M/S ABA Trade International Limited to actuate the demands of the defendant bank so as to ensure successful importation of the goods. Court further found that the Respondent Bank could not be held liable for dealings that were not within its knowledge.

Dissatisfied with the decision of the trial court the Appellant appealed to this Court on grounds that:

1. ' The learned trial Judge erred in fact and in law when although having found that there was evidence in support of the principle of money had and received, he held that the

Appellant was not entitled to a refund of the money deposited.

2. The learned trial Judge erred in fact and in law when he failed to consider that the Respondent was unjustly enriched by the Appellant's money.
3. The learned trial Judge erred in law and in fact when he made orders for payment of cost against the Appellant'.

The Respondent opposed the appeal.

Before addressing the grounds of Appeal, I have addressed my mind to the role of the first Appellate Court. The duty of this court as a first Appellate Court was stated in the case of **Kifamunte Henry V Uganda, S.C criminal Appeal No. 10 of 1997** where court held that;

> "The first appellate court has a duty to review the evidence of the case, to reconsider the materials before the trial judge and make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."

This Court therefore has a duty to re-evaluate the evidence to avoid a miscarriage of Justice as it mindfully arrives at its own conclusion. I will therefore bear these principles in mind as I resolve the grounds of appeal in this case.

Representations

At the hearing, the appellant was represented by Mr Paul Rutisya and the respondent was represented by M/s Olivia Matovu and Mr Henry Kato. The parties opted to adopt written submissions on record.

Submissions of counsel

Counsel for the Appellant addressed grounds one and two concurrently. It was counsel for the Appellant's submission that an action for "money had and received" is an equitable action, the gist of which is that the Respondent is obliged by the rules of natural justice and equity to refund the money.

Counsel cited **Shenol and Another vs. Maxmov, [2005] E.A 280** where the Supreme Court laid down the key ingredients for an action of money had and received.

Counsel submitted that the trial Judge failed to establish that the Appellant did not disclose the purpose for depositing the money on the Respondent's account. He argued that having found that the money was received by the Respondent and that the Appellant did not get any services, the trial judge should have ordered the Respondent to refund the money.

Counsel for the Appellant submitted that the finding of the trial court was unfair, unjust and as a result the Appellant was deprived of UGX 84, 000, 000 (Eighty four million shillings only) without any benefits. In turn the Respondent enriched itself.

Counsel for the Appellant submitted that the principle of unjust enrichment requires that;

1. The Respondent was enriched by using the Appellant's deposit to finance a trade and wherein it made millions in profit on interests at the expense of the Appellant.
2. The enrichment is at the expense of the Appellant.
3. The enrichment is unjust.

Counsel argued that the Appellant did not get any service from the Respondent after paying UGX 84,000,000. /= (Eighty four million shillings only) with the above submission the Appellant is entitled to the refund of the said amounts of money

In response, counsel for the Respondent argued the two grounds separately and submitted that first ground has no basis in the judgment of the learned trial judge.

On ground two, counsel for the Respondent argued that the trial judge rightly found that there was no unjust enrichment by the Respondent. It is counsel for the Respondent's submission that the Respondent agreed to grant ABA Trade International Ltd, a trade finance facility. This facility was on condition that ABA Trade International Ltd satisfied the pre-disbursement conditions of a security margin of Euros 200,000.

Counsel additionally submitted that the UGX 84,000,000(Eighty four million shillings only) which was deposited by the Appellant onto the Respondent's account was part of the monies paid by ABA Trade International as advised by ABA Trade International. It was based on that advice and completion of the required security deposit the bank

disbursed the facility. There was therefore unjust enrichment on the part of the Respondent.

Counsel further argued that the Respondent has never received money from the Appellant for the purpose claimed by the Appellant *"to secure her position as buyer."* Counsel submitted that in the Respondent's knowledge the money was transferred from the Appellant's account by the Appellant to the Respondent account for and on behalf of ABA Trade International.

Counsel discussed the law on "*Money had and received*" and he cited **Fibrosa Spolka Akeyjna vs. Fairbairn Lawson Combe Barbour Ltd, [1942] 2 ALLER 122 and Mahabir Kishore and others vs. State of Madhya Pradesh, 1990 AIR 313 or 1989 SCR(3) 596**

Counsel for the Respondent submitted that from the above authorities for the obligation to refund money under the doctrine of unjust enrichment to arise, the Respondent should have been enriched by the benefit, at the expense of the Plaintiff and the retention of the benefit is unjust. This is not the case in this matter. ABA Trade International was obligated to pay a security margin before letters of credit would be opened. The deposit in question was made for this cause by the Appellant on behalf of the ABA Trade International. The respondent did not receive any benefit from the said money.

In rejoinder counsel for the Appellant submitted that evidence of the Appellant was consistent and cogent. That there was no evidence on record to contradict the fact that the UGX 84,000,000/= (Eighty Four million shillings only) was received from the Appellant by the Respondent.

Analysis.

I have had the privilege of reading through the lower court record and the submissions of Counsel. In the instant case under **paragraphs 3 and 4** of the plaint, the Appellant was claiming recovery of UGX 84,000,000/= (**Eight four million shillings only),** that she deposited on the Respondent's account. The Respondent denied this demand and stated that they did not receive any money for the purpose which the Appellant alleged.

From the evidence on record it is not in dispute that the Appellant made a deposit of UGX **84,000,000/= (Eighty four million shillings only**) on ABA International account with the Respondent. What is disputed is that the Respondent received money and unjustly enriched itself. I will refer to the cases cited by the Respondent in regards to the principles of "money had and received" and unjust enrichment.

Fibrosa Spolka Akeyjna vs. Fairbairn Lawson Combe Barbour Ltd ,[1942]2 ALLER 122, Lord Wright held that;

> ".. The claim was for money paid for a consideration which had failed. It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit that is to prevent a man from retaining the money of, or some benefit derived from another which it is against conscience that he should keep .....
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> It lies for money paid by mistake , or upon a consideration which happens to fail , or for money got through imposition (express or implies or extortion or undue advantage taken of the plaintiff's situation , contrary to the law made for the protection of persons under these circumstances. In one word the gist of this kind of action is that the Respondent upon the circumstances of the case is obliged by the ties of natural justice and equity to refund the money"

In Mahabir Kishore and others vs. State of Madhya Pradesh, 1990 AIR 313, the Supreme Court India held that;

> "The principle of unjust enrichment requires; first, that the Respondent has been "enriched "by the receipt of a "benefit"; secondly, that this enrichment is "at the expense of the plaintiff and thirdly that the retention of the enrichment is unjust, this justifies restitution"

The circumstances of this case do not present a case for "*money had and received*" or unjust enrichment. It is an undisputed fact that there was a trade finance facility between the Respondent and the ABA Trade International Ltd. Under the trade finance facility ABA Trade International was obligated to pay Euro 200,000 as payment of the security margin before the letters could be opened. It was the undisputed evidence of the Respondent by DW1 that deposit made by the Appellant was part payment of the security margin. This was corroborated by DW2 a director of ABA Trade International testified

this deposit was part of the Company's receivables from the Appellant.

According to PW1 who is the Appellant in this matter, she was approached by Robert Mwesigye from ABA Trade international, that UDB was selling trucks. In her own Witness Statement the Appellant stated that the seller of the trucks was ABA Trade International. She further averred that she made a deposit after a one Mr. Opeitum told her to pay the UGX 84,000,000/= (Eighty four million shillings only) to secure her position.

The Respondent did not dispute receiving this money however its contention is that this money was received on behalf of ABA Trade International. I agree with the submissions of counsel for the Respondent that for the doctrine of unjust enrichment to arise, the Respondent should have been enriched by the benefit at the expense of the Appellant.

Under the law the Appellant is obligated to prove that the Respondent enriched itself by the money deposited by the Appellant according to **Section 101 and 103 of the Evidence Act**. In the case of ***Nsubuga vs. Kavuma [1978] HCB 307*** it was held that;

> "In civil cases the burden lies on the plaintiff to prove his or her case on the balance of probabilities."

The Appellant in this case failed to prove her case on a balance of probabilities. It was the uncontested evidence of DW2 the Director of ABA, Trade International Ltd, that the deposit made by the Appellant was part of their receivables. The Respondent issued a receipt in favour of the ABA Trade International Ltd. In other words the Respondents did not unjustly benefit from the said monies. It would be unfair and unjust to hold the Respondent responsible for monies it did not benefit from.

I therefore find that ground one and two fail.

Ground 3

Counsel for the Appellant submitted that costs follow the event unless the court for good reasons orders otherwise.

Counsel for the Respondent on the other hand argued that the Appellant brought a suit against the Respondent and it incurred costs to defend the suit. The trial court therefore rightly exercised its discretion since the Respondent was the successful party. Counsel cited **Kiska Ltd v. De Angelis, [1969]1 EA 6 and Devran Nanji Dattani vs. Haridas Kalidas Dawda, (1949), 16 E.A.C.A**.

I agree with the submission of both counsel that costs follow the cause. However ,considering the circumstances of the transaction, the costs of this appeal are to be shared by each party bearing its own costs.

This ground would succeed.

Decision

1. This appeal is accordingly dismissed .
2. Costs of this appeal are to be borne by each party individually.

Dated at Kampala this.....25th..... Day of .....Nov.....2022

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CHRISTOPHER GASHIRABAKE
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 0129 OF 2018

PENINA KENSHEKA::APPELLANT

VERSUS

UGANDA DEVELOPMENT BANK LIMITED:::::::::::::::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Kampala (Commercial Division) before Kainamura, J. dated 19th February, 2015 in Civil Suit No. 469 of 2011)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE MUZAMIRU MUTANGULA KIBEEDI, JA
HON. MR. JUSTICE CHRISTOPHER GASHIRABAKE, JA

JUDGMENT OF ELIZABETH MUSOKE, JA

I have had the advantage of reading in draft the judgment prepared by my learned brother Gashirabake, JA, and I agree with it. For the reasons which he gives I would dismiss the appeal and make the orders he has proposed.

As Kibeedi, JA also agrees, the Court unanimously dismisses the appeal but orders that each party bears its costs of the appeal.

It is so ordered.

Dated at Kampala this ......25th...... day of......Nov......2022.

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Elizabeth Musoke

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Elizabeth Musoke, Muzamiru M. Kibeedi & Christopher Gashirabake, JJA]

CIVIL APPEAL NO. 129 OF 2018

PENINAH KENSHEKA ..... APPELLANT

VERSUS

UGANDA DEVELOPMENT BANK LIMITED ..... RESPONDENT

(*Appeal from the judgment of the High Court of Uganda at Kampala, Commercial Division delivered on the 19th February,2015 in Civil Suit No 469 of 2011*)

JUDGMENT OF MUZAMIRU MUTANGULA KIBEEDI, JA

I have had the advantage of reading in draft the Judgment prepared by my brother, Hon. Justice Christopher Gashirabake, JA. I agree and have nothing useful to add.

Dated at Kampala this day of 2022

Muzamiru Mutangula Kibeedi
JUSTICE OF APPEAL