THE REPUBLIC OF UGANDA

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

HCT - 00 - CC - CS - 0973 - 2004

KLAUS KEMPT ::

PLAINTIFF

VERSUS

YOBE OKELLO ::
DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

J U D G M E N T:

This suit is for the recovery of Euros 4,500 together with interest, general damages and the costs of the suit.

The case for the plaintiff is that on or about the 7th September 2002 the plaintiff at the request of the defendant availed the said money to the defendant. It is alleged that the defendant had requested for the money because he was experiencing financial difficulties and that he had a mortgage with a bank over his property comprised in leasehold Register Volume 1982 Folio 15 Block 17. The bank had then decided to advertise the property for sale to recover on the facility advanced to the defendant. It is the case for the plaintiff that the plaintiff gave the defendant a bridging

loan facility which was to be repaid at some unclosed time. However todate despite several reminders the said loan has not been repaid by the defendant. For the defendant it is not denied that he received Euros 4,500 from the plaintiff. However it is denied that the money was loan. It is the case for the defendant that the money was for rent due from the plaintiff to the defendant. As it transpired the plaintiff and the defendant were old friends. At one point in time between 1986 and 1988 the defendant had stayed with the plaintiff at his residence in Cologne Germany. Then at a later point in time the plaintiff for a period of 43 months from October 2000 to April 2004 stayed at the residence of the defendant in Bukoto, Kampala. The plaintiff also claimed the value a computer tap top and printer supplied to the defendant at a cost of Ug.Shs.5,400,000/=. It is the case for the defendant by way of counterclaim that the plaintiff did not pay the due rent which by April 2004 had accumulated to US$8,600. As to the said laptop the defendant pleaded that it belonged to the plaintiff who merely left it at the defendant's home when he stopped staying there.

At the scheduling conference it was agreed that the laptop computer and printer be returned to the plaintiff by the defendant by depositing it into Court. This after a while was done and consequently resolved the dispute relating to the laptop. Furthermore at the scheduling conference it was agreed that the defendant's property was advertised for sale; that the defendant did stay at the residence of the plaintiff in Germany between 1986 and 1988; that the plaintiff did stay at the residence of the plaintiff in

Uganda between 2000 and 2004 and that none of the parties paid any rent to the other, while staying at the others residences.

Four issues were set down for determination by Court.

1) Whether the Euros 4,500 was a loan to be paid back.
2) Whether the defendant was in breach of the loan agreement.
3) Whether the plaintiff is under obligation to pay rent for occupation of the defendant's premises
4) Remedies.

Mr. Innocent Taremwa appeared for the plaintiff while Mr. Tom Balinda appeared for the defendant. Only the plaintiff and defendant testified. There was no third party evidence.

Issue No. 1: <u>Whether the Euros 4,500 was a loan to be paid back.</u>

The facts surrounding the Euros 4,500 are fairly straight forward. The defendant conceded receiving the money through various money transfer company.

The purpose of the money is what is in dispute. The case for the plaintiff is that it was loan to enable the defendant clear his obligations with his bank so that his home which was the subject of a mortgage was not sold.

From the evidence adduced in Court there is no written agreement as to the purpose of this money. So it is really a case of the plaintiff's word against that of the defendant. According to the testimony of the plaintiff, the defendant promised to repay him from the sale of Sun Flower Oil and that no date was fixed as when this would be. It would all depend on the income of the defendant. However the plaintiff then left Uganda and went to Germany for a heart operation. On his return to Uganda in 2004 the plaintiff then inquired from defendant when his money would be repaid. It is this point that the defendant allegedly told him to leave and stop staying at his house up to this point the plaintiff claims he was not aware of any obligation to pay rent to the defendant.

According to the defendant the money advanced to him would be offset against rent that the plaintiff was to pay him for staying at his house. The rent was US$200 per month. The defendant testified that this rent was never paid and this created a problem between the plaintiff and the defendant. The situation was aggravated when the defendant's Germany Shepard Dog was poisoned. The defendant testified that he attributed the poisoning to the plaintiff who denied that he did it so he was asked to leave the house.

Counsel for the plaintiff referred me to Blacks Law Dictionary 6 Ed. Pg 936 which defines a loan as;

"...A lending delivery by one party to and receipt by another party of money upon agreed or express or implied to repay it with or without interest".

Counsel for the plaintiff also referred me; Chitty an Contracts 24th Edition at Pg 3189 where it stated;

"If money is proved or admitted to have been paid by 'A' to 'B' and then in absence of any circumstances suggesting the presumption of advancement, there is prima facie, an obligation to repay the money. According, if 'B' claims that the money was intended as a gift, the onus is on him to prove the fact"

I was also referred to the case of Selden V Davidson [1968] 1 WLR 1083.

Counsel for the defendant on the other hand submitted that

"...The manner of advancement shows that indeed it was a friendly loan..."

However Counsel for the defendant then goes on to further submit;

"...It is the plaintiff who brought an action on allegations that he lent money to the defendant. By establishing that he gave money to the defendant, the defendant (sic) (I think he meant the plaintiff) has not set up a prima facie case of a loan. if this were not the case, Courts would be floaded with cases of people who through friendliness or

even philanthropy give money to others and when relations between them get sour, they came forth claim that there is a loan with an obligation to pay. This would make a mockery of justice..."

I have perused the evidence adduced at trial and the submissions of both Counsel. Clearly from the evidence of the defendant he had financial difficulties with his bank DFCU Bank Ltd. The bank had advertised his property for sale on the 27th June 2003 as evidence in Exhibit P4. He testified that he received the money and that he would pay back through an offset of rent. The defendant however did not agree that this was a loan.

Counsel for the defendant tried to make a distinction between what he termed as a friendly advance/loan and a loan. He submitted that this was a case of a friendly advance/loan and not a loan per se'. There was no written agreement nor written demand for payment. Counsel for the defendant however is not clear as to the legal effect of a friendly advance/loan as opposed to a loan per se'. Indeed one these days does see a string of cases coming up where one party or the other raises a claim or a defence based on a "friendly loan". This is now becoming notorious enough for us at the bench to take Judicial notice of this practice. An example of another such case is Gede Rwema V Ruth Bunyenyezi HCCS 181 of 2004 (unreported) where the money was allegedly advanced for a pyramid scheme called gifting circles.

However it is difficult to find a common thread between all these cases as to the legal effect of such a friendly loan. It would appear to me that what can be said of a friendly loan is that it is a loan given informally between the lender and the borrower. It can be given for a variety of reasons and each case should be handled on its own merits. However such informal facilities are expected to be paid back and that is why non payment leads to Court cases. To my mind a loan or a friendly advanced/loan is in legal terms a loan within the meaning assigned to it by Blacks Law Dictionary (supra). There is a prima facie legal obligation that it be repaid.

I according find in answer to the first issue that the Euros 4,500 was a loan to be paid back.

Issue No. 2: <u>Whether the defendant is in breach of the loan agreement.</u>

As found in the first issue there was a loan between the plaintiff and the defendant. It was a very informal loan the terms of which are difficult to construe. As the plaintiff himself testified it was fairly open ended. That notwithstanding it had to be repaid at some stage and it is clear from the evidence that at the time of the trial about 2 years after the last disbursement this money had not been repaid. I find that the obligation to repay the money crystallized when the plaintiff demand for money. The

defendant does not deny that the money was not repaid and so I find that the defendant was in general breach of the obligation to repay the money.

Issue No. 3: <u>Whether the plaintiff is under obligation to pay rent for occupying the defendant's premises.</u>

It is the evidence of the defendant that the plaintiff at various times over a (3 years & 7 months) period between October 2000 and April 2004 stayed at the defendant's house. There was difficulty in fully describing the accommodation given to the plaintiff. However I made out that it was a guest room, bath and toilet. The rest of the facilities in the house like kitchen, domestic help, water, electricity and security were shared. The plaintiff made his own meals. The defendant testified that plaintiff 3 or 4 times a year returned to Germany from Uganda but all the time his room and property would remain intact until the plaintiff returned.

Like in the case of the loan of Euros 4,500 there was no rent agreement clearly making this another very informal arrangement. The defendant testified that the rent was US$200 per month and was never paid throughout the time the plaintiff lived with them. The plaintiff is now counterclaiming US$ 8,600 in rent.

The plaintiff testified that he never contributed to electricity, water bills, and cost of house repair. He testified that he once in a while gave the security guard money when the security guard requested him. He said he was a visitor not a paying guest.

Counsels for both parties had tough time submitting on this issue because not only was there no agreement there was nothing else which was written. Counsel for the defendant submitted;

> *"...it therefore follows that the plaintiff owes the defendant rent for 43 months at the rate of USD 200 per month which totals to USD 8,600/=. The defendant having admitted that he received the Euros 4,500 as an offset of rent, the plaintiff is therefore indebted to him for the balance. Euros 4,500 is the equivalent of USD 5,850 the balance therefore is USD 2,750 which is due from the plaintiff to the defendant..."*

I have perused the evidence on record and the submissions of both Counsels.

Unlike the issue of the loan where there was evidence of remitting of money there is no documentary evidence at all (payment by cheque, receipt, letter of demand etc) of the existence of a "tenancy" between the plaintiff and the defendant. What is clear is that the two were friends and at one time the defendant stayed with the plaintiff in Germany and now the plaintiff also stayed with the defendant in Uganda. The period the plaintiff stayed with the defendant of course is much longer 43 months as opposed to 7 months.

It is indeed difficult to construe a tenancy if one stays at his friend's house. One would expect that if such an arrangement did exist then the defendant

should have followed up rental payments when he chased the plaintiff from his house which he did not. The defendant merely testified that he tried to find out where the plaintiff was in town to claim his money but was not successful. I find this testimony incredible coming from an old friend. It appears to me that the defendant had little motivation to follow upon the alleged USD 5,850 which was due. This in rental terms is a lot of money to be left hanging about. I agree with Counsel for the plaintiff that if this money is due and owing the legal onus is on the defendant to prove it. This he has not done. To my mind given the claim against the defendant for Euros 4,500, the whole rent claim appears to have come as an after thought to offset the amount. Objectively it would have been reasonable to expect the plaintiff as a long standing visitor to contribute to his hosts expenses in keeping him even without a formal rent relationship but this he did not do. This cannot reflect well upon him and probably was a basis for the breakdown of the friendship having stayed there for a long time. As a friend the defendant was under a moral obligation to make a contribution to his upkeep while at the plaintiff's house as a grown person. Whatever really happened here the truth lies some where between the claim for the repayment of Euros 4,500, the death of a German Shepard Dog and the breakdown of good friendship. It is a pity this could not have been solved through alternative dispute resolution (ADR) an opportunity this Court gave to the parties.

In answer to the third issue I find that on the evidence adduced and balance probabilities the plaintiff was under no legally binding obligation to pay rent for the occupation of the defendant's premises.

Issue No. 4: Remedies.

The plaintiff prayed for the following remedies in the plaint.

1. Euros 6,500.

   Only Euros 4,500 were proved and admitted to. I accordingly award the plaintiff Euros 4,500.

2. The return of laptop computer and printer or Ug.Shs.5,400,000/= being their value.

   The laptop computer and printer were returned by order of Court and this rests that issue.

3. Interest at 24% from the 7th day of September till payment in full.

   Clearly the parties as longtime friends did not intend to create any form of commercial transaction over the loan of Euros 4,500. I find it therefore unreasonable to give any interest in this so I give none.

4. General damages for breach of contract.

   Counsel for the plaintiff led no evidence as to proof of general damages. He only cited the case of Fredrick Pool Nsubuga V AG.

1993 1 KARL 33 (unofficial) that general damages are within Courts discretion to put the plaintiff in the position he was before the wrong. He however said a figure of Ug.Shs. 8,000,000/= should be awarded as general damages.

I find that to give the informal nature of this transaction I would award

nominal damages instead of 10,000/=.

5. Costs.

I find that this is a good case for each party to bear their own costs given that this was an open ended loan.

As to the counterclaim I dismiss it and order that here again each party bears its own costs given their conduct especially given the hospitality accorded by the defendant to the plaintiff for a long time.

Geoffrey Kiryabwire

JUDGE

Date: 25/05/06