THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT-00-CC-CS-0614 OF 2004

ECUMENICAL CHURCH LOAN FUND (U) ECLOFF ::::: PLAINTIFF

VERSUS

1. JOHN BWIZA
2. W. TUMUHAIRWE
3. KAHIMAKAZI
T/A KAMABARE WOMEN'S DEVELOPMENT ::::::: DEFENDANTS

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

R U L I N G:

The Plaintiff's claim against the Defendants is for recovery of Shs.7,513,107- being a debt due and owing as supported by avernments in the plaint. When the suit came up for a scheduling conference, Mr. Davis Ndyomugabe for the Defendants raised two distinct points of law.

1. That the agreement on which the claim is based is legally unenforceable in that it was purportedly entered into on 10/1/96 and yet the Plaintiff was incorporated as a company on 24/2/1997. And that in any case, the Plaintiff was not a registered money lender.

2. That the Plaintiff was at the time of the contract an agent acting on behalf of a disclosed principal, Ecloff Foundation, Geneva, but the suit is in the Plaintiff's names.

In reply, Mr. Kwemara – Kafuzi, counsel for the Plaintiff, has invited me to over rule the objections. He appears to accept that the contract in question was entered into before the Plaintiff's incorporation but argues that long after the said agreement the Defendant and the Plaintiff continued dealing with each other to the extent that at some point in time the 1st Defendant acknowledged the indebtedness to the Plaintiff. In his view, this amounted to Novation and Ratification of the contract which are exceptions to the pre-incorporation saga. He said nothing about the issue of agency but invited this Court to find that the objections amount to a technicality which Article 126 (2) (e) of the Constitution was meant to remedy.

I have very carefully listened to the arguments of counsel. I have considered Mr. Kafuuzi's submission that the parties had agreed that determination of the objections awaits adducing of evidence. This is denied by his learned colleague. On this, I must say that points of law are decided on the basis of pleadings and facts not disputed. Where a point of law would be sufficient to dispose of the case one way or the other, it ought to be decided by the Court without first calling witnesses. Where, however, issues raised in the pleadings require evidence, it is fair that Court does not delve into those issues as to do so would deny the other side a chance to produce its

evidence and therefore be condemned unheard. The object of determining points of law in the manner suggested by Mr. Ndyomugabe is expedition. However, in such a case, the point of law ought to be one which can be decided fairly and squarely one way or the other, on facts agreed or not in issue on the pleadings, and not one which will not arise if some fact or facts in issue should be proved. See: **N.A.S. Airport Services Limited –Vs- A.G. of Kenya [1959] EA 53.**

I will relate the above principle to the case now before me. It is common knowledge that a company comes into existence upon incorporation. Upon incorporation, the company assumes the attributes of a person. After incorporation, it is not bound by contracts entered into in its name or on its behalf before it was incorporated. This is because it simply did not exist. There is nothing technical about this. It is simply settled law.

In the instant case, there is evidence that the impugned contract was entered into on or about 10/1/1996. The Plaintiff was incorporated on 24/2/1997. The ordinary rules of contract would therefore preclude the Plaintiff from taking advantage of a contract entered into before its incorporation. However, this Court's attention has been drawn to a letter, annexed to the plaint, dated 23/7/1998. In the said letter the author, said to be the 1st Defendant, acknowledges indebtedness to the Plaintiff but pleads for more time within which to pay. The defence has disowned this letter. It

has been branded a forgery. If proved to have been authored by the 1st Defendant, its effect would be to acknowledge existence of the debt. An acknowledgment if proved, is a recognition of something as being factual. It is an acceptance of responsibility. Once it is proved that the 1st Defendant made the acknowledgment of the debt in 1998, the issue of the Plaintiff company being non-incorporated at the time of the alleged contract would not arise since the alleged acknowledgment, or call it novation if you may, would of itself found a cause of action independent of the contract in issue. Whether or not the letter relied upon is a forgery can only be determined on evidence. It cannot be determined on a point of law such as this.

The pleadings therefore raise questions of fact which ought to be investigated and remedied.

As to the Plaintiff not being a registered money lender, the law on the point was considered in **Naks Ltd –Vs- Kyobe Senyange [1982] HCB 52**. It was held in that case that since the Plaintiff had no money lending licence, any agreement or contract so made in default was illegal and could not be enforced by the Courts on the basis of the maxim ex turpi causa. This Latin phrase ex turpi causa non oritur actio simply means that 'no claim arises from a base cause'. The policy was well summarized by Lord Mansfield C.J in the 18th Century when he declared:

No Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If the cause of action appears to

arise ex turpi causa ……. the Court says he has no right to be assisted: SUCCESS IN LAW, 4th Edition by Richard H. Bruce at p.260.

In the instant case, it is not pleaded by the Plaintiff that it was a money lending institution governed by the Money Lenders Act. Certainly not every person that lends money is a Money Lender within the meaning of the Act. Our Act is in pari materia with the English Money Lenders Act 1900. Farwell J., while commenting on that Act in **Litchfield –Vs- Dreyfus [1906] 1 KB 584** at 588 – 589 observed, and I agree:

> *'…….. a man who carries on business as a money lender, and is not registered under the [English] Act, cannot recover. But not everyman who lends money at interest carries on the business of money lending. Speaking generally, a man who carries on a money lending business is one who is ready and willing to lend all and sundry, provided that they are from his point of view eligible.'*

Relating the above to the issue before Court, the Plaintiff has been described by counsel as a body affiliated to churches in this country. The law under section 1 of the Act defines who a 'money lender' is. Court does not know at this stage whether the Plaintiff comes within the meaning of that section; how the Defendants, if they borrowed money from the Plaintiff as alleged, came to know the Plaintiff as a Money Lender to raise the inference that it

was a ready and willing body to lend money to all and sundry; or whether the lending was selective, to bring it within the exceptions stated in S. 1 (h) of the Act. Clearly, evidence is required in that regard.

Coming to the defence of ex turpi causa itself, the law on the point is far from being settled. Noteworthy is the fact that other than this Court's interpretation of the law in Naks Ltd case, supra, there is no section in the Act, equivalent to one in other jurisdictions, stating that 'no contract for the repayment of money lent by an unlicensed money lender shall be enforceable.' If any such section existed, there would perhaps be no room for debate on this point. In England where our law prides it origin, opinion is divided. Thus in **Bow Makers Ltd –Vs- Barnet Instruments Ltd [1945] KB 65** at 71, Lindlay L.J. said:

> *'Any rights which he (a Plaintiff) may have irrespective of his illegal contract will, of course, be recognized and enforced.'*

One illustration of this principle, and a strong case on its facts, was the decision of the Privy Council in **Sajan Singh –Vs- Sardara Ali [1960] AC 167.** The Plaintiff and the Defendant in that case concluded an illegal contract for the sale of a lorry and jointly engaged in its unlawful and fraudulent operation [contrary to certain Malaysian Regulations]. The Defendant then removed the lorry from the Plaintiff and refused to return it. The Plaintiff sued in detinue. He recovered the lorry and damages for its

wrongful detention, despite his own participation in the illegal contract and in the unlawful scheme involved. It was held that the property in the lorry had passed to the Plaintiff under the contract, notwithstanding its illegality and that he was therefore entitled to enforce his cause of action in detinue despite the ex turpi causa defence. That case, and many more including **Saunders & Anor –Vs- Edwards & Anor [1987] 2 All ER 651,** show that there are no rigid rules for or against the application of the ex turpi causa defence.

This is not surprising since it involves issues of policy and, if I may add, issues of security as well. Depending on the circumstances of each case, it would be preposterous for a man, not denying taking another man's money, to plead without shame that the other should whistle for his money merely because of an alleged illegality which the parties may not have had in contemplation at the time of the contract. Accordingly, this Court takes the view that each case must be decided on its own unique facts and circumstances.

The cases I have referred to show very clearly that the conduct and relative moral culpability of the parties are relevant in determining whether or not the ex turpi causa defence falls to be applied as a matter of public policy. I agree. Therefore, the authorities, including our own Naks Ltd, supra, cannot be applied literally in every situation. Until Court listens to the evidence,

both from the Plaintiff and the Defendant, it is not in position to tell on which side of the line the present case falls. At the end of the day, after listening to both parties, Court will be able to determine whether the moral culpability of the Defendant greatly outweighs any on the part of the Plaintiff to the extent that it he is found to have indeed taken the loan, he should be allowed to keep the fruits of his fraud.

In view of what I have stated above, and considering the law as enshrined in Article 126 (2) (e) of the Constitution which enjoins the Court to administer substantive justice without undue regard to technicalities, I am inclined to the view espoused by counsel for the Plaintiff that the commercial justice engrained in this case requires that I overrule all the objections raised by counsel for the Defendant and I order that all issues raised be determined on evidence. I do so.

The Plaintiff shall be entitled to the attendant costs herein in any event. I order so.

Yorokamu Bamwine

J U D G E

02/09/2005