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Bank Of Baroda (U) Ltd-V- Mpungu & Sons Transporters Ltd- HCT-00-CC-CS-092-1997 [2007] UGCommC 16 (20 February 2007)

THE REPUBLIC OF UGANDA

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

HCT-00-CC-CS-0921-1997

Bank Of Baroda (U) Ltd Plaintiff
Versus
1. Mpungu & Sons Transporters Ltd
2. Justine Nalunkuma Iga
3. George William Mpungu
4. Sserunkuma Phillip Defendants

20 February 2007

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

J U D G M E N T:

The plaintiff's case against the defendants is for recovery from them a sum of Shs.141,944,136-, together with interest thereon at the rate of 24% p.a. from 30th May 1997 till payment in full and costs of the suit. The said debt arose out of loans of Shs.30,000,000- and Shs.60,000,000- which were granted to the first defendant by the plaintiff on 17/6/1993 and 29/12/1994 respectively. The 2nd, 3rd and 4th defendants guaranteed the repayment of the said loans.

The first scheduling conference was conducted before another Judge on 31/3/2003. When I took over the case in August 2005, it became necessary to re-do it. At this subsequent scheduling conference, the following matters were agreed upon by the parties:
1. Loans were taken as pleaded.
2. The loans were secured by personal guarantees and debenture executed by the first defendant.
3. Other than the amount realised from the sale of the Motor vehicle, the loan balance is still due and outstanding.
4. The plaintiff holds an equitable mortgage over a certificate of title deposited with the plaintiff.

The following issues were agreed upon for Court's determination:
1. Whether the defendants are indebted to the plaintiff, and if so, to what extent.
2. Whether the 3rd defendant (in the counter claim) is liable on the loan.
3. Whether the sale of the 1st defendants motor vehicle was lawful.
4. Whether the plaintiff is liable in conversion.
5. Remedies, if any.

Counsel:
Mr. John Fisher Kanyemibwa for the plaintiff.

Mr. Edward Mugogo for the defendants.

Before I consider the evidence adduced by the parties in support of their respective claims, I find it necessary to warn myself on the burden of proof and the standard thereof.

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 that 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 that presumption. The standard of proof is on a balance of probabilities. Relating this principle to the instant case, the plaintiff has alleged that the defendants are liable to him in the sum of Shs.141,944,136- as at the time of filing the suit in 1997. The burden lies on it to prove that allegation.

As to whether the defendants are indebted to the plaintiff, and if so, to what extent.

The case for the plaintiff is mainly based on the testimony of PW1 Alison Mutakirwa and a number of exhibits. The said PW1 Mutakirwa is an employee of the plaintiff, a banking institution. By the time she appeared as a witness on 1/6/2006, she had, according to her, clocked 19 years with the plaintiff. By 1994 she was a Credit Officer, among other duties, appraising loans and over draft proposals. It is her testimony that the first defendant was their customer. They approached the bank for a facility between 1992 – 94. Addressing herself specifically to 1994, she said that the defendants approached the bank for a facility of Shs.90m. The money, according to P. Exh. XV, was for purchase of a bus. She appraised the application and recommended them for a lesser sum of Shs.60m. She did so because the company had other outstanding loan which it was servicing. These were loans of Shs.40m and Shs.30m respectively. The loan of Shs.30m was formally sanctioned on 11/6/93 and disbursed on 17/6/93. Before then, they had a loan of Shs.40m which they had got on 4/6/92.

For the Shs.30m loan, personal guarantors were the directors, floating debenture and mortgages on some property, namely, Plot 347 Block 187 Kasangati, Plot 86 Block 53 Kyadondo and Plot 692 Block 57 Bulemezi.

She looked at P. Exh. 11 and identified it as the debenture, a floating one on the company's assets both present and future. It is her evidence further that at the time the loan of Shs.60m was approved in favour of the defendants, the outstanding amount on the previous loans was Shs.61,164,107-. Then another loan was sanctioned on 23/8/94 and disbursed on 29/12/94. The said outstanding amount of Shs.61,164,107- was as at 9/3/94. The witness was shown P. Exh. 111, a Bank Statement, which according to her shows that by 31/7/97, the principal amount outstanding on this loan was Shs.85,211,813-, exclusive of interest between 1/10/96 to 31/7/97. I have considered the evidence of PW1 Mutakirwa. Although she was clearly involved in the loan appraisals, it would appear that she was not involved in the processing of documents on which the plaintiff's claim of Shs.141,944,136- is based. I have also looked at the bank statements annexed to the plaintiff's plaint. According to annextures 'D' and 'E' to the plaint, collectively marked P. Exh. 111 at the scheduling conference, as at 9/3/93, one account operated by the 1st defendant opens with a debit balance of Shs.47,675,585- as at 9/3/93 and closes with a debit balance of Shs.56,732,323- as at 31/5/97. The calculation of interest on this account ceased effective 1/6/96. The other statement is for a period between 29/12/94 and 31/7/97. It opens with a debit balance of Shs.60m and closes with a debit balance of Shs.85,211,813- as at 31/5/97. Calculation of interest on this account ceased effective 1/10/96. The plaintiff is bound by its own pleadings. The question whether the defendants are liable to the plaintiff in the sum claimed or at all must be determined on the pleadings and the evidence; on the pleadings, upon the presumption that any express or implied allegations of fact in

it are true; and, on the evidence, upon the presumption that the figure of Shs.141,944,136- was arrived at by an expert in that area, which Court is not, after taking into account all the relevant factors, including the contractual arrangement between them as to how the interest would be calculated.

The two amounts (that is, Shs.56,732,323- and Shs.85,211,813-) give a total of Shs.141,944,136-, the exact amount claimed by the plaintiff in the plaint. The defendants have not challenged the method used by the plaintiff to arrive at this figure. According to the evidence of PW2 Mawanda, the bus was sold on 2/4/97 at a price of Shs.35m. The amount was received by the plaintiff, according to the evidence of PW1 Mutakirwa. The money was paid in 3 instalments of Shs.20m on 11/4/97; Shs.5m on 23/7/97; and Shs.10m on 11/12/97. From the records, the bank statements give the position as at 31/7/97. The suit was filed on 19/9/97. The figure of Shs.141,944,136-, therefore, included the Shs.20m realised from the sale of the bus. The other amounts, that is, Shs.5m and Shs.10m appear not to be accounted for, going by the same bank statements. In these circumstances, Court is satisfied that as at the time of filing the suit, the defendants loan accounts had a debit balance of Shs.136,944,136-. Upon the payment of Shs.10,000,000- also from the bus sale proceeds, the amount was reduced to Shs.126,944,136- which the plaintiff is in, my view justified to claim from the defendants.

PW1 Mutakirwa testified that as at 1/6/2006, the total indebtedness was Shs.467,616,829-. I have been invited to find that this is the outstanding amount. The figure includes interest from the date of filing to-date, which interest is clearly disputed by the defendants although it was not framed as a specific issue for Court's determination. In my view, subject to the Court's finding on the issue of interest at a later stage of this judgment, the plaintiff has proved to the satisfaction of the Court on the balance of probabilities that the amount claimed in the plaint, that is, Shs.141,944,136-, less a sum of Shs.15,000,000- being the balance on the bus sale proceeds is still due and owing from the defendants. I say that it is owing from the defendants because the 2nd, 3rd and 4th defendants guaranteed the repayment on the loan. This fact was admitted at the scheduling conference. The guarantors are therefore equally liable with the principal, the first defendant, on the said loan facilities. I so find and hold that from the evidence, the outstanding amount is Shs.126,944, 136-.

As to whether the 3rd defendant (in the counter claim) is liable on the loan, the said 3rd defendant on the counterclaim is the administrator of the estate of Amos Sekitende Salongo. In para 10 of the suit by way of counter claim, the 1st defendant (Mpungu & Sons Transporters Limited) claimed that it was entitled to a declaration that the 3rd defendant (on the counter claim) should contribute towards the payment of the loan of Shs.60m in proportions as this Honourable Court may determine. There is no evidence to show that the plaintiff on the counter claim made any effort to serve any Court process under this suit on the said 3rd defendant on the counter claim.

Before the plaintiff's case opened, counsel for the defendants informed Court thus:

> "If we don't bring a representative of the estate of late Amos Sekitende Salongo next time, we shall drop claim against him and therefore issue No. 2."

The said representative was never brought. The presumption is that the plaintiff on the counter claim (Mpungu & Sons Transporters Ltd) abandoned the pursuit of the said issue. The said issue is accordingly struck out and no finding made in respect of that claim in the counter claim.

As to whether the sale of the first defendant's motor vehicle was lawful, from the defence pleadings, the sale of the Isuzu bus Reg. No. 422 UAR by the plaintiff is challenged on the following grounds:

(a). That the said vehicle was never part of the securities offered by the 1st defendant to the plaintiff. The first defendant contends that the only security offered to the plaintiff was land comprised in Plot 116 Block 185 Buddu;

(b). The said vehicle was pledged by the 1st defendant to UCB and not the plaintiff, that the plaintiff did not finance the purchase of the said vehicle;
(c). The said vehicle was undersold by the plaintiff;
(d). The second defendant to the counter claim (an agent of the plaintiff) to his in-law at a ridiculously low price; and
(e). The said vehicle was not sold at an auction.

The plaintiff contends that it was at all times entitled to sell the first defendant's vehicle under a Debenture Deed, P. Exh. 11, securing a loan of Shs.30m. The certificate of Registration of the Debenture is part of the said Exhibit. There is also the Instrument of Hypothecation dated 12/12/94, P. Exh. V11, which the plaintiff relies on.

I have seen the Debenture Deed P. Exh. 11. It is dated 31/8/93. It was executed between Mpungu & Sons Transporters Ltd and the plaintiff. It provides (Clause 3 thereof):

> "3. The borrower hereby charges in favour of the Bank all its undertaking, good will, plant machinery, current assets, uncalled capital and all other movable assets, and property whatsoever both present and future ....."

From the above, Court is satisfied that the first defendant's assets, in existence at the time of the execution of the said deed and those it would own in future were charged to the bank. Accordingly, for as long as the said debenture remained unsettled, and it is an admitted fact that other than the amount realised from the sale of the first defendant's motor vehicle the loan balance is still due and outstanding, any moveable assets subsequently acquired by the first defendant were subject of the charge under the said debenture. Under clause 9, the parties agreed that the bank could sell any such property by public auction or private treaty. In these circumstances, there is no merit in the defendants' argument that the said vehicle was not sold at an auction. Public auction was not the only agreed mode of selling any such asset.

There was an attempt by Mr. Mpungu to show that by the time the parties went in for the second loan of Shs.60m the first one had been paid. This is of course a self defeating argument considering the admitted facts at the scheduling conference, and P. Exh. IV, a collection of letters dated 21/7/94, 17/8/94 and 19/8/94 (among others) in which the first defendant clearly admits that it had an outstanding loan of Shs.45m at the time it was applying for a loan of Shs.60m to purchase the Isuzu Bus.

The same said Mr. Mpungu (DW1) testified that the loan of Shs.30m was repaid and the securities in respect thereof returned to the first defendant. My understanding of D. Exh. IV, an undertaking by the 1st defendant, is that the title deeds in question were released to the first defendant on the understanding that as soon as UCB gave them a cheque of Shs.50m, they would take the money and pay it to the plaintiff through Hunter & Greig Advocates. The language used in the document is plain and unambiguous. It admits of no other interpretation. It did not, in my view, discharge the first defendant from its liability under the debenture.

In his testimony Mr. Mpungu (DW1) claimed that the said vehicle was pledged by the first defendant to UCB and not the plaintiff bank. By this assertion, DW1 is saying that the said vehicle was not available to the plaintiff bank under the said debenture.

I have perused the letter relied on by the 1st defendant, D. Exh. X1. It is dated 7th September, 1994. It makes reference to a letter from them (UCB) dated 22/12/93 offering the 1st defendant a facility of Shs.50m to purchase one unit of an Isuzu Bus. It states that due to some over sight on their part, the bus had not been registered in the name of the bank. He was accordingly being asked to surrender its log book not later than 15th September, 1994. From the records, however, the Isuzu Bus which was sold by the plaintiff bank arrived in Uganda in December 1994. In my view, a vehicle which had not arrived in the country by December 1994 could not have been having a log book which the first defendant was being asked to surrender to UCB by September 1994.

I have been asked by learned counsel for the plaintiff to find that the vehicle sold by the plaintiff is not the vehicle which UCB was threatening to impound if the first defendant did not surrender its log book and transfer forms by 15/9/94. I find so. For as long as by 15/9/1994 the vehicle sold by the plaintiff had not been imported into the country, it could not have been the subject matter of D. Exh. X1. My resolve in this regard is strengthened by a letter dated November 28th, 1994, part of D. Exh. X11. It is from General Motors Kenya Ltd and addressed to the 1st defendant. It reads:

> "Dear Sir,
> RE: **MPUNGU BUS NO. 2**
> Sir, please refer to your letter dated November, 25, 1994 on the above mentioned matter.
>
> We are pleased to confirm to you that your second bus will be ready on the 7th December, 1994.
>
> Please kindly liaise with your Bankers to ensure full payment before the date indicated above.
>
> Thank you.
>
> Yours faithfully,
> MUTISYA A. KILONZO."

From this letter, Court is satisfied that prior to the arrival of the impugned bus in the country, the defendants had imported from the same supplier a different bus. Court is satisfied that the bus sold by the plaintiff was the second bus in D. Exh. X11. It was not the subject matter of the pledge to UCB. On the balance of probabilities, what was pledged to UCB was the one imported previous to the second one, the one that was in the country by September 1994. I so find. In the absence of any evidence that at the time of the sale UCB protested the sale or ever did so subsequently, Court is of the considered view that the claim peddled by the defendants that UCB had any interest in it is false. It is not supported by any credible evidence.
As to whether the vehicle was under sold, there is evidence that it was advertised for sale in the New Vision of 21/3/1997. There is evidence that it was sold at a public auction conducted by DW2 on 2/4/97. The highest bidder paid Shs.35m. The Chief Government Mechanical Engineer assessed its value at Shs.20m. DW2 Muhumuza did not carry out the valuation. The valuation was carried out by one David Sempa. The person who assessed it has since died. Therefore, the assessed value of Shs.70m has not been substantiated. Court asked DW2 Muhumuza as to the likely forced value in view of the market value attached to it by Sempa. His view was that in practice the forced sale value would be about 40% of its market value.

Learned counsel for the defendants has submitted that 40% of Shs.70,000,000- is Shs.42,000,000-. He is as wrong on that as his reference to a Judge of this Court as 'Your Worship' in his written submissions opening address. The correct figure is Shs.28,000,000-, implying that the amount

realised from the vehicle was more than its forced sale value at the time. The vehicle was sold in forced sale circumstances.

As to whether the sale was to an in-law, no evidence was adduced to that effect. The claim that it was sold at a ridiculously low price is devoid of any merit in view of the credible and unchallenged evidence of PW3, the Chief Government Mechanical Engineer. In all these circumstances, the counter claimants have not proved any of the allegations made in the counter claim.

It has been submitted by learned counsel for the defendants that the loans to the 1st defendant were fully secured and that the plaintiff should have disposed of the same securities before suing the defendants. This argument must also fail. A mortgagee has several options of recovering loans under the mortgage, including a suit against the defaulter. There is evidence that the securities held by the plaintiff in respect of the loans were advertised for sale but they did not attract any bidders. I accept the evidence of PW1 Mutakirwa on this point and also that of PW2, the auctioneer instructed by the plaintiff to sell the said securities, on the unmarketability of the said securities. In any case, Court has not been appraised of any agreement between the parties that in the event of a default, Courts of law would have no jurisdiction over the matter till after the sale of the said securities. Such agreement, if it existed, would be contestable.

As regards interest, learned counsel for the defendants has argued that the first defendant's account was prudentially closed in 1997 and that interest on loans advanced by the plaintiff to the first defendant ceased to accrue in 1997. In response, Mr. Kanyemibwa has submitted that Bank of Uganda Prudential Norms on Assets Quality for Financial Institutions obliges a financial institution to recover both principal and interest on prudentially closed accounts. His submission is supported by the decision of this Court in **Pearl Motors Limited –Vs- Bank of Baroda (U) Ltd HCCS No. 562 of 1996** (un reported). In that case the plaintiff raised an argument as herein and it was rejected. The Court, per C.A. Okello, J. observed that the Regulation is a best practice measure designed to ensure that as between BOU and commercial banks, the books of accounts show the commercial bank's current financial position. It is therefore a document for the internal management of a commercial bank which does not affect the contractual relationship that a commercial bank may have with a customer. I'm of the same view. In the instant case, however, I notice that for close to 10 years now the case has remained undecided. This in my view does not give credit to the parties or even the judicial system. What was in the region of Shs.141m is now estimated to be in the region of Shs.400m thanks to a myriad of factors that have contributed to the delay of the case in Court. In these circumstances, I think the justice of the case warrants that interest be deemed discretionary on equitable considerations. Lord Denning in the case of **Harbutts 'Plasticide' Ltd –Vs- Wyne Tank and Pump Co. Ltd [1970] 1** ALL ER 225 held:

> "...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 use of it himself. So he ought to compensate the plaintiff accordingly."

I agree.

In the instant case, Court is more than certain that the defendants did not derive much benefit from the loans. Not long after the bus came, it was impounded and sold. The problem was compounded by the plaintiff's acceptance of valueless securities which the bank cannot sell now to realize the amount due. The bank does not earn credit for granting a loan on securities with no sale value. Liability was then disputed, implying that reliefs had to be determined by Court. The right to those reliefs does not normally arise until they are assessed by Court. I would in the unique circumstances of this case award interest from the date of judgment and not from the date of filing. I do so.

The plaintiff shall be entitled to the rate of interest prayed for (that is, 24% per annum) from the date of judgment till payment in full. The plaintiff shall also have the costs of the suit.

There being no merit in the counter claim, it is dismissed with costs to the plaintiff/1st defendant in the counter claim, and the 2nd defendant in the counter claim.

In the final result, judgment is entered for the plaintiff against the defendants, jointly and severally, in the following terms:
(i). Special damages: Shs.126,944,136-.
(ii). Interest thereon at the rate of 24% p.a. from the date of judgment till payment in full.
(iii). Costs of the suit and counter claim.

Yorokamu Bamwine
J U D G E
20/02/2007
20/02/2007
Mr. Kanyemibwa for the plaintiff.
Mr. Mugogo for the defendants.
3rd defendant present.

Court: Judgment delivered.

Yorokamu Bamwine
J U D G E
20/02/2007