THE REPUBLIC OF UGANDA

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

HCT-00-CC-CS-0548 OF 2004

SHINE PAY (U) LTD :::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

1. SARAH KAGORO
2. LITTLE SISTERS CO. LTD :::::::::::::::::: DEFENDANTS

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

J U D G M E N T:

The Plaintiff, a money lending company, sued the Defendants, jointly and severally, for a sum of US $20.765 and interest on it at the rate of 15% per month effective 20/6/2004. The suit was filed under summary procedure, 0.33 r 2 of the Civil Procedure Rules. The Plaintiff obtained Judgment in default of defence. However, the same was set aside vide HCMA No. 0201/2005 and the defence filed a Written Statement of Defence in which they denied the Plaintiff's claim. There are two (2) agreed facts in this case:

1. That the Defendants borrowed money from the Plaintiff.
2. That the Plaintiff is a registered money lender.

There are four (4) issues for determination:

1. Whether the Defendants borrowed US $20.765 from the Plaintiff.

2. Whether the Defendants have defaulted in the payments of the said sum of money.

3. Whether the interest of 15% per month on any unpaid instalment is excessive and unconscionable.

4. Whether the Plaintiff is entitled to the remedies prayed for.

Counsel:

Mr. David Innocent Nyote for Plaintiff.

Mr. Patrick Katende for Defendants.

Before I delve into the assessment of evidence in this case, I consider it necessary to state the law on some aspects of this case:

1. The Burden of Proof:

In law, a fact is said to be proved when Court is satisfied as to its truth. The general rule is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. When such party adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof: that is, his allegation is presumed to be true, unless his opponent adduces evidence to rebut the presumption. The standard of proof is on a balance of probabilities. Relating the above to this

case, the Plaintiff has alleged that it advanced a loan of US $20.765 to the Defendants. The burden rests on it to prove that allegation.

2. Parol Evidence Rule:

The parol evidence rule is to the effect that evidence cannot be admitted (or even if admitted, it cannot be used) to add to, vary or contradict a written instrument. In relation to contracts, it means that where a contract has been reduced to writing, neither party can rely on evidence of terms alleged to have been agreed, which is extrinsic document, that is, not contained in it. Where, however, there is a dispute as to what transpired between the parties, as in the instant case, evidence can be admitted to show that a written contract has been varied or even rescinded. S.92 (d) of the Evidence Act refers.

3. Doctrine of Non-est factum:

This latin expression simply means “it is not his deed”. It is an old common law defence which permitted a person who had executed a written document in ignorance of its character to plead that notwithstanding the execution, “it is not his deed.”

The old position was that the doctrine should not apply in favour of persons of full age and capacity. However, this narrow view of the doctrine has now

been discarded such that every case must now be decided on its own unique facts and circumstances.

I now turn to the evidence as adduced by the parties.

As to whether the Defendants borrowed US $20.765 from the Plaintiff, I have considered the evidence of PW1 Eyasu Sirak. It is that on 20/5/2004, through his company (SHINE PAY (U) LTD), he lent the 2nd Defendant, through the 1st Defendant, its Managing Director, a sum of US $20.765. His evidence is that the parties signed an agreement, P. Exh. 1. That such an agreement was executed by the Defendants is not denied by the 1st Defendant. She admits borrowing money from the Plaintiff but disputes the form of currency alleged by the Plaintiff. According to her, the Plaintiff lent her Shs.19m and the payment was by cheque, not cash. That the parties executed the impugned loan agreement, P. Exh. 1, is therefore not an issue but a fact. The issue is whether money changed hands in the manner stated in the agreement.

I must confess that the evidence presented to Court by the parties has caused me considerable discomfort. On the face of it, one party to this case is a fraudster or both of them are.

I have considered the Plaintiff's side of the story. It is supported by the loan agreement itself, P. Exh.1. There is also the evidence of PW3 and PW4,

people who were present when it was being executed. The problem with the evidence of these so called independent witnesses is that they were all on the Plaintiff's side. None of them can be said to have witnessed the agreement on the side of the Defendants. To that extent, their evidence is highly suspect. DW1 Sarah Kagoro stated in her evidence that she just signed; that the document could as well have been blank. The visual appearance of the document itself rules out that possibility. Nothing shows that the document was tampered with after execution or that it may have been blank when she signed it. I have therefore ruled out such a possibility. In any case she would be careless to do that sort of thing and carelessness of the signer excludes the doctrine of non-est factum. A person cannot invoke the doctrine if he/she carelessly signs a document containing blanks which are later filled in otherwise than in accordance with his/her instructions. See: **United Dominions Trust Ltd –Vs- Western [1976] QB 513**.

In my opinion, when the evidence is considered together, it raises a number of possibilities, including that what the document states is not necessarily what the parties did subsequent to its execution. One such possibility finds favour in the evidence of DW1 Sarah Kagoro. She has produced a copy of a cheque dated 20/5/2004. The cheque indicates the payee as Little Sisters. Her evidence is that she banked that cheque and she has produced a bank statement showing, among other things, that a cheque dated 20/5/2004 was on 25/5/2004 cleared in favour of Little Sisters. It was in the sum of

Shs.19,000,000-. It is a cheque drawn on an A/C of Eladam Enterprises Ltd, a sister company to the Plaintiff in which PW1 Eyasu Sirak by his own admission owns majority shares. The Plaintiff has not led evidence to show that Eladam Enterprises Ltd had dealings with the Defendants in another capacity or that the cheque is a forgery. On the contrary, on seeing the signature, Eyasu's response was that it looks like his. He did not say that it is not his; or that he suspected the signature and/or the cheque to be a forgery; or that Eladam Enterprises Ltd did not pay a sum of Shs.19,000,000- indicated on that cheque and on the bank statement of the Defendants.

In my view, Court is entitled to draw an adverse inference on the basis of the Plaintiff's failure to lead evidence of the bank on the matter. It is evidence which shows that Shs.19m was paid to Little Sisters at the very time when the Plaintiff alleges that it paid them US $20.765. Court has come to this conclusion in view PW1 Eyasu's evidence that other than this transaction, that is, the subject matter of this suit, the Defendants did not have any other known dealings with him or with Eladam Enterprises Ltd where he holds majority shares and he was apparently the sole signatory to the company account.

In the result, Court finds that the cheque dated 20/5/2004 and the Bank Statement reflecting that Little Sisters A/C was credited with a sum of Shs.19m on 25/5/2004 on a cheque issued by a company where PW1 owns

majority shares, are strong pieces of circumstantial evidence which corroborate the 1st Defendant's evidence that although she signed a loan agreement acknowledging receipt of US $20.765, she was actually not paid in that currency or that much but was paid a sum of Shs.19m Uganda money and by way of a cheque. Accordingly, the loan agreement could as well be telling a lie about itself. It cannot be relied upon as evidence that excludes other evidence, written or oral, in this case oral. While the Plaintiff has adduced evidence sufficient to raise a presumption that what it asserts is true, the Defendants have adduced more credible evidence to rebut that presumption.

Accordingly, Court is not satisfied that the Defendants borrowed US $20.765 from the Plaintiff. However, it is satisfied on a balance of probabilities that they received Shs.19m from the Plaintiff's sister company, Eladam Enterprises Ltd, on a cheque signed by the Plaintiff's Managing Director, PW1 Eyasu, notwithstanding the purported denial of that transaction by him. I have not found the first issue proved to the satisfaction of Court or at all and I answer it in the negative.

As to whether the Defendants have defaulted in the payments of the said sum of money, the answer is No, as long as the alleged sum of money relates to the Plaintiff's claim of US $20.765. Having said so, the Defendants evidence is that other than the amount realised from the sale of their sewing

machines, they have not paid anything more to the Plaintiff. Having found that the Defendants received Shs.19,000,000- from the Plaintiff, and in view of the undisputed evidence that Shs.1,400,000- was realised from the sale of the attached property, I hold that subject to what I will be saying later in this Judgment, a sum of Shs.17,600,000- is still outstanding on the loan.

As to whether the interest of 15% per month on any unpaid instalment is excessive and unconscionable, in a sister case to this one, **Shine Pay (U) Ltd –Vs- Kiyonga Francis HCCS No. 547/2004** (unreported), I had occasion to express an opinion on a similar issue. The terms of the loan in that case were similar to the instant one. I stated in that case, and I so reiterate herein, that interest, if it is not part of the contract terms is a discretionary remedy. The interest claimed by the Plaintiff in the instant case is not based on the agreement. If anything, the agreement only provided for payment of a penalty, not interest, in the event of a default by the Defendants on the principal sum. 15% per month translates to 180% per annum which by our standards is a rip off, especially in a situation where the parties agree that it was an interest free loan, a friendly one so to say. There would be nothing friendly about interest of 180% per annum when the Commercial one currently stands at 25%. In my view, while the penalty may have been intended to discourage willful defaults, it was an indirect and disguised charging of exhobitant interest. This Court has a discretion to

award interest at less than the contractual rate when the rate is manifestly excessive. See: **Juma –Vs- Habib [1975] EA 103 (T).**

From the evidence on record, Court is satisfied that the Defendants have kept the Plaintiff out of its money. However, from the evidence of DW1 Kagoro, the Defendants did not have peace with that money. First, although they had 6 months within which to retire the loan, as soon as they defaulted on the initial instalment, the Plaintiff filed this suit. Secondly, a person who had been given Shs.19m was now asked to pay US $20.765, an amount twice as much as the loan. I accept the defence evidence on this point. In these circumstances, interest would be awarded on the special damages at the rate of 25% per annum from the date of Judgment till payment in full. I so order.

As to whether the Plaintiff is entitled to the remedies prayed for, it is common ground that the Defendants' sewing machines were attached in execution and sold. From the evidence, they were attached around 24/2/2005 and thereafter advertised for sale. There is evidence that the said attachment was done in the presence of the 1st Defendant. However, nothing is on record to have been done by her to stop the sale of the attached property until mid March 2005 when with the assistance of counsel they filed HCMA No. 0201 of 2005 for an order to set aside the exparte Judgment. This application included a prayer for stay of execution. As fate

would have it, the same could not be heard till close to mid May 2005. There being no order of stay, which could easily have been made by the Registrar as an interim remedy pending determination of the substantive application, if any had been requested for as is usual practice in matters of this nature, the Court Bailiff went ahead and disposed of the attached property before the application was heard. Given that an application to set aside an exparte Judgment cannot of itself be relied upon to stay execution, I'm unable to fault the Bailiff's action. The Defendants should have known better. For a person who claims that she had not been served with the plaint and was therefore impliedly surprised by the attachment, it appears to me that the objection to the sale was designedly delayed and therefore an after thought. It offended the proviso to 0.19 r 55 of the Civil Procedure Rules. There will therefore be no order to reverse the sale.

Be that as it may, I have considered the evidence that eight sewing machines were sold. The bailiff talked of a Valuation Report in his possession but none is on record to guide Court on this issue. They are said to have been industrial sewing machines of high value but other than the evidence tendered by the Defendants regarding the cost of these machines some years ago, Court has not been favoured with an independent report indicating their fair value before the impugned sale. In all these circumstances, the possibility that they were under valued or sold at give away prices cannot be ruled out.

Taking into account the circumstances of this case and the discredited nature of the Plaintiff's claim, Court has decided to discount the balance due on the loan, that is, Shs.17,600,000- by a factor of 30% and accordingly awarded the Plaintiff a sum of Shs.12,320,000- (twelve million three hundred twenty thousand only) as special damages. I so order.

It has been suggested by the Defendants that since they gave the Plaintiff land comprised in plot 608 Block 273, the Plaintiff should sell the said security instead of suing them and they would only be deemed to have defaulted after the security fails to sell. I'm unable to accept that proposal. The Defendants were given the impugned land title by a one Busulwa. DW1 Kagoro did not know him well or at all. Busulwa was only introduced to her by PW3 Lule, an agent for the Plaintiff. It is little wonder that they have not cared to pay the money they borrowed from the Plaintiff. They knew they would default and tell the Plaintiff in the face to go and realize the security or else whistle for the money since none of them had any interest in the land. I accept the Plaintiff's evidence that the security was bogus and cannot be realised. I wonder how the Plaintiff could have accepted it as security for such a hefty sum of money without taking the necessary precautions of verifying its authenticity or viability; a factor at the back of my mind when in the course of this Judgment I observed that one party to this case is a fraudster or both of them are. In my view none of them has come to Court with clean hands.

As regards costs, the usual result is that the loser pays the winner's costs. However, this practice is discretionary so that a winner may not be awarded his costs, depending on the circumstances of the case. In the instant case, in view of the Plaintiff's partial success and the dishonest manner in which the parties sought to cheat each other, Court is of the considered opinion that an order that each party bears its own costs of this suit would meet the ends of justice. I so order.

In the final result, Judgment is entered for the Plaintiff against the Defendants jointly and severally and the following orders made:

i. Special damages: Shs.12,320,000- (twelve million three hundred twenty thousand only).

ii. Interest on (i) at the rate of 25% per annum from the date of Judgment till payment in full.

iii. Each party shall bear its own costs.

Yorokamu Bamwine

J U D G E

26/04/2006