

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**[COMMERCIAL DIVISION]**  
**HCT - 00 - CC - CS - 0061 - 2007**

**ACCESS FINANCIAL SERVICES PLC LIMITED ::::::::::::::: PLAINTIFF**

**VERSUS**

**KHAYONGO PATRICIA RUTIBA ::::::::::::::: DEFENDANT**

**BEFORE:    HON JUSTICE GEOFFREY KIRYABWIRE**

**J U D G M E N T:**

The plaintiff, Access Financial Services PLC Limited, a limited liability company brought this case against the defendant Khayongo Patricia Rutiba, by way of a summary suit seeking payment of Ug.Shs.6,431,211/= (Six million four hundred thirty one thousand two hundred and eleven Uganda shillings), interest and costs of the suit.

The case for the plaintiff is that on the 16<sup>th</sup> of March, 2005 the defendant applied for an unsecured personal loan of Ug.Shs.3,750,000/= (Three million seven hundred and fifty thousand Uganda shillings) from the plaintiff for home improvement and that on that same day, the plaintiff entered into a loan agreement with the defendant under which the plaintiff extended to the defendant an unsecured personal credit facility of Ug.Shs.3,750,000/= repayable together with interest within a period of 24 months by way of monthly installments. The plaintiff accordingly advanced the loan to the defendant upon the execution of the loan agreement. It is the case for the plaintiff that the defendant has neglected and failed to pay the stipulated monthly installments leaving to an outstanding unpaid balance of Ug.Shs.6,431,211/= (Six million four hundred thirty one thousand two hundred and eleven Uganda shillings) and is therefore in breach of the Loan agreement.

The defendant in her written statement of defence denies the claim and avers that she has never applied for any loan from the plaintiff. The defendant further contends that her former employer M/S Pinnarche and Envision Architects Ltd and its directors, applied for staff loans from the plaintiff company to clear staff arrears and that M/S Pinnarche and Envision Architects Ltd agreed with the defendant that they would repay the said loan. The defendant avers that based on this understanding, she signed the loan agreement prepared by the plaintiff together with an official of her employer and also went ahead and received the loan disbursement. It is the case for the defendant that it was not until seven (7) months later that the Defendant received a call from the plaintiff informing her that her employers had failed to repay the loan and that she therefore had to pay it personally. The defendant therefore contends that the plaintiff's actions amounted to a misrepresentation of fact pertaining to the payment of salary arrears and that the suit is entirely misconceived, without merit and ought to be dismissed with costs.

The defendant in her written statement of defence also raised a counter claim against the plaintiff (the first counter defendant), Pinnarche & Envision Architects Ltd (the second counter defendant), Godfrey Kahangi (the third counter defendant), Godfrey Songa (the fourth counter defendant) and Flora Runumi (the fifth counter defendant )seeking the payment of the sum of Ug.Shs.6,431,211/= (Six million four hundred and thirty one thousand two hundred and eleven Uganda shillings) as special damages for the amount due under the contract between the first defendant and the other defendants, interest on the amount, general damages and costs.

The defendant/claimant contends that the first counter defendants who are also the Plaintiff's employers in the matter entered into a contract to benefit the employees of the second counter defendant. That she was not a party to those negotiations and agreement and that the counter defendants misrepresented the contents of their negotiations and agreements which were purportedly meant to benefit the employees of the second counter defendant by payment of salary arrears.

There where no agreed facts at the pre trial conference.

The agreed issues however were the following;

1. Whether there was a valid loan Agreement between the plaintiff company and the defendant?
2. Whether the second to fifth counter defendants were parties to the loan agreement?
3. Whether the first to fifth counter defendants jointly and severally misrepresented the contents and effect of the loan agreement, if any?
4. Whether there is liability to pay the debt claimed by the plaintiff?
5. What remedies are available to the parties?

Mr. Paul Kuteesa appeared for the plaintiff/1<sup>st</sup> counter defendant and Mr. R. Mugisha appeared for the defendant/counter claimant while Mr. Timothy Atuhaire appeared for the second to fifth counter defendants. The second to fifth counter defendants did not testify in court.

**Issue No.1:            Whether there was a valid loan Agreement between the plaintiff company and the defendant?**

Counsel for the plaintiff in his submissions relied on the evidence adduced by Mr. John Luberanga (PW 1) who testified that the Plaintiff was approached by officers of M/S Pinnarche and Envision Architects Ltd (herein after referred to as the second counter defendant) with a request that the plaintiff extends loan services to its employees and that the request was embodied in a letter dated 04<sup>th</sup> December, 2004 and marked Exhibit P1. That after carrying out a business analysis on the second counter defendant, the plaintiff entered into an agreement with them for purposes of allowing the plaintiff to market its products to the second counter defendant's employees and the company in turn would carry out deductions on the employees' salaries to pay the loans in the event that loans were advanced to them.

Mr. Luberanga (PW1) further testified that on the 15<sup>th</sup> March 2005, the defendant approached the plaintiff and requested for a loan of Ug.Shs.3,750,000/= (Three million seven hundred and fifty thousand Uganda shillings) and that she was also advised to bring a letter of introduction from her

employer, a copy of her identity card, pay slip and bank statement which she did. The loan was thereafter approved and she was invited to sign the loan agreement marked Exhibit P5 and the salary deduction authorization form marked Exhibit P6 which she did. That the loan was subsequently processed and the defendant was advised to pick up the cheque and that she delegated her husband, Mr. Rutiba who picked it from the plaintiff's offices.

It was Mr. Kuteesa (counsel for the plaintiff) submission that the defendant/counterclaimant signed the loan agreement which in this case embodied the contract between the parties. Counsel pointed out that all the essentials of a contract were fulfilled when, the defendant applied for the loan, the plaintiff agreed to grant the loan, the parties signed the agreement and the loan was advanced and received. Counsel for the plaintiff further submitted that the signing of the loan agreement was without any form of coercion or duress and that the defendant was given an opportunity to read the loan agreement before signing it. Counsel also relied on the testimony of the defendant Khayongo Patricia Rutiba who admitted in cross examination that she was literate, a graduate of architecture and could read and write English. He further submitted that it was also her testimony that before signing she had the opportunity to read through the agreement. Mr. Kuteesa thus referred court to the case of

**L'ESTRANGE .V. GRACOUR LIMITED [1934] 2 K.B 394**, where **Scrutton L.J.** held that;

*"...When a document containing contractual terms is signed, then , in the absence of fraud, or, I will add, misrepresentation , the party signing it is bound, and it is wholly immaterial whether he has read the document or not."*

Counsel for the plaintiff therefore submitted, on this issue, that there was a valid and binding loan agreement between the plaintiff company and the defendant.

On the other hand, counsel for the defendant submitted that the plaintiff never met the defendant personally in this transaction. He referred to the testimony of Mr. Luberanga (PW1) in cross examination who agreed that at the material time the defendant was on maternity leave, that she never personally approached the plaintiff company for the loan nor did she meet the manager or any of the

officials of the plaintiff's company and that the plaintiff handled the whole transaction with the officials of the second counter defendant her employer.

Counsel for the defendant, submitted that the defendant Mrs. Khayongo (DW1) , testified that she was told by her employers that she was going to be paid her salary arrears, but that the employer was going to arrange a salary loan to cover this transaction and that in return the employer would repay loan to the plaintiff company in installments. It was the testimony of Mrs. Khayongo that she entered into an agreement with the second counter defendant and that subsequently, her employer M/S Pinnarche & Envision Architects Ltd went ahead to provide the relevant information to the plaintiff for processing the loans. She further testified that the only physical participation she had in the transaction was signing the loan agreements.

Counsel for the defendant therefore submitted that the real applicant for the loan was the second counter defendant. That the defendant was simply induced to sign a loan document on the false promise that the second counter defendant was going to repay the money using the salary arrears due to the Defendant. Counsel further submitted that the defendant signed the document due to the representations and undertakings made to her by her employers that the loan was in payment of her salary arrears and that they would repay the money advanced to her. It is the case of the defendant that in the circumstances there was no a valid contract.

I have reviewed the submissions of both Counsel on this issue and looked at the evidence adduced. It is quite clear that there was a loan agreement between the plaintiff and the defendant that was signed by them. However the difficulty arises in determining whether this was a valid loan agreement. A review of the loan agreement Exhibit P.5 clearly shows that the agreement is between Access Financial Services (the plaintiff company) and Khayongo Patricia the defendant.

**Lord Denning** in the case of **Solle v Butcher (1950)1KB 671** held that,

*“once a contract has been made, that is to say, once the parties whatever their most state of mind, have to all outward appearance agreed with sufficient certainty the same terms subject matter, then the contract is good unless and until it has been set a side for breach of some conditions expressed or implied in it for fraud.....neither party can rely*

*on his own mistake to say it was annulity from the beginning no matter that it was a mistake to which his mind was fundamental”*

It was the testimony of the defendant Mrs. Khayongo Patricia Rutiba during cross examination, that before signing the agreement she had the opportunity to read through it, as she was literate, a graduate of architecture and could read and write English.

I am satisfied with the plaintiff’s evidence before me through the testimony of Mrs. Khayongo, that when the Defendant was signing the agreement with Access Financial Services Limited, she fully knew and was aware of the terms and conditions she was binding her self to.

Mrs. Khayongo signed the Salary Deduction Authorization Form with Financial Services Limited on the 16<sup>th</sup> of March 2005, where she agreed under paragraph 2, I quote;

*“I further understand and undertake that this is an irrevocable instruction and cannot be cancelled by me until all amounts due have been paid to AFS. Should my employer for any reason not deduct any of the amounts in terms of this request, I shall consider the amounts unpaid and if due undertake to pay AFS such sums.”*

The facts in this matter are clear that in accepting the terms of the Agreement, the defendant made her self bound to pay the loan should her employer fail to do so.

In answer to issue No.1 therefore, I find that this was a valid loan agreement, entered into between Mrs. Khayongo, the defendant on one part and Access Financial Services PLC Limited, the plaintiff on the other part.

**Issue No.2:                    Whether the 2<sup>nd</sup> to 5<sup>th</sup> counter defendants were parties to the loan agreement?**

On this issue, counsel for the defendant/ counter claimant submitted that the oral evidence adduced by Mr. Luberanga (PW1) that when no remittances were received for seven months, the plaintiff company

never notified the defendant, suffices to show that the second counter defendant was a party to the loan agreement. He further submitted that the first agreements, namely that between the plaintiff and the second counter claimant marked Exhibit P.3, which led to the loan agreement were signed by the officials of the second counter defendant. Counsel for the Defendant made reference to the case of

**Central London Property Trust Limited .v. High Trees LTD [1947] KB 130** where court held that;

*“ where Parties enter into an arrangement which is intended to create legal relations between them and in pursuance of such an arrangement, one party makes a promise to the other which he knows will be acted upon and which is infact acted upon by promise, the court will treat the promise as binding on the promissory to the extent that would allow him to act inconsistently with it even though the promise may not be supported by consideration in strict sense.”*

Counsel also referred me to section 113 of the Evidence Act Cap 6 which provides that;

*“When a person has by his, declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such a person or his representative, to deny the truth of that thing.”*

Counsel for the defendant therefore submitted that in the instant case the employer made a clear inducement to the defendant and that acting on the inducement, the defendant acquired a loan she had not in reality applied for and never needed.

Counsel for the plaintiff in response however submitted that the second to fifth counter defendants were never parties but merely strangers to the loan agreement. Counsel for the plaintiff referred to the loan agreement (Exhibit P5) and submitted that the parties to the agreement are the plaintiff company

and the defendant only. That the second to fifth counter defendants are neither named nor incorporated into the agreement. Counsel for the plaintiff further submitted that the defendant did not adduce any evidence to contradict or vary the express terms of the Loan agreement so as to make or incorporate the second to fifth counter defendants as parties to the contract.

Counsel for the plaintiff submitted that the agreement marked Exhibit P.3 between the plaintiff and the second counter defendant was merely an agreement meant to enable the plaintiff to market its products to the second counter defendant's employees and to establish a mechanism for recovery of the loans so advanced. That it did not in any way purport to make the second to fifth counter defendants liable under the loan agreement.

This facts relating to this issue are very clear. A review of the loan agreement Exhibit P.5 clearly shows that the agreement is **ONLY** between Access Financial Services (the plaintiff company) and Khayongo Patricia the defendant. That being the case, in answer to the current issue, it is therefore my finding that the second to fifth counter defendants were not parties to the loan agreement between Access Financial Services, and Mrs. Khayongo Patricia.

**Issue No.3:                    Whether the 1<sup>st</sup> to 5<sup>th</sup> counter defendants jointly and severally misrepresented the content and effect of the loan agreement, if any?**

It was the submission of Counsel for the plaintiff that in this case, the burden of proving the misrepresentation lay on the defendant. That the defendant did not adduce any evidence to this effect. Counsel for the plaintiff further submitted that even if the misrepresentation was present which is a fact the plaintiff denied, the defendant did not adduce any evidence to show that such misrepresentation infact induced the defendant to enter into the loan agreement.

Counsel for the defendant, in his response to Counsel for the plaintiff's submission, submitted that the defendant was induced to receive the loan in the belief that the money was a payment for salary arrears, and that the second counter defendant was going to repay the loan with interest. Counsel further submitted that the representation did not have to be put into the loan agreement as a term. That the promises made by the second to fifth counter defendants that the loans were for the payment of



salary arrears and would be repaid by them induced the defendant to sign the loan agreement. Counsel thus submitted that this amounted to a misrepresentation.

The second, third, fourth and fifth counter defendants in their pleaded response to the counter claim aver that they did not participate in any misrepresentation or concealment and neither were they aware of the existence of any between the counter claimant/defendant and the plaintiff/ first counter defendant. They further state that the loan agreement which the counter claimant/ defendant signed was a willful and voluntary deed and that she is not entitled to payment by the defendants of general and special damages as claimed.

I have addressed my mind to the arguments of both counsel and the evidence of the parties in this case so I will now proceed to discuss the law relating to misrepresentation.

A misrepresentation has been defined by **Cheshire, Fifoot and Furmston's in The Law of Contract 14<sup>th</sup> edition**, as a representation that is untrue. It is not that every statement made to a party to a contract, will amount to misrepresentation so as to entitle the representee to relief.

Further **Cheshire, Fifoot and Furmston's** at pages 298-300, states that for a statement to amount to misrepresentation it must;

1. be a statement of an existing fact i.e. must not be a statement of opinion or law
2. must be intended to induce the misrepresentee to enter into the contract
3. statement must have actually induced the representee to enter into the contract
4. the representation must be material.

They further state that a misrepresentation is legally harmless if the plaintiff never knew of its existence, or did not allow it to affect his judgment or was aware of its untruth.

Through the evidence given before me, it is my finding that Mrs. Khayongo Patricia believed that her employers M/S Pinnarche and Envision Architects Ltd were going to repay the loan using her salary

arrears as they had promised her and it is on this representation that she accepted to take the loan. The representation made to her thus in every sense met the requirements of what amounts to a misrepresentation.

It was the holding of court in the case of **Gross v Lewis Hillman Ltd [1970]CH 445** that in testing the honesty of the representor's belief, his statement must not be considered according to its ordinary meaning but according to the meaning understood by him.

It was the evidence of Mrs. Khayongo Patricia that when she signed the loan agreement with M/S Access Financial Services Limited she believed that her employers would pay it back using the arrears of salary they owed her. It was still her testimony that when M/S Access Financial Services Limited started making demands for repayment she had informal meetings with the directors of M/S Pinnarche and Envision Architects Ltd who reassured her that they would repay the loan which they did not do up to date.

**Justice Yorokamu Bamwine** in the case of **Esther Sempebwa v The Non Performing Assets Recovery Trust HCT- 00 - CC - CS - 0954 - 2004** held that;

*“It is trite law that a representation is not a term, but a statement of fact made by one party, to the other, during their preliminary negotiations, which was intended to induce the other party, to enter into the contract and which did so induce the other party, to enter into that contract. “*

From the facts of the case before me it is evident that in accepting to take up the loan from M/S Access Financial Services Ltd, Mrs. Khayongo Patricia honestly believed that her employers M/S Pinnarche and Envision Architects Ltd was going to pay it off as stated in her testimony. It is not a disputed fact that M/S Pinnarche and Envision Architects Ltd was undergoing some difficulties and entered into an understanding with M/S Access Financial Services to advance them a sum of money under salary loans to cover salary arrears that they, M/S Pinnarche and Envision Architects Ltd, had failed to pay. The second to fifth counter defendants did not testify or adduce evidence to rebut this.

The evidence on record shows that Mrs. Khayongo Patricia was not involved in the process of applying for the loan because at that time she was on maternity leave and was told that her arrears

were going to be paid through a scheme organized by the company and she would be notified when it was ready and called in to sign the relevant documents. She was just told as a fact that everything had been set up, that she could not change anything; she just had to sign two contracts; one with the second counter Defendant to show that they would pay back the loan and one with the Plaintiff to allow her to be able to access the money.

She further testified that the second counter Defendant explained to her upon inquiry about their subsequent failure to remit the money to the Plaintiff, that they had had several meetings with the management of the Plaintiff company and that they were going to pay back the money when they got it and that she, among others, was not to worry about anything, and should continue working.

It is my finding that the second counter defendant, who was the employer of the defendant together with the third, fourth and fifth counter defendants, who were the directors of the second counter defendant jointly and severally misrepresented the content and effect of the loan agreement when they represented to the defendant that they were going to pay back the loan as they had promised. From a procedural point, it would have been better for the Defendant/Counterclaimant to have applied for the second to fifth Defendants to have been added to the suit as third parties to indemnify her under Order 1 rule 14 instead of bringing this counterclaim. That notwithstanding, misrepresentation is not part of a contract at all (see Hodgins Law of Contract in East Africa 2006 Ed, P. 113). It is an equitable remedy and the maxim “*equity will not suffer a wrong to be without a remedy shall be applied in this situation*”. The second to fifth counter Defendants in my finding should make good their misrepresentation.

However I find that the first counter defendant who is also the plaintiff in this case did not misrepresent any content and effect of the loan agreement to the defendant since they only met when she was signing the loan agreement which she accepts to have read and understood before signing.

**Issue No.4:           Whether there is liability to pay the debt claimed by the plaintiff?**

Counsel for the plaintiff on this issue submitted that the existence and quantum of the debt claimed by the plaintiff was not disputed by the defendant or the second to the fifth counter defendants. That neither was it disputed that the debt arose from the loan agreement. Counsel therefore submitted that there is liability to pay the debt and that liability falls on the defendant.

Counsel for the defendant however submitted that since the evidence showed that the second counter defendant company had guaranteed that it would repay the loan and that no salaries were actually ever paid to the defendant, it would remain only fair that the third to fifth counter defendants be held liable to repay the money.

In the case of

**Printing and Numerical Registering Company v Sampson (1875) LR 19 Eq 462, Sir George Jessel said,**

*“if there is one thing more than the other that public policy requires is that a man of full age and competent understanding should have the utmost liberty to contract and that their contract when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice.”*

I therefore find that there is a debt to be paid since the plaintiff and the defendant entered into a contract which is binding on both parties, the defendant is liable to pay the debt.

**Issue N0.5:   What remedies are available to the parties?**

The plaintiff prayed for the payment of Ug.Shs.6, 431,211 (Six million four hundred thirty one thousand two hundred and eleven Uganda shillings) which is the principal sum of the loan, payment of interest at commercial rate of 25% and costs of the suit.

The defendant in her counter claim prays for payment of the sum of Ug.Shs.6,431,211/= (Six million four hundred and thirty one thousand two hundred and eleven Uganda shillings) as special damages for the amount due under the contract between the first defendant and the other defendants, interest on the amount, general damages and costs.

In the case of

**Coffee Marketing Board v Kigezi Growers Cooperative Union H.C.C.S No. 437/1994**  
court held that

*“Even if it were to be held that the loan agreement was illegal, when the parties to an agreement are not in pari delicto, the defendant should still repay the money as had and received”*

Since the Defendant signed the loan agreement personally with the Plaintiff, it is my finding that she should pay the money she owes them. The plaintiff/first counter defendant is not awarded general damages as they did not pray for them

On the other hand since the second, third, fourth and fifth counter defendants misrepresented to the defendant the terms and contents of the loan agreement I find them liable in this respect and I order that they pay the defendant the equivalent of the principal sum which the Defendant currently owes to the Plaintiff.

The Defendant in her counterclaim prayed for general damages for breach of contract and inconvenience by the Counter Defendants. In her testimony before Court, the Defendant testified that she received numerous phone calls from the Plaintiff Company regarding her indebtedness. In addition, when she inquired from her employers, the Counter Defendants, they promised to repay the amounts due to the Plaintiff before the latter took court action against her. Unfortunately, the counter Defendants reneged on that promise and the Defendant has ended up in courts of law.

It is trite law that general damages are a pecuniary compensation given on proof of a wrong or breach. In the case of **Dr. Denis Lwamafa v Attorney General H.C.C.S No. 79 of 1983** Court held that the

plaintiff who suffered damage due to wrongful act of the defendant must be put in the position he would have been had he not suffered the wrong.

Court was not guided on the quantum to be given for general damages by the defendant. Court is therefore left to exercise its discretion in determining the amount of general damages to be awarded. I therefore award Ug.Shs.1,000,000/= (one million Uganda shillings) as general damages for the inconvenience caused to the defendant payable by each of the, second, third, fourth and fifth counter defendants.

Regarding the question of interest, the Plaintiff prayed for interest at Court rate from the date of judgment till payment in full. The Defendant prayed for interest on the principal sum and the award of general damages at a rate above 25% per annum from the date of judgment till payment in full.

**Lord Denning** in **Waller Steiner V Moir [1975] 1 QB 373** at p.388 said:

*“In addition, in equity interest is awarded whenever a wrong doer deprives a company of money which it needs for use in its business. It is plain that the company must be compensated for the loss thereby occasioned to it. Mere replacement of the money – years later – is by no means adequate compensation, especially in days of inflation. The company should be compensated by the award of interest.”*

In addition, it is a firmly established principle that an award of interest is made at the discretion of court. In accordance with the said principles, the Plaintiff Company has been deprived of its money for way over two years and is entitled to interest on the principal sum at a rate of 25% per annum from the date of filing until payment in full.

Equally the Defendant shall also have interest at the same rate and for the same period on the principal sum and on the award of general damages from the date of judgment until payment in full.

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**Geoffrey Kiryabwire**  
**JUDGE**

**Date: 24/09/2009**

24/09/09

9:40am

**Judgment read and signed in open court in the presence of;**

- P. Kutesa for plaintiff /1<sup>st</sup> Counter Defendant
- Rose Emeru – Court Clerk

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**Geoffrey Kiryabwire**

**JUDGE**

**Date: 24/09/2009**