

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]**

HICIC.S. NO. 131 OF 2001

ALPHA INTERNATIONAL INVESTMENTS LTD:..... PLAINTIFF

VERSUS

NATHAN KIZITO:.....DEFENDANT

BEFORE: THE HON. LADY JUSTICE M.S. ARACH - AMOKO

JUDGMENT:

The Plaintiff is a limited liability company and a licensed money lender. The Defendant is a Ugandan businessman.

The Defendant obtained a loan of Shs.5m from the Plaintiff on 15/4/99. By a loan agreement dated 15/4/99, the Defendant undertook to re-pay the loan within 3 months at an interest rate of 20% per month. He deposited his land title to land comprised in Private Mailo Block 337 Plot 274, at Mugogo, as security.

The Defendant defaulted in repaying the loan and the Plaintiff tiled this summary suit for Shs.16,450,000/= being the amount of principal and interest due and owing as at 30/4/2000. The Defendants application for leave to appear and defend (Misc. Appl. No. 132/2001) was dismissed for want of prosecution; and Judgment was entered for the full amount claimed. The Defendant then applied to set aside the Judgment and stay execution under 0.33 rule 11 of the CPR. The application was allowed partly and the Judgment was set aside in part. However, since the Defendant admitted obtaining the Shs.5m loan, Judgment remained in that sum. The Defendant was granted leave to defend the rest of the claim. He filed a W.S.D disputing the interest of 20% per month on the ground that it is illegal and excessive and renders the transaction harsh an unconscionable. He asked the Court to re-open the transaction and award interest at Court rate or such a rate that does not contravene the Money Lenders Act Cap 264 or as the Court may think just in the circumstances.

The parties did not call evidence. They simply filed submissions on the basis of the law. Mr. Bamwite, learned counsel for the Plaintiff submitted that the interest of 20% per month which is actually 240% per annum is excessive and violates S.13 of the Money Lender Act Cap 264 of the laws of Uganda. According to Halsbury's Laws of England Edition volume 27 page 30 Para 80 where a money lender contravenes the provisions of the Money Lenders Act, the transaction is unlawful and any contract which forms part of it is void and confers no rights. Section 26 of the CPA also gives powers to the Court to intervene in an agreement where interest is harsh and unconscionable. The purpose of this provision is to guard against unjust enrichment.

He cited the case of **C.P. LALOBO -Vs BUGANDA BUTCHERIES** (1947) 14 EACA 12 where the interest rate of 48% p.a was held to be harsh and unconscionable and was reduced to 24% p.a, and the case of **BAGOKA -VS- KIBWAIJANA** [1976] HCB 338 where interest was reduced from 48% to 10%, to support his submissions.

Applying these principles, learned counsel for the Defendant invited the Court to re open the transaction between the Plaintiff and the Defendant and proposed the rate of 10% p.a.

In respect of costs, Mr. Bamwite submitted that the costs of the proceedings should be borne by the Plaintiff because the loan agreement is tainted with illegality. It has charged the Defendant Shs.25,000/ as Administrative fees. This violates S.19 of the Act which prohibits charges or expenses on loans whether administrative or otherwise.

Mrs. Basaza Wasswa learned counsel for the Plaintiff submitted that the Court has discretionary powers to re open a money lending transaction under the provisions sections 12 & 13 of the Act and that 24% per annum is only a bench mark. I respectively agree with her submission. Section 12 & 13 provide in part as follows:

“12 (1) Where proceedings are taken in any Court by a moneylender for the recovery of any money lent after the commencement of this Act, or the enforcement of any agreement or security made or taken after the commencement of this Act, in respect of money lent either before or after the commencement of this Act, and there is evidence

which satisfies the Court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals or any other charges, are excessive, and that, in either case, transaction is harsh and unconscionable, or is otherwise such that a Court of equity would give relief, the Court may reopen the transaction, and take an account between the money-lender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of such principal, interest and charges, as the Court having regard to the risk and all the circumstances, may adjudge to be reasonable; and if any such excess has been paid, or allowed in account, by the debtor, may order the creditor to repay it; and may set aside, either wholly or in part, or revise or alter any security given or agreement made in respect of money lent by the security money-lender, and if the money-lender has parted with the security may order him to indemnify the borrower or other person sued.”

“13 (1) Where, in any proceedings in respect of any money lent by a money-lender after the commencement of this Act or in respect of any agreement or security made or taken after the commencement of this Act in respect of money lent either before or after the commencement of this Act, it is found that the interest charged exceeds the rate of twenty - four per centum per annum, or the corresponding rate in respect of any other period, the Court shall presume for the purposes of section 12 of this Act, that the interest charged is excessive and that the transaction is harsh and unconscionable, but this provision shall be without prejudice to the powers of the Court under that section where the Court is satisfied that the interest charged, although not exceeding twenty-four per centum per annum, is excessive.”
(underlining is mine for emphasis)

The discretionary powers must however be exercised Judicially.

Mrs. Basaza Wasswa has maintained that the interest rate of 20% per month charged by the Plaintiff in this case is not harsh or unconscionable and is justifiable and warranted because of the following circumstances and factors:

1. When the Money Lenders Act which came into force in 1952; a lot of circumstances and factors present in Uganda today did not exist then. The standard and cost of living, the standards of competition and sophistication of business, the risks in business, inflation in the value of money, operational costs of business and the level of unscrupulous and bogus money borrowers etc render the 24% p.a as the bench mark of excessive interest rates inordinately too low and out of keeping with prevailing modern circumstances.
2. The interest charged is calculated on simple not compound basis, unlike in commercial banks.
3. The rate of the dollar has gone up since April 1999. The money loaned has lost value.
4. The Defendant is estopped from denying the agreement. He signed or well knowing the terms. He took the money and enjoyed it and he now comes to take refuge in Court. He ought to come to Court with clean hands.
5. The Defendant borrowed the money for speculative purposes. He has sold the school for which he borrowed the money. The chances of the Plaintiff recovering the money have greatly reduced.

In the alternative, learned counsel for the Plaintiff prays that Court allows a rate of 15% per month if it is inclined to re-open the transaction.

Now upon careful consideration of the law, the authorities cited by both learned counsel, and their submissions, I must say that, I am not persuaded by the reasons given by learned counsel for the Plaintiff as justification for the 20% per month (240% per annum) interest rate. I instead agree with Mr. Bamwite's submission that the interest charged in respect of the transaction between the two parties is not only excessive and harsh, but it renders the transaction unconscionable.

It is true that Money Lenders Act Cap 264 on 1st/1952 adopted the benchmark of 24% p.a, not per month. However, even at that time, the legislators were not oblivious to the fact that the rates would keep on changing in keeping with changing circumstances in the business world such as inflation, competition and risks. They therefore provided in section 13 that the rate would be "24 per centum per annum or the corresponding rate in respect of any other period" and that the provisions of S13 are "without prejudice to the powers of the Court under that section where the Court is satisfied that the interest charged, although not exceeding twenty - four per centum per annum, is excessive."

In other words, the legislator put the 24% per annum as a benchmark, but the Court could interfere subject to the prevailing rate of the period in question. Under S.13, the Court can actually interfere with the interest rate even if it is lower than the 24% depending on the circumstances. In the Lalobo case, the rate was reduced from 48% p.a to 24% p.a. It is possible that the Defendant as a lay person was not aware of the provisions of the Money Lenders Act when he signed the loan agreement. Quite often, people resort to loans in desperate situations. They do not bother to find out the legal implications of their actions first. Fortunately for the Defendant, provisions of Money Lenders Act referred to are clear. There is a guide as to the interest to be charged in transactions under the Act. It protects the category of persons in which the Defendant falls. Taking into account the rate charged by commercial financial institutions which is now between 18 - 20% p.a, I find that the rate of 240% is excessive and very harsh. There is no justification for it in terms of data or reports carried out by similar money lending institution. It is contrary to S.13 of the Money Lenders Act.

I therefore exercise the discretion under S.12 and re-open the transaction. I think the rate of 24% p.a is fair in the circumstances. The full Judgment is in favour of the Plaintiff in this case therefore:

1. Shs.5m principal.
2. Interest at rate 24% p.a from 15/4/99 till payment in full.
3. Costs of the suit.

M.S. Arach - Amoko

JUDGE

22.04.03