THE REPUBLIC OF UGANDA

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

HCT-00-CC-CS-0312-2005

INVESTMENT MASTERS LTD :::::::::::::::::::::::: PLAINTIFF

VERSUS

AMBROSE KAGANGURE :::::::::::::::::::::::::::::: DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

R U L I N G:

The plaintiff's claim against the defendant is for a sum of Shs.25, 000,000- being, allegedly, the outstanding amount on a loan extended to the defendant together with interest and costs of the suit. When the case came up for a scheduling conference, Mr. Tibesigwa, learned counsel for the defendant, raised a preliminary point of law. He argued that the plaintiff's claim is barred by Limitation. The substance of his argument is this: that in paragraph 1 of the plaint, the plaintiff has pleaded that it is a duly Licensed Money Lender; that the money was lent to the defendant on 13/2/2003; and that the repayment period was a month only from 13/2/2003. According to counsel, the money should have been repaid by 13/3/2003; the suit was filed on 12/4/2005, after a period of 2 years less by one day. In his view, given that the cause of action accrued to the plaintiff on 13/3/2003, the suit filed on 12/4/2005 was barred by S. 19 (1) of the Money Lenders Act, Cap. 273.

Mr. Kiwanuka-Kiryowa does not agree. According to him, paragraph 1 of the plaint is the description of the plaintiff at the time of filing the suit and not its description at the time of lending the money. That for one to be bound by provisions of the Money Lenders Act, and therefore for the objection to succeed, the defendant must prove that at the time the plaintiff lent money to the defendant, he was in fact a money lender governed by the Money Lenders Act. In his view, whether or not the plaintiff was a registered money lender by 13/2/2003 is a question of fact, not law, which can only be proved by evidence.

I have very carefully listened to the arguments of both counsel. I take cognizance of the fact that the point of law was not pleaded in the defendant's Written Statement of Defence ("the WSD") which would ordinarily have elicited a response from the plaintiff as to its status at the time the loan transaction was concluded. I also take cognizance of the fact that a point of law, whether pleaded or not, can be raised at any stage of the proceedings. But, I hasten to add that points of law are decided on the basis of the pleadings and facts not disputed. Where a point of law would be sufficient to dispose of the case one way or the other, it ought to be decided by the Court without first calling witnesses. Where, however, issues raised in the pleadings require evidence, it is fair that Court does not delve into those issues as to do so would deny the other side a chance to produce its evidence and therefore be condemned unheard. The object of determining points of law in the manner suggested by Mr. Tibesigwa is expedition. However, in such a case, the point of law ought to be one which can be decided fairly and squarely one way or the other, on facts agreed or not in issue on the pleadings, and not one which will not arise if some fact or facts in issue should be proved. See: **N.A.S Airport Services Ltd –Vs- A.G. of Kenya [1959] EA 53.**

I will relate the above principle to the instant case. It is pleaded by the plaintiff that it (the plaintiff) is a duly licensed money lender under the Laws of Uganda, a fact not disputed by the defendant. However, the defendant claims that given that the plaintiff is a duly registered money lender; that money was lent out to him in February 2003; the alleged default was in March 2003; and, that the suit was not filed till April 2005, the same (the suit) is barred by S. 19 (1) of the Money Lenders Act. Under this section, the proceedings must be commenced before the expiration of 12 months from the date on which the cause of action accrued.

As pointed out already, counsel for the plaintiff does not agree. According to him, the plaintiff may be a registered money lender now, and may actually have been a registered money lender at the time of filing the suit, but this does not by any means imply that it was a money lender on 13/2/2003 to raise inference that the transaction falls squarely within the four corners of the Money Lenders Act. His argument may sound subtle or rather ingenious but it is not at all far fetched. The fact that it was licensed in 2005 is no evidence that it is a registered money lender now or that so it was in 2003. His argument cannot, therefore, be blushed off summarily, given that the issue of Limitation was not pleaded.

I have already indicated that if it had been pleaded, chances are that the plaintiff would have had opportunity to offer rebuttal averments in its pleadings. It is immaterial that such rebuttal averments may fail in the end.

From the records, it is not pleaded by the plaintiff that it was a registered money lending entity in 2003. This is not a trivial point considering that not every person that lends money is a Money Lender within the meaning of the Act. Our law is couched in the same words as the English Money Lenders Act of 1900. Farwell J., commenting on the English Act in **Litchfield –Vs-Dreyfus [1906] IK.B. 584** (at 588-89) observed, and I agree:

> ***"…….a man who carries on business as a money lender, and is not registered ……. cannot recover. But not everyman 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."***

Relating the above to the instant case, the plaintiff has been described as a registered money lender. It is not pleaded that in that capacity it entered into a money lending business with the defendant. If the defendant had raised the point of law regarding Limitation in its WSD, and the plaintiff had had opportunity to respond to it before the matter was finally placed before me, it would not have been difficult for me to make a determination of the issue based on the pleadings. As fate would have it, this was not done. The law under S. 1 of the Act defines who a money

lender is. Court does not know at this stage whether the plaintiff came within the meaning of that section in February 2003; how the defendant, if he borrowed money from the plaintiff as alleged, came to know the plaintiff as a money lender, to raise inference that the plaintiff was a ready and willing entity to lend money to all and sundry; or whether the lending was selective, to bring it within the exceptions stated in S. 1 (h) of the Act.

The defendant has averred in his WSD that the transaction was an agency transaction, strictly for one month; while the plaintiff claims, in its reply to WSD and counterclaim that the land comprised in Block 216 Plot 1565 Buye Ntinda was tendered as security for the repayment of the loan. If the plaintiff's version is correct, and I have no reason reject it at this stage, then the parties executed a mortgage in which the loan was secured by the defendant's immovable property. Under S. 21 (1) (c) of the Act, the Act does not apply to any money lending transaction where the security for the repayment of the loan and interest on the loan is effected by execution of a legal or equitable mortgage upon immovable property or of a charge upon immovable property or of any bonafide transaction of money lending upon such mortgage or charge. The exemption provided for in this section applies whether the transactions referred to above are effected by a money lender or not. In the event that S.21 (1) (c) of the Act applies to this case, the plaintiff's claim would not be time barred. Clearly, therefore, Court has to determine the nature of the transaction before making a final determination of the point of law raised by counsel. In other words, until Court listens to the evidence, both for the plaintiff and the defendant, the issues raised in the pleadings cannot be decided fairly and squarely, one way or the other. In these circumstances, I agree with Mr. Kiwanuka-Kiryowa that evidence is required before a proper determination can be made as to whether or not the suit is time barred.

For the reasons stated above, and considering the law as enshrined in Article 126 (2) (e) of the Constitution which enjoins the Court to administer substantive justice without undue regard to technicalities, I'm inclined to the view that the commercial justice herein demands that I over rule the objection and order that all issues raised be determined on evidence. I do so.

Costs shall abide the outcome of the suit.

Yorokamu Bamwine

J U D G E

15/05/2007

15/05/2007

Mr. Kiryowa Kiwanuka for plaintiff.

Mr. Tibesigwa for defendant.

Plaintiff's Managing Director present.

Court: Ruling delivered.

Yorokamu Bamwine

J U D G E

15/05/2007