THE REPUBLIC OF UGANDA

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

HCT-00-CC-CS-0400-2005

JAMBA SOITA ALI :::::::::::::::::::::::::::::::::
PLAINTIFF

VERSUS

DAVID SALAAM :::::::::::::::::::::::::::::::::
DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

J U D G M E N T:

The plaintiff's case against the defendant is for money had and received. It is his case that he advanced a loan to the defendant which he failed to pay back. The defendant does not deny receipt of some money from the plaintiff. However, he contends that it was Shs.1,850,000- and not Shs.9,000,000- as claimed by the plaintiff; and that he paid it back to him and even more.

At the hearing both parties agreed that:

1. The plaintiff lent money to the defendant.
2. The defendant issued three undated cheques to the plaintiff.

3. The defendant was charged and acquitted in the Chief Magistrate's Court at Buganda Road for issuing false cheques.

There are two issues for determination:

1. Whether the plaintiff advanced to the defendant the sum of Shs.9,000,000- as claimed in the plaint.

2. Whether the plaintiff is entitled to the reliefs claimed or at all.

Counsel:

Mr. Sebanja for the plaintiff.

Mr. Semugera for the defendant.

Before I consider the evidence adduced by the parties in support of their respective claims, let me state the law on some aspects of this case.

Firstly, 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 principle to this case, the plaintiff has alleged that the defendant is indebted to him in the sum of Shs.9,000,000-. The burden lies on him to prove that allegation.

Secondly, money had and received.

Money which is paid to one person which rightfully belongs to the other, as where money is paid by A to B on a consideration which has wholly failed or by mistake is said to be money had and received by B to the use of A. The paying of A to B, according to the learned author of A Concise Law Dictionary by P.G. Osborn, 5th Edn at p. 212, becomes a quasi-contract, an obligation not created by law, but similar to that created by contract, and is independent of the consent of the person bound. The cause of action is rooted on quasi – contract on the footing of an implied promise to re-pay. Besides, liability is based on unjust enrichment, that is, the action is applicable where the defendant has received money which, in justice and equity, belongs to the plaintiff under circumstances which render the receipt of it by the defendant a receipt to the use of the plaintiff. For the plaintiff to succeed, there must be evidence of the payment sought to be recovered.

In the instant case, it is an admitted fact that the plaintiff lent money to the defendant. This created lender/borrower relationship, a contractual obligation. It was not money paid by the plaintiff to the defendant on a consideration which failed in the end nor was it a payment by mistake. In

these circumstances, the cause of action cannot be money had and received, a quasi-contract, but one based on a contract of lending and borrowing.

Be that as it may, it has been submitted by learned counsel for the defendant that the transaction between the parties was a loan agreement; that the principal sum attracted an interest of 25% per month; and, that in view of the Money Lenders Act which prohibits lending of money with an interest by a person other than a registered money lender, the transaction between the parties contravened the law and was therefore illegal.

Counsel for the plaintiff does not agree.

I have directed my mind to this argument. The law on this 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, a contraction of a much longer 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 said:

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. See: Success in Law, 4th Edn by Richard H. Bruce at p. 260.

In the instant case, the plaintiff is not a registered money lender. He lent money to the defendant at an agreed interest of 25% per month, an excessive rate indeed given the current commercial rate of between 20 – 25% per annum. Court is cutely aware that the plaintiff, apparently upon the realisation that what he did was in contravention of the law, has decided to abandon his claim for interest. It is submitted by counsel that the abandonment of the claim is an attempt to circumvent the law which prohibits Courts from sanctioning and enforcing illegal contracts. I agree with that submission. I think it is fair to say that not every person who lends money is a money lender within the meaning of the Act.

Commenting on a similar law, Farwell J. in **Litchfield –Vs- Dreyfus [1906] 1 K.B 584** at 588 -89 observed:

> *" .... a man who carries on business as a money lender, and is not registered under the Act, cannot recover. But not every man 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 to all and sundry, provided that they are from his point of view eligible."

I agree.

Relating the principle to the issue now before the Court, there is unchallenged evidence that the plaintiff lent money to the defendant at an interest. The defendant was simply introduced to the plaintiff as a money lender by an acquaintance to both and from that time they started dealing with each other in matters of money. Court is satisfied that neither party knew the other before the incident. In other words the plaintiff did not merely extend a loan to a friend albeit at interest. It was his business and he was ready and willing to lend his money to all and sundry, to use the very words of the learned Judge, provided that they were from his point of view eligible.

Under S. 2 (4) (b) of the Money Lenders Act, Cap 273 [formerly S. 3 (2)], it is an offence to carry on business as a money lender without having in force a proper money lenders licence authorizing one to do so.

In the instant case, since the plaintiff had no money lending licence and was carrying on business of money lending, any agreement or contract between

him and the defendant was illegal. It cannot be enforced by the Court on account of being an illegal act and therefore a base cause.

The question of the same being a friendly loan does not arise because from the plaintiff's own admission the agreement was that he pays interest on the principal sum at the rate of 25% per month. There cannot be anything friendly about a loan that on a yearly basis translates into 300% interest on the principal sum, the mischief, the unsatisfactory state of affairs which the Act was enacted to remedy. I have already observed that the plaintiff made a last minute attempt to abandon the claim for interest, an act he said was out of good will. Counsel for the defence has argued, quite correctly in my view, that the amendment does not save the plaintiff in any way because whereas the plaint stands to be amended, the transaction still remains the same. I agree. Amending the plaint does not in itself purify the illegal transaction. Once a party demonstrates that the transaction was illegal, as the defendant has done herein, the cause of action is deemed to have arisen ex turpi causa, and the Court says that he has no right to be assisted. The illegality extends to the cheques as well on which the plaintiff further bases his claim. The plaintiff's claim is based on a base cause. Court cannot enforce it against the defendant.

As to whether the plaintiff is entitled to the reliefs claimed or at all, in view of my finding in the first issue, he is not entitled to any of the reliefs claimed for in the plaint. The suit would be dismissed. However, in the event of a

successful appeal, in view of the plaintiff's claim for special damages, I shall try to assess the evidence in respect of that claim to determine whether I would have awarded him anything.

As to his claim for special damages in the sum of Shs.9,000,000-, the rule has long been established that special damages must be pleaded and proved by the party claiming the same.

From the evidence, the transactions between them started way back in 1999. Neither the plaintiff nor the defendant appears to know the date. There was no written agreement between them to give the basis for the computation of interest. It is therefore the plaintiff's word against that of the defendant. The plaintiff claims that the money was advanced on two separate occasions in instalments of Shs.6m and Shs.3m respectively. The defendant issued three cheques: one for Shs.14m, another for Shs.2,635,000- and the other for Shs.2,700,000-. From the evidence of the parties, the cheques were undated when they were issued to the defendant. It is not known which cheque was meant to act as security for payment of which instalment.

The defendant's version is that he was given a loan of Shs.1,000,000- and another of Shs.850,000- on separate occasions. That between 1999 and the filing of this case by the plaintiff, he had paid Shs.10,570,000- to the plaintiff.

He produced evidence of payment to the plaintiff directly and through his (plaintiff's) bank Account.

I have not had considerable difficulty deciding which of the two versions is more credible than the other because the casual and informed manner in which the plaintiff handled these important issues of money. For instance, although the plaintiff admits that the defendant made some payments to him, he does not know how much they add up to. He was simply not keeping track of the payments. Accordingly, what he thinks is owed to him by the defendant can only be an estimate, a matter of conjecture. He bases his claim on the 3 cheques which add up to Shs.19,335,000-. However, he does not know by what factor a loan of Shs.9m would add up to that much. In my view he has not come out clean on the evidence against the defendant. Whereas in the criminal trial his claim was that he lent Shs.19,335,000- to the defendant, as it has turned out now, he did not give him cash to that tune. And whereas in the criminal trial he swore that the defendant had not paid him anything, he now acknowledges receipt of some payments from him much as he does not know how much it adds up to. Moreover, whereas in the criminal trial he insisted that money deposited on his account by the defendant was his (the plaintiff's) own money which he was giving him to deposit on his (plaintiff's) account by virtue of the defendant being an employee of the bank, he has now admitted that the defendant used to pay him cash and at times he would deposit the money on the account. It is a

well known principle of law and practice that a man who swore the contrary of that which he stated on a previous occasion was not worthy of belief. See: **M. Kabenge –Vs- James K. Mpalanyi Civil Appeal No. B 56 of 1962, M.B. 84/64.**

Assuming that the plaintiff advanced Shs.9m to the defendant and that the loan carried no interest, as the plaintiff has now invited us to find, then the amount partly paid to him directly and partly deposited on to his account in the Bank amounting to Shs.10,570,000- rested the loan, in the absence of the plaintiff's own account of how much he received from him. It is submitted that while in custody the defendant undertook to pay Shs.5m to the plaintiff as evidence that he owed him money. I take cognizance of the fact that this was a person in custody, on account of his alleged failure to settle the debt. The possibility of undue pressure on him cannot be ruled out. I have considered the evidence of both parties in its totality. I also had the opportunity to note their demeanour as they testified. In my view, as between the plaintiff and the defendant, the defence version makes much more sense than that of the plaintiff. The defence version is much more credible than that of the plaintiff. I therefore accept his (defendant's) evidence that following a misunderstanding between them over the outstanding amount, he issued to the plaintiff the impugned cheques. They were merely to serve as evidence of indebtedness to the plaintiff, not that he owed him the amount stated thereon. They were to it down and determine

who owed what to the other but they never did. Instead the plaintiff banked them and they bounced. It is little wonder that he was acquitted in criminal trial. Accordingly, even if the plaintiff's cause of action had been okayed, I would still have found that the plaintiff had failed to prove his claim against the defendant.

As regards costs, the usual result is that the loser pays the winner's costs. However, this practice is subject to the Court's discretion such that a winning party may not necessarily be awarded his costs, even though they probably ran into millions of shillings.

In light of the peculiarities of the case, especially given that the defendant benefited from the illegal transaction; the casual manner in which the parties handled important issues of money; and the manner in which the defendant, a banker, abused the institution of cheques, I'm inclined to order that each party bears its own costs, save any costs which may already have been decreed to either party in any event. It is so ordered.

For the reasons stated above, the suit is dismissed. Each side shall bear its own costs. I order so.

Yorokamu Bamwine

J U D G E

03/07/2006

03/07/2006

Parties present.

Okuni Charles – Clerk.

Court: Judgment delivered.

Yorokamu Bamwine

J U D G E

03/07/2006