THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL COURT DIVISION]

CIVIL SUIT NO.470 OF 2009

PESA FINANCE LIMITED…….……..…..PLAINTIFF

VERSUS

LOUIS NTALE……...…….DEFFENDANT

BEFORE HON. LADY JUSTICE HELLEN OBURA

RULING

This is a ruling in respect of two preliminary issues on points of law raised by counsel for the defendant. The first issue is whether the suit is time barred by limitation and the second one is whether the two loan agreements which are the basis of the suit are admissible in evidence and if not whether the suit discloses a cause of action. At the scheduling conference, counsel for the defendant requested court to allow the parties to argue those preliminary issues before proceeding to determine the rest of the issues as they would dispose of the suit if court agrees with the defendant. Court then directed the parties to file written submissions on those two preliminary issues which they did and I have duly considered their arguments in this ruling.

The brief background is that the plaintiff sued the defendant for recovery of money allegedly lent to him by the plaintiff in October and November 2007 respectively under two separate loan agreements. The defendant in his written statement of defence denied any indebtedness to the plaintiff and contended that the loan agreements relied upon to support the claim are illegal and unenforceable.

On the first preliminary issue, the defendant's counsel submitted that the suit is barred by section 19 of the Moneylenders Act Cap 297 which provides for limitation of time for proceedings to recover money lent as follows:-

> *"No proceedings shall lie for the recovery by a moneylender of any money lent by him after commencement of this Act or of any interest in respect of that money, or for the enforcement of any agreement made or security taken after the commencement of this Act in respect of any loan made by the moneylender, unless the proceedings are commenced before the expiration of twelve months from the date on which the cause of action accrued."*

Counsel submitted that under clauses 5 and 6 of the two loan agreements the loans and interests thereon at the rate of 10% per month were to be paid within two months from the date of the agreements. He argued that the cause of action for the first loan agreement which was signed on the 30th October 2007 arose after the expiry of the loan period on 31st December 2007 by which date the defendant ought to have repaid the money allegedly lent to him by the plaintiff and he did not. It was further argued that the suit for recovery of the loan should have been brought within twelve months from that date, that is to say, before 31st December 2008.

As regards the second agreement dated 2nd November 2007, counsel submitted that the two month loan repayment period expired on 2nd of January 2008 and the twelve months within which the suit should have been instituted expired on 3rd January 2009. He argued that this suit was instituted on 15th December 2009 which was outside the period of twelve months stipulated by section 19 of the Moneylenders Act.

Counsel for the defendant referred to **F.X.S Miramago vs A.G [1979] HCB 29** where Engwau J. (as he then was) held that time begins to run from the date when the cause of action occurred up to the time when the suit is filed. He then argued that this suit is time barred because it was instituted outside the 12 month period for filing a claim under the Moneylenders Act. He also relied on the case of **Iga vs Makerere University [1967] E.A 65** where it was held that:- *"A plaint which is barred by limitation is a 'plaint barred by law'……..…The Limitation Act….. operates to bar the claim or remedy sought for, and when a suit is time barred, the court cannot grant the remedy or relief."* He prayed that on that basis, the suit should be rejected and struck out with costs in accordance with Order 7 rule 11 (d) of the Civil Procedure Rules (CPR).

On the second preliminary issue, counsel for the defendant submitted that section 42 of the Stamps Act Cap. 342 provides:

> *"No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of the parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person, or by any public officer, unless the instrument is duly stamped."*

He submitted that the above section requires stamp duty to be paid upon all documents that qualify as instruments for the purposes of the Act. Therefore the non-payment of stamp duty renders the loan agreements which were tendered in court as evidence for the recovery of the money allegedly lent to the plaintiff inadmissible.

The defendant's counsel relied on the case of ***Yokoyada Kaggwa v Mary Kiwanuka & Anor [1979] HCB 23*** where court held that generally under section 38 (as it then was) of the Stamps Act any instrument on which a duty is chargeable is inadmissible in evidence unless that instrument is duly stamped as an instrument on which the duty chargeable thereon has been paid. Counsel stated that it is not in dispute that the stamp duty has never been paid on the two loan agreements and as such the two documents are unstamped. He submitted that the plaintiff cannot rely on those unstamped agreements as evidence and as the basis of the suit.

Counsel for the defendant also referred to ***Proline Soccer Academy v Lawrence Mulindwa & 5 Others HCMA No. 0459 of 2009*** where the court considered an unregistered deed of assignment and agreed with the argument of counsel for the respondent that;

"……for as long as the impugned deed of assignment is unregistered, it cannot be used in this case to found a cause of action against the respondent.……No court will lend its aid to a person who founds his claim upon an illegal act. The effect of non-registration of documents is a matter of substantive law, not procedure. Therefore for a plaint to disclose a cause of action, it must show that the plaintiff enjoyed a right, which was violated by the defendant."

Counsel invited this court to follow the persuasive decision of Bamwine. J (as he then was) in that case and hold that the plaint discloses no cause of action and dismiss it accordingly.

In reply to the first preliminary issue, counsel for the plaintiff submitted that the objection that the suit is barred by limitation is premised on the contention that the plaintiff is a moneylender within the ambit of the Moneylenders Act, Cap. 297 and that this suit is filed outside the twelve months period provided by section 19 of that Act. He submitted that the recovery of money sought as stated in the plaint is also based on dishonored bills of exchange and the plaint does not disclose whether the plaintiff was a duly registered moneylender under the Moneylenders Act at the time of lending the money. Counsel submitted further that the loan agreements provided for immovable property in the form of land comprised of Kyadondo Block 20, Plot 982 land at Nateete as security for both the agreements. He argued that therefore the plaint is not solely and exclusively restricted to the provisions of the Moneylenders Act.

He further argued that the non-disclosure by the pleadings of whether the plaintiff is a money lender under the Moneylenders Act could also suggest that the loan agreements are ordinary agreements made by business people for borrowing which is governed by the Contract Act and common law. He contended that involvement of immovable property in any borrowing suggests on the face of it, application of the Mortgage Act, 2009 and or the principles of common law on equitable mortgages and their protection under the Registration of Titles Act Cap. 230 therefore an assumption that the suit is premised on the Moneylenders Act is erroneous.

Counsel for the plaintiff further submitted that in the case **of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (19967) E.A 696*** court observed that a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point of law may dispose of the suit. He also relied on the decision of Bamwine. J (as he then was) while considering a similar objection in the case of ***Investment Masters Ltd vs Ambrose Kagangure HCCS No. 312 of 2005*** (unreported) who stated thus:-

> *"In the event that S. 21 (1) (c) of the Act applies to this case, the plaintiff's case 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."*

On the basis of the above authority, counsel for the plaintiff contended that the provisions of section 21 (1) (c) of the Moneylenders Act gives an exception which is so wide and inclusive thereby requiring this court to investigate the question of whether the mortgages were created, performed and/or actuated by hearing the merits of the case before determining the issue of limitation.

On the second preliminary issue, it was submitted for the plaintiff that sections 40 and 68 of the Stamps Act enjoins this court to impound any instrument or document which requires stamp duty to be paid and has not been paid, if it deems fit, and may order the party to pay taxes or duties before the suit can continue or that party can rely on it. He argued that under those provisions court cannot make want of duty a ground for dismissal of a suit. This argument was based on the decision in the case of ***Yokoyada Kaggwa*** (supra) which was relied upon with approval by the Court of Appeal in the case of ***Dieter Pabst v Abdu Ssozi & Anor Civil Appeal No. 116 of 2000*.**

Counsel for the plaintiff then submitted that the loan agreements in the instant case can still be admissible in evidence any time after payment of the stamp duty. He also argued that as pointed out under the first preliminary issue, the plaintiff's cause of action is composite as it is based on more than one document and for that reason the

plaint cannot be rejected and/or suit dismissed. He prayed that court should over rule the preliminary objection.

In rejoinder to the plaintiff's submissions in reply, the defendant's counsel submitted that the plaintiff's suit is for recovery of an outstanding loan advance based on the two loan agreements and not on the dishonored cheques and neither is it for the enforcement of an equitable or legal mortgage. He argued that the submission of the plaintiff's counsel on the dishonoured cheques and the alleged mortgage is clearly misconceived as the plaintiff is bound by his pleadings and can not be allowed to set up a case different from what is pleaded in its plaint.

Counsel contended that section 19 of the Moneylenders Act is applicable to the plaintiff's suit as it did not deny being a moneylender who falls within the meaning of section 1 (h) of that Act. He urged this court to so find. Counsel also submitted on a fresh matter that had never been raised in the objection namely, that; for the plaintiff to execute such an agreement it ought to have moneylending license and certificate in place failure of which renders the acts of the plaintiff criminal under the Act and makes the loan agreement illegal and unenforceable. He therefore prayed that on that basis this court should dismiss the suit. On the whole counsel prayed that the plaint be rejected and the suit dismissed with costs.

I have carefully considered the above submissions and I will start by dealing with the matter which was raised for the first time in the rejoinder. I must observe that this is an unacceptable approach because the plaintiff did not have an opportunity to respond to the matters raised. I will therefore dismiss that argument summarily without giving it my attention and proceed to consider the first preliminary issue of limitation.

I have reviewed the plaintiff's pleadings and all the authorities relied upon by the parties in their submissions and I am more inclined to agree with the submissions of counsel for the plaintiff that more evidence is required to determine the question of whether or not the loan agreements were money lending transactions under the Moneylenders Act. It would be unfair for this court to determine this matter at this point without hearing the parties on the merits of the case. I completely agree with the plaintiff's counsel that the plaint is silent on the question of whether or not the plaintiff is or was at the time of the transaction a moneylender within the meaning of the Moneylenders Act. I do not therefore know the basis of the defendant's conclusion that the transaction in dispute is affected by section 19 of the Moneylenders Act. I can only come to that conclusion upon hearing the evidence because not all money lending transactions are governed by the Moneylenders Act. For that reason, the first preliminary point is over ruled for lacking merit.

As regards the second preliminary point, the decision of the Court of Appeal in ***Dieter Pabst v Abdu Ssozi & Anor*** (supra) which binds this court is quite explicit on the

matter. In that case Byamugisha .JA (RIP) in her lead judgment clearly stated as follows;

> *"The decision of whether the instruments attracted duty or not ought to be made before the instrument is admitted. The party concerned ought to be given an opportunity to pay the duty so that the instrument can be used in evidence. I therefore agree with the submissions of Mr. Adriko and the authorities he cited, to the effect that the trial court should determine whether a document is dutiable or not before it is admitted in evidence. The rationale being to enable the party affected to pay the stamp duty and penalty….."*

From that authority it is clear that all that this court needs to do is to determine whether the two loan agreements are dutiable or not and if it is dutiable then order the plaintiff to pay the requisite duty together with the penalty. It is now settled that court cannot dismiss a suit merely because the stamp duty has not been paid on the documents relied upon to bring the claim. I believe this is in line with the provisions of Article 126 (2) (e) of the Constitution which enjoins this court to administer substantive justice without undue regard to technicalities.

For the above reason, I also find that the second preliminary issue lacks merit and it is accordingly over ruled. Since it is not in dispute that the duty payable on the transactions were never paid, I order the plaintiff to pay the same as well as any penalty which may be assessed before the two loan agreements can be admitted in evidence.

I so order.

Dated this 18th day of September 2014.

Hellen Obura

JUDGE

Ruling delivered in chambers at 3.00 pm in the presence of Mr. Mulema Mukasa for the plaintiff and Mr. Paul Kuteesa for the defendant.

JUDGE
18/09/14