THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION

CIVIL SUIT NO 268 OF 2008

GROFIN EAST AFRICA LIMITED}

DFCU } ……..……..

PLAINTIFFS

VERSUS

JOAN TRADERS LIMITED}

HELLEN KAKYO } …. ……..….

DEFENDANTS

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA

JUDGMENT

The plaintiff's counsel Mr. Nicholas Ecimu applied for judgment on admission under order 13 rule 6 of the Civil Procedure Rules. He submitted that partial judgment was entered for Uganda shillings 407,000,000/= and given the other additional admissions in the joint scheduling memorandum, judgment should be entered on admission under order 13 rule 6 and this would leave only one issue for trial that is how much is due and owing to the plaintiffs. In the joint scheduling memorandum signed by counsels for both parties, and dated the 22nd of April 2010 and filed on court record on the 22nd of April 2010, the following facts are agreed by the parties namely:

1. It is admitted that the first defendant and the first plaintiff entered into a loan agreement for 740 million Uganda Shillings.

2. The sum was co financed in equal portions by the first and second plaintiffs in the respective sums of 370 million Uganda Shillings each.

3. Under the loan agreement the sum was to attract interest at 22% per annum.

4. The defendants provided property comprised in Kyadondo Block 185 plots 2746 and 2747 as security for the said loan but the second defendant attempted to sell the same without the knowledge and consent of the 1st plaintiff.

5. The second defendant signed a deed of guarantee by which she guaranteed the obligations of the first defendant under the loan arrangement.

6. At the time the time the loan was made in the portion financed by the first plaintiff, they did not have a money lenders license issued in Uganda.

It is agreed that the 1st defendant still owes the 1st plaintiff some outstanding balance on the loan amount which can be clarified by reconciliation and the plaintiffs shall provide proof of the outstanding balances.

Counsel for the plaintiff submitted that the agreed facts substantially dispose of the suit and leave only the issues of outstanding balance for trial. He prayed that the parties are given a week to carry out a final reconciliation which if not amicably agreed to, evidence would be led on the outstanding amount due only. As far as the admitted part of the suit is concerned he prayed for costs.

Henry Kyalimpa counsel for the defendant's agreed with the plaintiff's position and did not object to judgment on admission. He agreed that the parties could try to reconcile their accounts and ascertain the outstanding balance and then judgment may be entered on the admitted facts.

I have considered the law and pleadings of the parties. Judgment on admission is entered under order 13 rule 6 of the Civil Procedure Rules. However an admission must qualitatively deal with

factual or legal matters in controversy otherwise a mere admission of fact may not be material to the resolution of the dispute.

In this case admissions of facts were made in writing and in the joint scheduling memorandum signed by counsels for both parties. As far as partial judgment entered by court is concerned, the background to the joint scheduling memorandum in which factual admissions have been made is relevant. On the 27th of May 2009, the plaintiff's Counsel Messrs Mugarura, Kwarisiima & Company Advocates filed on court record a letter addressed to the defendant's Lawyers Messrs Sebalu and Lule Advocates dated 19th of May 2009 in which they admit as follows:

1. That the defendants borrowed 740 million Uganda shillings which loan attracted 22% interest per annum. That their client could not pay this amount because the cosmetic imported with the loan was declared unfit for the purposes and they sought a waiver of interest.

2. They stated that their clients had so far paid 223,326,363/= in repayment of the loan. They promised to pay 110,000,000/= to the defendants as soon as their client settled issues relating to the liquidated collateral security with DFCU Bank. If done they stated that the settlement would bring down the principal debt to Uganda shillings 407,000,000/=

3. The defendants proposed to pay shillings 407,000,000/= by equal monthly installments of shillings 5,000,000/= each.

Messrs Sebalu and Lule counsel for the plaintiffs in a letter dated 14th July 2009 and filed on court record on the 15th July 2009 declined the proposal to pay in installment and also the outstanding amount which they noted was over 1,200,000,000/= Uganda shillings. The suit went for mediation and the mediators consent order dated 4th of December was that:

1. Sebalu and Lule Advocates will advertise the property which was given as security to the plaintiff comprised in Block 185 plot 2746 and 2747 within one week from the order,

2. The said properties would be marketed within 15 days

3. The two caveats registered on plot 2746 by the spouse of the second defendant Mr. Ali Ahmed Salim and the other called Flugensia Tumwesigye, which releases are being held by Mr. Kyalimpa Henry counsel for the defendant will make them available for release of the caveats to facilitate the sale.

4. The parties will then meet and agree on the outstanding amount due to the plaintiff by the defendants.

5. The second defendant will take three weeks from today to travel to South Africa and settle with her suppliers any monies due to her so as to make good her indebtedness with the plaintiff.

The Registrars order is dated 29th of October 2009. On the 9th of September 2010 when the case came for hearing before Hon. Mr. Justice Lameck Mukasa, a consent judgment on admission was entered which reflects the letter of the defendants lawyers stated above. The record of the judge shows that the order is as follows:

> "By consent of the parties partial judgment is entered in the sum of Uganda shillings 407,000,000/= against the first defendant on admission in favour of the 1st plaintiff"

It should be emphasized that the judgment is in favour of the first plaintiff and against the first defendant. This introduces a curious issue in light of other agreed facts as to which plaintiff is a beneficiary for amounts recovered in the suit. I shall deal with this later on. On the 17th of March 2011 when the matter came before me, counsel for the plaintiffs Mr. Luswata applied for amendment of the plaint and the application for amendment was allowed. The plaintiff was required by court to file an amended plaint within 7 days and serve the defendants and the defendants were to file a response thereto within 7 days.

The amended plaint was filed on court record on the 24th of March 2011. No amended written statement of defence was filed in response. It is in light of this background that the agreed facts/admitted facts should be placed. Paragraph 5 of the amended plaint claims against the defendants jointly and severally the recovery of a total of **UGX 1,125,994,303/= (One billion**

one hundred and twenty five million, nine hundred ninety four thousand, three hundred and three shillings) out of which the debt due to the second plaintiff stood at **UGX 528,407,680/- (Five hundred and twenty eight million four hundred and seven thousand, six hundred and eighty shillings**). What is crucial is that the amended plaint claims against the defendants jointly and severally. Counsel Henry Kyalimpa, counsel for the defendants has not deemed it necessary to respond to the amended plaint within 7 days as ordered by court.

Paragraph 6 (b) of the amended plaint avers that on the 19th of May 2006, the 1st plaintiff entered into a loan agreement with the 1st defendant (For and on behalf of both plaintiffs) and by the said loan agreement the plaintiffs were advanced **Uganda shillings 740,000,000/= (Seven hundred and forty million)** to the 1st defendant at an interest rate of 22% per annum. This averment in the plaint is substantially admitted by the memorandum of agreed facts 1 and 3 written above and the letter of the defendant's lawyers Messrs Mugarura, Kwarisiima & Company Advocates dated 19th of May 2009 and filed on court record. Agreed facts 1 and 3 are: That it admitted that the first defendant and the first plaintiff entered into a loan agreement for 740,000,000/- **(Seven hundred and forty million)**. That under the loan agreement the sum was to attract interest at 22% per annum.

Paragraph 6 (c) of the plaint avers that the loan amount was equally contributed by the plaintiffs in the respective sums of Uganda shillings 370,000,000/= (Three hundred and seventy million shillings) each. The averment in the plaint is admitted by the memorandum of agreed facts number 2 written above.

Paragraph 6 (h) of the plaint avers that security for the repayment of the loan was by way of a power of attorney to the 1st defendant allowing it to pledge the second defendants land and developments comprised in Block 185 plots 2746 and 2747. Furthermore paragraph 6 (i) of the plaint avers that as a further security the 2nd defendant executed a deed of Suretyship in favour of the 1st Plaintiff by which she undertook to pay any loan amount that the first defendant failed to pay the plaintiff. This averments in the plaint are substantially admitted by paragraphs 4, 5 and 7 of the memorandum of agreed/admitted facts.

The agreed facts paragraph 6 thereof introduce another fact that "at the time the time the loan was made in the portion financed by the first plaintiff, they did not have a money lenders license

issued in Uganda. Last but not least paragraph 7 of the memorandum of agreed facts provides for the real matter in controversy namely "It is agreed that the 1st defendant still owes the 1st plaintiff some outstanding balance on the loan amount which can be clarified by reconciliation and the plaintiffs shall provide proof of the outstanding balances."

It is instructive that we refer to the prayers in the plaint. Paragraph 9 (a) prays that the outstanding amount of UGX 1,125,994,303/= or such sums as will be proved due to each of the plaintiffs respectively be ordered. The prayers also seek interest at 22% per annum from the date of filing the suit, till date of judgment. Finally the plaint seeks interest on the above amounts at 25% per annum from the date of judgment till payment in full and also costs of the suit.

Order 12 rule (2) provides that where parties reach an agreement, orders shall immediately be made in accordance with rules 6 and 7 of Order XV of the rules.

Order 15 rules 6 and 7 provides as follows:

> "6. Questions of law or fact may by agreement be stated in the form of issues.
>
> Where the parties to a suit are agreed as to the question of law or of fact to be decided between them, they may state the question in the form of an issue and enter into an agreement in writing that, upon the finding of the court in the affirmative or the negative of the issue—
>
> (a) a sum of money specified in the agreement, or to be ascertained by the court or in such manner as the court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement;
>
> (b) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct; or
>
> (c) One or more of the parties shall do or abstain from doing some particular act in the agreement and relating to the matter in dispute.
>
> 7. Court, if satisfied that agreement was executed in good faith, may pronounce judgment.

Where the court is satisfied, after making such inquiry as it deems proper—

(a) That the agreement was duly executed by the parties;

(b) That they have a substantial interest in the decision of the question as aforesaid; and

(c) that the question is fit to be tried and decided, it shall proceed to record and try the issue and state its finding or decision on the issue in the same manner as if the issue had been framed by the court; and shall, upon the finding or decision of the issue, pronounce judgment according to the terms of the agreement; and upon the judgment so pronounced a decree shall follow.

It should be noted that order 12 deals with the scheduling conference and order 12 rule 1 and 2 are on the scheduling conference wherein the conference sorts out points of agreement and disagreement. Now order 12 rules 1 and 2 do not specify what form the agreement of the parties is to take. In this case we have an agreement embodied in a joint scheduling memorandum. Secondly order 12 rule 2 specifies that where an agreement is reached an order shall immediately follow in terms of order 15 rules 6 and 7. Order 15 of the Civil Procedure Rules deals with the framing of issues and the determinations of the suit on agreed issues of fact or issues of law. Rule 6 of order 15 when put in context, deals will agreed issues for trial. Secondly order 15 rule 7 also deals with an executed agreement wherein the court would try the issue and pronounce its judgment. It's in light of the wording of the rule that I suppose counsel opted to apply for judgment under order 13 rule 6 of the Civil Procedure Rules. I see no prejudice to the parties in this approach. A judgment under order 13 rule 6 need not settle an outstanding claim. Judgments may settle questions of fact which when decided as to what the facts of the case are need not be tried again. A decision based on the facts becomes res judicata but the decision may not conclude the trial of all matters in controversy. My view is strengthened by order 21 rule 5 of the Civil Procedure Rules which provides that the court shall in cases where issues have been framed, state its finding or decision on each issue.

In the joint scheduling memorandum the parties framed three issues for trial namely:

1. Whether the second plaintiff co financed the loan amount and if so whether it can claim under the loan agreement.

2. Whether the defendants are jointly or severally liable to the plaintiffs for the outstanding amount on the loan agreement

3. What remedies are available to the plaintiff's?

From an assessment of the memorandum of agreed facts, and to a large extent the suit as far as matters of fact are concerned and particularly on issues numbers 1 and 2 has been substantially resolved in favour of the plaintiffs by the admission/agreement of facts affecting the defendant save for the issue of whether the first plaintiff had a money lenders license and the effect of this on the question of liability.

Order 13 rule 6 provides that:

> 6. Judgment on admissions.
>
> Any party may at any stage of a suit, where an admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon the admission he or she may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon the application make such order, or give such judgment, as the court may think just.

Order 13 rule 6 of the Civil Procedure Rules, should be construed widely. It permits judgment on controversies of fact and law. The consequence of the decisions on questions of fact or law may either partially, substantially or wholly resolve the matters in controversy in the suit. The decision should be based on all or any issues in terms of order 21 rule 5 of the Civil Procedure Rules. Based on the law as stated above it is the decision of this court based on admissions that the following matters stand resolved.

Paragraph 5 of the amended plaint avers that the claim against the defendants jointly and severally is for the recovery of a total of UGX 1,125,994,303/= **(One billion one hundred and twenty five million, nine hundred ninety four thousand, three hundred and three shillings**) out of which the debt due to the second plaintiff stood at 528,407,680/-**(Five hundred and twenty eight million four hundred and seven thousand, six hundred and eighty shillings**).

By agreement of the parties, it has been agreed that the outstanding amount should be resolved through a reconciliation of figures between the parties. I refer specifically to paragraph 7 of the memorandum of agreement which provides that "it is agreed that the 1st defendant still owes the 1st plaintiff some outstanding balance on the loan amount which can be clarified by reconciliation and the plaintiffs shall provide proof of the outstanding balances." The agreement requires the plaintiffs to provide proof of what is owed and this is to be checked against the figures the defendants may have. To cut the long story short, the loan agreement which specifies how the amounts will be specified will guide the parties on how the outstanding amount is to be calculated. Accountants from both parties can meet and resolve this outstanding amount by checking the payments so far made by the first defendant against the outstanding amount so far established. What remains is to agree whether to take evidence on this issue or whether an independent auditor is appointed by both parties to resolve the question of how much money remains outstanding.

Secondly as noted above paragraph 6 (b) of the amended plaint avers that on the 19th of May 2006, the 1st plaintiff entered into a loan agreement with the 1st defendant (For and on behalf of both plaintiffs) and by the said loan agreement the plaintiffs were advanced Uganda shillings 740,000,000/= to the 1st defendant at an interest rate of 22% per annum. This averment in the plaint is substantially admitted by the memorandum of agreed facts 1 and 3 written above and is therefore proved. The reconciliation of the actual outstanding amount due is based on the resolution of the facts pleaded in paragraph 6 (b) of the plaint. The agreed facts state as follows: That "it is admitted that the first defendant and the first plaintiff entered into a loan agreement for 740 million Uganda Shillings." In other words there is a loan agreement for sums averred in paragraph 6 (b) of the plaint. Secondly, paragraph 3 of the agreed facts states that "under the loan agreement the sum was to attract interest at 22% per annum." The claim in the plaint that interest stands at 22% per annum is proved and the court finds so accordingly. This finding is merged with the first finding that the outstanding loan amount is what is yet to be determined. It will be determined using the loan agreement and the agreed interest thereon of 22% per annum.

Thirdly paragraph 6 (c) of the plaint avers that the loan amount was equally contributed by the plaintiffs in the respective sums of Uganda shillings 370,000,000/= (three hundred and seventy million) each. The averment in the plaint is admitted by the memorandum of agreed facts number

2 written above. This partially resolves issue No. 1 of whether there was co-financing of the loan agreement. It is explicitly agreed that there was co-financing on a 50% to 50% basis. Consequently the proportion of what is due to each plaintiff has been agreed. It becomes a matter of interpretation as to whether the second plaintiff can claim in the suit. This would be a question of standing. Counsel can address court based on the agreed facts. I must note that if the entire amount is proved by one plaintiff against the defendants, that plaintiff would be obliged to pass on 50% to the other plaintiff. Additional evidence may be taken only on how the 50% sharing between the plaintiffs is to be done. However there is no suit between the plaintiffs. This matter can be resolved between the plaintiffs and is of no concern to the defendant. As to whether there is a separate agreement by which the loan was given on a 50% partnership basis and whether this gives standing to both parties to sue for recovery of the loan would not affect the suit so long as any one of the plaintiffs can sue for the whole amount. This finding does not prejudice the parties from arguing on the basis of the lack of money lenders' license of the first plaintiff at the time of the loan agreement. What is important is that the total amount claimed and proved is to be shared equally between the two plaintiffs. However the question of standing in court will only be resolved finally when the parties address court on the effect of agreed fact 6 of the memorandum of agreed facts.

Fourthly paragraph 6 (h) of the plaint avers that security for the repayment of the loan was by way of a power of attorney to the 1st defendant allowing it to pledge the second defendant's land and developments comprised in Block 185 plots 2746 and 2747. Furthermore paragraph 6 (i) of the plaint avers that as a further security the 2nd defendant executed a deed of Suretyship in favour of the 1st Plaintiff by which she undertook to pay any loan amount that the first defendant failed to pay the plaintiff. This pleadings are substantially admitted by paragraphs 4, 5 and 7 of the memorandum of agreed/admitted facts. This also wholly resolves issue number 2 of the agreed issues as far as factual matters for trial are concerned and only saves the point of law relating to standing to sue in this court and the question of legal liability based on the license of the first plaintiff. In other words save for the question of legal liability if the amount claimed is not paid by the principal borrower, executions will issue against the second defendant and I find so accordingly.

Last but not least the agreed facts and paragraph 6 thereof introduce another agreed fact that "at the time the loan was made in the portion financed by the first plaintiff, they did not have a money lenders license issued in Uganda. Furthermore, paragraph 7 of the memorandum of agreed facts provides for the real matter in controversy namely "It is agreed that the 1st defendant still owes the 1st plaintiff some outstanding balance on the loan amount which can be clarified by reconciliation and the plaintiffs shall provide proof of the outstanding balances." An assessment of these agreed facts lives the following matters for trial namely:

a. What the outstanding loan amount is. This as noted was firstly to be established through reconciliations of repayments of the loan by the defendant against the amount due. Failure of reconciliation being amicably done by agreement of the parties, it will be done by either a neutral third party agreed by the parties who will make a report to court or a referee of court with the expertise to reconcile the accounts of the parties.

b. The effect of not having a money lenders license on the part of the first plaintiffs at the time of the execution of the loan transaction is a question of fact. What the effect of this fact is; is a matter of interpretation resolved by law. The parties will address court on this question if not amicably resolved without calling further evidence. This issue resolves the question of whether the first plaintiff can sue for the amounts in the loan agreement and should be tried first.

c. Costs of the suit,

d. Interest claimed from date of judgment till payment in full.

It is the agreement of the parties that a reconciliation of accounts to determine the loan amount shall first be tried. This will be done under direction of court. Should the parties fail to resolve what the outstanding loan amount is, they will address court through counsel on having a referee of court or an agreed referee to try the question of fact by examining evidence of loan repayments by the defendants against the outstanding amount. As far as the outstanding question of costs and interests are concerned, it will be determined after the final outcome of the suit by

resolving the effect of agreed fact paragraph 6 therefore and by address of the counsels for both parties hereafter. Ruling delivered in open court on the 10th day of May 2011

Hon. Mr. Justice Christopher Madrama

Ruling delivered in the presence of Nicholas Ecimu, for the Plaintiffs,

Pius Olaki Senior Legal officer Second Plaintiff,

Henry Kyalimpa Counsel for Defendants;

Hellen Kakyo Second Defendant;

Patricia Akanyo Court recording assistant,

Ojambo Makoha court clerk,

Dated at Kampala this 10th day of May 2011

Hon. Mr. Justice Christopher Madrama