THE REPUBLIC OF UGANDA

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

HCT-00-CC-CS-0291-2004

1. W.A KARIM
2. SULTI KARIM :::::::::::::::::::::::::::::::::::: PLAINTIFFS

VERSUS

STANHOPE FINANCE COMPANY LTD :::::::::::::::: DEFENDANTS

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

J U D G M E N T:

The plaintiffs are husband and wife. The defendant is a limited liability company carrying on business in Uganda as a financial institution. The couple's claim against the defendant is for a refund of a sum of Shs.56,000,000= plus a sum of Shs.35,280,000= being interest allegedly paid so far on a loan taken on 18/9/2003 to be able to pay the defendant; general damages and costs.

The facts are rather convoluted. From the evidence, however, the plaintiffs were customers of the defendant. Prior to 29/9/2001, they held account numbers 123101205 with debit balance of Shs.23,928,400=; No. 123101211A with a debit balance of Shs.12,964,686; No. 123101211B with a debit balance of Shs.27,292,638= and No. 110100088 wit a debit balance of Shs.52,422,102=. When the total debit balances on the different accounts are put together, they add up to Shs.116, 607,826=.

From the evidence the plaintiffs also held 4 fixed deposit accounts with the defendant. On 29/9/2001 the said fixed deposits were merged with the four loan accounts to form one account: No. 123101260.

There are two issues for determination:

1. Whether the suit is res judicata.
2. Whether the plaintiffs are entitled to the remedies sought.

Representations:

Mr. Peter Mulira and Kiryowa-Kiwanuka for the plaintiffs.

Mr. Masembe-Kanyerezi for the defendant.

As to whether or not the suit is res judicata, counsel for the defendant concedes that although there was an earlier suit between the parties, that is **HCCS No. (OS) 18 of 2003, Stanhope Finance Co. Ltd –Vs Wahid Karim & Sulti Karim** filed on 26/8/2003 in which the key issue for determination was whether there were monies owed by the present plaintiffs to the defendant, the suit did not proceed to trial on the merits and no judgment was recorded. Counsel has accordingly conceded that as a matter of law, res judicata cannot apply. In view of that concession, Court finds that the suit is not res judicata.

As regards the 2nd issue, the plaintiffs have invited me to find that they are entitled to a refund of Shs.56m alleged to have been paid by them to the defendant under duress; a refund of Shs.35, 280,000= being interest alleged to have accrued on the borrowing of Shs.56m; and interest on the two sums at the rate and for the period claimed.

Before I delve into the assessment of evidence, I consider it necessary to warn myself on the burden of proof in a case like this. 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 a person 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 plaintiffs have alleged that the defendant owes them the sums claimed herein. The burden rests on them to prove that allegation.

The plaintiffs led evidence of two witnesses: Sulti Karim (PW1) and Amin Manji (PW2). The former is the 2nd plaintiff herein and the latter an accountant. The defence version is mainly on the evidence of one witness, DW1 Nandan Kannanpulakkal, the defendants General Manager.

From the evidence of the parties, as at 29/9/2001, the plaintiffs had debit balances on their three accounts amounting to Shs.116, 607,826=. They also operated fixed deposit accounts with the defendant with a total credit balance. The plaintiffs claim that the credit balance was Shs.36, 085,965= whereas the defendant puts it at Shs.33, 557,721=, a difference of Shs.2, 528,244=. The parties also agree that come 29/9/2001, the debit and credit accounts were merged. According to the defendant, the merger resulted into a debit balance of Shs.80, 521,861=. The plaintiffs claim it was Shs.77, 728,400=. Having heard from the plaintiffs' witness, Mr. Amin Manji, an accountant by profession, and the defendant's own General Manager, Nandan, Court was of the view that the two finance experts could meet and agree on a position on the contentious aspects of debits and credits to the various accounts. The two met and came up with a position, Court Exhibit 1. From this document, the experts reviewed the statement of accounts of the defendant company from the balances outstanding in the accounts (both loans and debits) as at 29/9/2001 and worked forwards, tracing the movement of funds between the accounts. They found that the debit balance in account 123101362 as at 30/8/2003 was Shs.56, 195,665=. This was arrived at assuming that the debit entry dated 26/9/2002 for Shs.45, 000,000= was a loan by the defendant to the plaintiffs, an issue which the experts left the Court to determine.

I have addressed my mind to this issue. It is not disputed that Shs.44, 509,200= was paid into account No. 123101260 on 26/9/2002. The defence case is that this was a further borrowing by the plaintiffs. The plaintiffs deny it. They claim that they got the funds from their own sources.

I have considered the defence evidence on this point. According to DW1 Nandan, the facility on account No. 123101260, D. Exh. V11, was applied for by the plaintiffs on the merger date, that is, 29/9/2001, as they had no funds to pay off the debit balance of Shs.80,521,861= which had

resulted after the merger. The application for this facility is on record as D. Exh. V111. The sum applied for was Shs.100m.

From the records, a facility of Shs.90m was approved in favour of the plaintiffs. A facility letter, D. Exh. XV1 was issued on 29/9/2001. Clause 5 of the facility letter provided that the loan facility would be repaid in six (6) monthly installments from 29/10/2001. This means that it would be fully repaid by March 29, 2002. PW1 Sulti Karim does not deny receipt of this facility. I make a finding that it was made available to the plaintiffs.

I have perused the ledger account in respect of A/C No. 123101260. I'm satisfied that by the expiry of the six months facility period, that is, on March 29, 2002, the facility had not been repaid. The amount had by now increased to Shs.88, 159,927=. It is DW1 Nandan's evidence that the plaintiffs requested a further six months extension for repayment and that their request was granted on September 29, 2002. That by 10/9/2002, there was a debit balance of Shs.43,591,200=; that on 18/9/2002, the plaintiffs again applied for a further loan of Shs.100m to be used in part to roll over the outstanding facility which was due to expire shortly. The application for credit facility form, D. Exh. IX is admitted by the plaintiffs. The admission is, in my view, evidence that the loan repayments were in arrears.

From the records also, and the evidence of DW1 Nandan, the defendants issued to the plaintiffs a facility letter on 23/9/2002. He testified that the defendant approved a lesser sum of Shs.45m only sufficient to roll over the loan. I have given due consideration to this evidence.

From the records, the plaintiffs signed documents in relation to the loan of Shs.45m on 25/9/2002. The first one is a promissory note, D. Exh. X1. It reads in part:

> ***"We Wahid A. Karim and Mrs Sulti Karim promise to pay on demand to Stanhope Finance Co. Ltd the sum of Shs.45,000,000= for value received ....."***

The second document is D. Exh. X11, a personal guarantee deed securing repayment of Shs.45, 000,000=. And the third one is an equitable mortgage deed, D. Exh. X, in respect of Plot 530 at Muyenga signed by the 2nd plaintiff as the proprietor thereof.

There is evidence also that the plaintiffs counter signed on the facility letter, D. Exh.XV111, in acceptance of the loan and its terms. Their signatures on these documents have not been challenged by any independent evidence.

The defendant's General Manager (DW1) further testified that upon signing the loan documents, the plaintiffs signed a cash withdrawal voucher, D. Exh.X1X, on 26/9/2002 on the new loan account No. 123101362 drawing Shs.45,000,000= in cash. The amount withdrawn was split into two: Shs.44,509,200= being deposited on account No. 123101260 and thereby repaying the whole of the balances owed thereon; and Shs.490,800= being deposited on the new loan account No. 123101362.

The deposit slips for the two payments are on record as D. Exh. XXV and D. Exh. XXV1, respectively. As fate would have it, the plaintiffs were during the hearing of the case found to have possession of the original counter foil for the Shs.490, 800= deposit. It is on record as P. Exh. X11.

I found it strange that people claiming to have brought Shs.44, 509,200= from their own sources to settle indebtedness on account No. 123101260 would also end up depositing a sum of Shs.490, 800= on a newly opened account to make a total of Shs.45, 000,000=, the exact amount claimed by the defendant to have been advanced to the plaintiffs, and supported, as it were, by documents duly signed by the said plaintiffs. The cash withdrawal slip for Shs.45m, D. Exh. X1X; the deposit slip of Shs.44, 509,200=, D. Exh.XXV; and the cash withdrawal slip for Shs.490, 800= were all availed to a handwriting expert, Mr. Mujuzi, DW2. He confirmed that the signatures appearing thereon were those of the plaintiffs. This evidence has not been challenged by evidence of another expert. I have seen no reason to fault Mr. Mujuzi's findings. I accept them.

I have considered other pieces of evidence in connection with this matter.

Although the plaintiffs deny knowledge of account No. 123101362, D. Exh. X111, from which the Shs.45m was drawn, they are on record to have deposited on the very same account Shs.4, 220,000= on March 11, 2003. The deposit slip for this sum is on record as D. Exh. XX.

The plaintiffs claim that they paid off the loan balance in September 2002. However, on 7/7/2003, Sulti Kerim wrote to the management of the Bank proposing payment of Shs.1, 000,000= per month for the 1st three months from July 2003. And on 21/8/2003, Wahid Kerim wrote to the same people assuring them that they were in the process of settling their loan commitment. If it was not the loan of Shs.45m, which one was it since they claim that by this date the entire loan had been paid up? The two letters are on record as P. Exh. XX11 and D. Exh. XIV, respectively. The plaintiffs claim that they paid the Shs.56, 000,000= owed on account No. 123101362 under duress. They cite the institution of fore closure Court proceedings as instance of that duress. I'm unable to accept their argument on this point.

Foreclosure proceeding in HCCS No. (OS) 18 of 2003, like any other Court action, could have been resisted if the defendants therein (the plaintiffs herein) believed or had cause to believe that they had paid off the debt. They had services of lawyers, M/S Singh & Treon Advocates, who, while handling the case on behalf of the plaintiffs herein, did not deny the claim but opted to settle the outstanding amount. Their letter of September 1, 2003, D. Exh. 1 is very clear on this point. They stated that they were acting on behalf of their client, Sulti Haji. They were happy to enclose a cheque for Shs.47, 000,000= and the plaintiffs countersigned it, confirming its correctness. They are estopped from denying that indebtedness. In these circumstances, Court is unable to accept the plaintiff's claim that the foreclosure proceedings amounted to duress. It sounds to me very cheap talk.

A few days later on September 11, 2003 to be exact, the defendant indicated to the plaintiffs that the loan balance stood at Shs.56,195,665= after the addition of interest. The second plaintiff in her wisdom acknowledged receipt of that letter and endorsed thereon:

> ***"I agree to the above.***
> ***Sulti Karim***
> ***September 11.2003***"

This was not conduct of a person acting under duress. Moreover, these are people who claim to have settled the loan amount using their own money in September 2002. There is no evidence that they asked for the return of their certificate of title to them and that the defendant refused to do so. However, there is evidence that up to September 2003, a full year later, the defendants were still in possession of the title deed in respect of the security they had offered for the loan. In my view, they did not request for the return to them of the title deed because it had been offered to the defendant for the additional borrowing.

I observed earlier on that a fact is said to be proved when Court is satisfied as to its truth. The plaintiffs claim that they got the Shs.45, 000,000= from another source. Evidence on record shows a cash strapped couple surviving on bank loans offered to them by the defendant. They have not indicated to Court as to how they got a hefty sum of Shs.44, 509,200= if it was not from the defendant. They have not suggested to Court any possible alternative source of funding. On the contrary, the defendant has laid before the Court credible evidence showing that the plaintiffs did borrow from them a sum of shs.45,000,000= in September 2002. From the evidence of DW1 Nandan, which I found credible, and the exhibited documents, duly signed by the plaintiffs, it is clear to me that PW1 Sulti's claim, that she signed the documents but later decided not to take the loan because of its unacceptable terms, is incapable of belief. It simply does not make any sense. It is, in my view, a lie. The plaintiffs' claim shall therefore be rejected and I do so.

Having said so, they are not entitled to the reliefs sought here in. I would dismiss the suit with costs to the defendant and I order so.

Dated at Kampala this 18th day of May, 2007.

Yorokamu Bamwine

J U D G E

18/05/2007

Order: This judgment shall be delivered on my behalf by the Registrar of the Court on the due date.

Yorokamu Bamwine

J U D G E

18/05/2007