THE REPUBLIC OF UGANDA

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

HCT-00-CC-CS-0010 OF 2005

MICHAEL NYANGAN :::::::::::::::::::::::::::::::
PLAINTIFF

VERSUS

1. COLONEL SAMUEL WASSWA
2. ROSE NALONGO WASSWA **t/a S.S.W TRANSPORTERS**
3. ISAAC SEMUJJU **::::::::::::::**
DEFENDANTS
4. PEACE NAKAZI

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

J U D G M E N T:

The Plaintiff brought this suit to recover Shs.55,200,000- which he allegedly lent to the Defendants through the 1st Defendant. It is his case that on 5/9/2000 he entered into an agreement with the 1st Defendant wherein he lent him Shs.19,200,000-. That the 1st Defendant failed to repay the said amount and instead asked for a further loan of Shs.36,000,000- in May 2001. He has failed to pay off both debts. Hence the claim for Shs.55,200,000-. The other Defendants are said to be co-directors with the 1st Defendant in a company known as S.S.W Transporters.

In a written statement of defence covering all the Defendants, the 1st Defendant admits borrowing money from the Plaintiff in the sum of Shs.12,000,000- to finance the activities of a company called Aquifer Int. Agencies Co. Ltd where he is a Director and Shareholder and executing a loan agreement of Shs.19,200,000- to include the interest thereon. The amount was repayable within 5 weeks from the date of execution of the loan agreement. He denies getting from the Plaintiff a further loan of Shs.36m but admits issuing a cheque in the same amount.

The long and short of the defence case is that the Plaintiff was paid all the sums due under the agreement plus even extra sums.

At the scheduling conference which the 1st Defendant did not attend, the parties through their respective counsel agreed that:

1. The Plaintiff lent to the 1st Defendant Shs.19,200,000-.
2. The 1st Defendant issued a cheque of Shs.36m to the Plaintiff and upon presentation it bounced.

Two issues were framed for determination:

1. Whether the 1st Defendant is indebted to the Plaintiff in the amount claimed in the plaint.
2. Whether the Plaintiff is entitled to the reliefs sought.

Representations:

Mr. Kavuma Geoffrey for the Plaintiff.

Mr. Mbabazi Mohamed for the Defendant.

First, 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 rests on the party who asserts the affirmative of the issue or question in dispute. When the 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. In the instant case, the Plaintiff has alleged in his plaint that the Defendants owe him Shs.55,200,000-. The Defendants deny it. The burden of proof lies on the Plaintiff to prove that what he is asserting against the Defendants is true. The standard of proof is on a balance of probabilities. From the way the issues were framed, the case is basically between the Plaintiff and the 1st Defendant. The other Defendants come into the picture simply because the impugned cheque bore S.S.W Transporters as the drawer. Other than that, there is no evidence of any dealings between the Plaintiff and the company. The presumption is that this was a matter between individuals: the Plaintiff and the 1st Defendant.

As to whether the 1st Defendant is indebted to the Plaintiff in the amount claimed in the plaint, I must observe right from the word go that the evidence offered by the Plaintiff on the matter is not only inconsistent but at variance with the pleadings.

The Plaintiff, the sole witness for his side, testified that he gave Shs.19.2m to the 1st Defendant on 5/9/2000 and P. Exh. 1 was executed. That on another occasion, he gave the same Defendant a sum of Shs.36m for which he issued to him a post dated cheque, P. Exh. 11, as security for repayment of that loan. Contrary to his averment in the reply to the Defendant's WSD that the Pick up Nissan Diesel referred to in para 8 (f) of the defence was purchased by him from M/s Aquifer International Agencies Ltd with his own money, the Plaintiff stated in his testimony to Court that he was taken to one Karugire's Chambers and given the vehicle towards settlement of the said debt and that he later received from one Jovia Saleh cash amounting to Shs.8.5m in connection with the said debt. Thus at the hearing, without moving Court for an amendment to his plaint, the Plaintiff stated that the amount due and owing to him at the time of filing the case was Shs.38,700,000- and not Shs.55,200,000- as stated in the plaint.

Asked why he was now changing his story, the Plaintiff confessed that he sued for that much in the plaint first, because he was annoyed with the 1st

Defendant, and secondly, because he knew that there was no written evidence that the 1st Defendant had paid him anything. He said:

> *"Later, I realised it was bad to cheat anybody. So I presented to Court evidence of payment of Shs.6m by cheque from Col. Wasswa and evidence of sale of the vehicle (agreement) which was valued at Shs.8m. I also disclosed payment to me of cash Shs.2m by Col. Wasswa plus Shs.500,000-."*

As the saying goes, confession is only good for the soul. It does not take away the sin. Whether he is sorry about it or not, the lies have undermined his credibility not only as a claimant but also as a witness for his side. While a witness who has been untruthful in some parts and truthful in other parts could be believed in those parts where he has been truthful, and it is the duty of the Court to separate the truth from the lies, it is a well known principle of law and practice that a man who swears the contrary of that which he stated on a previous occasion is not worthy of belief: M. Kabenge – Vs- James K. Mpalanyi Civil Appeal No. B 56 of 1962, M.B. 84/64.

The 1st Defendant has of course not helped Court in ascertaining the truth in this case. He never appeared in Court at all throughout the hearing. After failing to appear in Court as directed, Court closed the hearing in accordance with 0.15 r 4 of the Civil Procedure Rules. He therefore did not appear as a witness to substantiate his claim that he paid back all the money. It is an

admitted fact that the Plaintiff lent to the 1st Defendant Shs.19,200,000-. I believe he did. It is contended by the Plaintiff and denied by the defence that the Plaintiff extended a further loan of Shs.36m.

It is argued for the defence that it is inconceivable that a person who had been advanced Shs.19.2m and had defaulted in the payment could be advanced another Shs.36m without executing another loan agreement or memorandum of understanding to evidence the amount.

I have been persuaded by this argument.

This is a person who had not been paid the entire Shs.19.2m in time or at all. How would he entrust him with another Shs.36m, unsecured? And since the amount had now increased to Shs.55,200,000-, why wasn't the post dated cheque made in such away as to reflect the total indebtedness as at that date?

Moreover, the first debt had been reduced into writing. It was for a sum of Shs.19.2m. Why wasn't this one, almost twice as much, equally reduced into writing and witnessed by other people, just like the first one? I could go on and on. These unanswered questions have raised a doubt in the mind of Court. Coupled with the fact of the Plaintiff's confessed dishonesty in this case, Court has come to the conclusion that the fact of the alleged lending of Shs.36m to the 1st Defendant has not been proved.

I would answer the first issue in the negative and I do so.

As to whether the Plaintiff is entitled to the reliefs sought, his first claim is for Shs.19,200,000- as money borrowed and not repaid by the 1st Defendant.

From his own evidence, he received from the 1st Defendant or other people paying on his behalf cash amounting to Shs.8.5m and a pick – up vehicle estimated at Shs.8m all totaling to Shs.16,500,000-. These were payments towards the settlement of the debt. In view of this evidence, the assertion that the entire debt of Shs.19.2m is still due and owing cannot succeed. It fails in part as I will show later.

From the evidence, the Plaintiff may have been dishonest in claiming that he had not been paid any money under the agreement of 5/9/2000. On account of this dishonesty, I have been asked to dismiss the entire claim. From the evidence as presented to Court and the submissions of both counsel, I'm unable to grant that prayer.

This is because from the evidence, the 1st Defendant borrowed Shs.19.2m from the Plaintiff. After harangues from the Plaintiff, a total of Shs.16,500,000- has been admitted as paid by the Defendants.

It is also admitted that the 1st Defendant issued to the Plaintiff a cheque in the sum of Shs.36m. No evidence has been presented to Court that he was coerced into doing so. However, from the evidence, following the 1st Defendant's failure to pay, the parties disagreed on the amounts due on the loan agreement. Court is of the view that the issue of interest took centre stage. The 1st Defendant agreed to pay Shs.36m but renaged on that one as well.

It is claimed by the defence that on 5/9/2001, Shs.10m was paid to the Plaintiff on cheque No. 542259 drawn on Allied Bank. However, documents presented to Court show that this cheque also bounced. Plaintiff's evidence on that point has not been challenged.

It is also claimed by the defence that on 26/4/2002, Shs.2m was paid to the Plaintiff. The defence has produced documents indicating acknowledgment of payments by the Plaintiff. No document has been produced to indicate acknowledgment of payment to him on 26/4/2002.

From the evidence, therefore, proved payments to the Plaintiff amount to Shs.16,500,000-. The loan agreement of 5/9/2000 made no provision for payment of interest. This would leave a balance of Shs.2,700,000- on the loan agreement.

It would appear to me that the Plaintiff has been insisting on payment of interest to him when it was not part of the contract terms. The general rule is that interest can only be claimed if the claim is based on an agreement for it in the document sued on or by statute. In the instant case, the document being sued on is silent on the issue of interest on the principal sum of Shs.19,200,000-. Therefore, none was payable as of right.

There was, it would appear, an attempt to quantify interest upon the breach. Hence counsel's evidence from the Bar that the amount due to the Plaintiff was Shs.7,500,000. Given that the Plaintiff had falsified his claim, Court is not sure that the computation was based on correct legal principles or at all. Accordingly, interest can only be paid herein as a discretionary remedy.

In para 9 (d) of the plaint, the Plaintiff has prayed for interest on the principal sums at commercial rate from the date of the breach till full payment. In my Judgment, this would mean interest on the proved unpaid sum of Shs.2,700,000-.

The principle of interest as a discretionary remedy was laid down by Lord Denning in Harbutts Plasticide Ltd –Vs- Wyne Tank & Pump Co. Ltd [1970] 1 QB 447. He said:

> *"An award of interest is discretionary. It seems to me that the basis of an award of interest is that the Defendant has kept the*

Plaintiff out of his money; and the Defendant has had the use of it himself. So he ought to compensate the Plaintiff accordingly".

In the instant case, money was advanced to the 1st Defendant on 5/9/2000. It was to be refunded within 5 weeks but this was never done.

The principle which emerges from decided cases, including Sietco –Vs- Noble Builders (U) Ltd SCCA No. 31/95 is that where a person is entitled to a liquidated amount and has been deprived of it through the wrongful act of another person, he should be awarded interest from the date of filing the suit. In the instant case, the suit was not filed immediately upon the breach. The Plaintiff filed one and he was told he had filed it against a wrong party. He then filed the instant one on 7/1/2005. I have addressed my mind to a letter dated 21/2/2003 from the Plaintiff himself. It is D. Exh. V. In that letter, the Plaintiff wrote:

"M/S Kiryowa & Karugire Co. Advocates KAMPALA.

Re: <u>Agreement executed with M/S Aquifer International Agencies Ltd</u>

I refer to an agreement executed in your chambers sometime in or about November 2001 in which the said company acknowledged being indebted to me in the sum of Shs.24,000,000-. I wish to confirm that I have to date received the equivalent of the sum of Shs.16,500,000- leaving a balance of Shs.7,500,000- which I now demand. You should therefore

ignore the matter written by my lawyer in terms contrary to the above."

The Plaintiff's lawyer had earlier on written to the said firm of Advocates putting the Plaintiff's claim at Shs.20,000,000-.

The Plaintiff did not object to this document being put in evidence as an exhibit. The defence itself relies on it, implying that it was satisfied with the Plaintiff's stand on the matter as at that date.

At the scheduling conference, counsel for the Defendants, while summarizing the defence case, stated that it was true that the Defendant borrowed money from the Plaintiff as per the agreement of 5/9/2000. That the money was repayable within a given period, that is, by 31/10/2000. That there was interest being calculated and that this resulted into the Defendant issuing a cheque for Shs.36m. That this was meant to cover the Shs.19,200,000- and the accumulated interest. Counsel continued:

"Later, there were negotiations with a certain company called Aquifer. These negotiations were between Aquifer, 1st Defendant and the Plaintiff. So Aquifer on behalf of 1st Defendant paid Shs.28,500,000-. This left a balance of Shs.7,500,000-. This amount is acknowledged as due and owing."

No witness has appeared on behalf of the 1st Defendant to contradict the above position. The presumption is that counsel was instructed to state so. In these circumstances, Court takes the view that whether the balance was calculated from the Shs.36m previously bounced cheque or the re-negotiated amount of Shs.24m as per D. Exh. V, the truth is that the balance acknowledged by both parties was Shs.7,500,000-. Court is therefore satisfied that by further agreement of the parties, the balance still due and owing, including the Shs.2,700,000- originally outstanding on the loan advanced to the Defendant on 5/9/2000 was as at 21/2/2003 Shs.7,500,000-. It is awarded to the Plaintiff under "any other relief this Court may consider just." I allow interest on it at the commercial rate of 23% per annum from the date of filing the suit (7/1/2005) till full payment.

In para 9 (b) of the plaint, the Plaintiff's claim is for Shs.36m being money borrowed and not repaid by the Defendants. I have already pronounced myself on that claim. It is disallowed.

In para 9 (c) of the plaint, he prays for general damages for breach of contract.

From the evidence, the parties had agreed that the loan of Shs.19.2m be paid back on or before 31/10/2000 without fail or exercise. The 1st Defendant breached that part of the contract. The payments first denied but later

accepted by the Plaintiff were effected much later, after the Plaintiff had lost his cool and sought extra-Judicial remedies against the 1st Defendant from the powers that be.

The law is that when a party fails to do what he/she agreed to do or does not do it properly, he/she is said to be in breach of the contract. He/she will be liable to pay damages to the aggrieved party to compensate him for any loss occasioned.

The damages which the other party ought to receive in respect of such a breach should be such as may fairly and reasonably be considered as either arising naturally, that is, according to the usual course of things, from such a breach itself or such as may reasonably be supposed to have been in contemplation of the parties at the time they made the contract as a probable result of its breach.

Counsel has invited Court to consider the fact that the Plaintiff was a successful businessman whose businesses have now been paralysed by the 1st Defendant's act of refusing to pay him. Court accepts that being denied use of his money has occasioned him loss and inconvenience.

Counsel did not suggest to Court any figure he would consider to be appropriate for the loss suffered by the Plaintiff. This Court is of course

cutely aware that damages are intended as compensation for the Plaintiff's loss and not a punishment to the Defendant. Taking into account all the circumstances of the case and doing the best I can, I deem a sum of Shs.2,500,000- (two million five hundred thousand only) adequate compensation for the said breach. It is awarded to him.

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 self confessed attempt to cheat the Defendant, Court is inclined not to award him full costs of litigation. He is therefore decreed half the taxed costs of the suit.

The other Defendants did not participate in the proceedings. No issue was framed to cover them and counsel's submissions are silent on them. I would in these circumstances dismiss the case against them and order them to meet their own costs, if any. I order so.

In the result, Judgment is entered for the Plaintiff against the 1st Defendant. The following orders are made against him:

i. Special damages: Shs.7,500,000- (Seven million five hundred thousand only).

ii. General damages: Shs.2,500,000- (Two million five hundred thousand only).

iii. Interest on (i) at the prayed commercial rate of 23% per annum from the date of filing the suit till payment in full.

iv. Half the taxed costs of the suit.

(signed)

Yorokamu Bamwine

J U D G E

1/2/2006