

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

CIVIL SUIT No. 108 OF 2011

DAMIANO SSEKIZIYIVU ::: PLAINTIFF

VERSUS

BANYONYI FAINANCE &

**INVESTMENT CO. LTD & 12 OTHERS :::
DEFENDANTS**

BEFORE: HON. B.KAINAMURA

RULING ON PRELIMINARY OBJECTION

Brief background

During the scheduling conference Counsel for the defendants raised a preliminary point of law to the effect that:-

Whether the plaint discloses a proper cause of action or whether the plaintiff has a right to sue the defendants on a contract that he is not privy to.

By way of background, the plaintiff granted to the defendant jointly and severally Powers of Attorney for a period of 5 years over a property comprised in Plot No. 10-12 Mutagwanya Lane Mubende Town Council Mubende District to borrow money from DFCU Bank Ltd. All defendants acting under the 1st defendant took out a loan of UGX 140,000,000/= from DFCU Bank Ltd using the property mentioned herein as security. The defendants also undertook to pay rent for the property and by the time they vacated the plaintiff's property the rent due was UGX 3,600,000/=. They also undertook by a joint affidavit dated 3rd May 2007 to be bound

individually as Directors of the 1st defendant to pay all the money due. Upon default the property was subjected to threat of being sold off. The plaintiff redeemed the property by paying UGX 70,340,437/= as the outstanding loan amount and accrued interest. The plaintiff subsequently filed this suit praying for special damages of UGX 70,340,437/= and outstanding rent arrears of UGX 3,600,000/= and any subsequent rent that accrued as long as the defendants occupied the property.

PRELIMINARY OBJECTION

Counsel addressed court in written submissions on the preliminary objection.

Counsel for the defendants made a joint submission on the preliminary point. They submitted that the two plaints i.e. the amended and original plaint do not disclose a cause of action because they have unclear and confusing prayers as well as a muddle of confusing facts that do not give the plaintiff the right to sue or claim any relief from the defendants.

Counsel for the defendants contended that the plaintiff did not show anywhere that he has the right to be refunded UGX 70,340,437 nor any agreement to have a refund. Counsel submitted that the contents in the Powers of Attorney executed by the plaintiff dated 3rd May 2007 and the joint affidavit do not give any right to the plaintiff. They contended that the powers of attorney did not grant the plaintiff the right to pay off debts owed by the 1st defendant or all defendants. Counsel further stated that the powers issued in favor of the 1st defendant had not expired. They also contended that the commitment by the directors to pay the money without fail was only in case of the collapse of the company. They argued that failure by the plaintiff to clearly indicate in the plaint the capacity in which he is suing the various defendants makes the element of the defendants' liability missing.

In conclusion, Counsel submitted that as provided under Order 7 rule 11(a) of the CPR, the plaints ought to be struck out with costs for failure to disclose a cause of action.

Counsel for the plaintiff in reply argued that the defendants were expected to make a formal application of the preliminary objection. He submitted that there is no legal basis for the preliminary objection. He made reference to the case of East African Court of Justice in **Appeal N0.1 of 2011 A.G of Kenya Vs Independent Medical Legal Unit** where court held that it is improper to raise points of law by preliminary objections as that does nothing but unnecessarily

increases costs. Court must therefore insist on the adoption of the proper procedure for entertaining applications for preliminary objections.

Counsel submitted that the 2nd, 3rd, 4th and 5th defendants acknowledged the power of attorney to borrow from DFCU Bank using the plaintiff's title and they committed themselves to pay the loan and interest in a joint affidavit dated 3rd May 2007. He stated that the plaintiff claims monies from all defendants jointly and / or severally as special damages.

Citing the case of **Auto Garage Vs Motokov (1971) EA 514**, Counsel submitted that the plaintiff enjoyed his right of possession of the land in dispute which has been violated by the defendants.

In conclusion, Counsel submitted that the preliminary objection is centered on prayers, facts, and documents which have already been admitted by the Counsel for the defendants in the scheduling conference. He prayed that the preliminary objection be rejected with costs since its *res judicata*.

DECISION OF COURT

I have read the arguments and pleadings of both Counsel. Counsel for the defendants raised a preliminary objection basing on Order 7 rule 11(a) that the plaint does not disclose a cause of action.

In the case of **Tororo Cement Co. Ltd Vs Frokina Int'l Ltd C.A No.2 of 2001** court held that a cause of action means;

“Every fact which is material to be proved to enable the plaintiff to succeed or every fact which if denied, the plaintiff must prove in order to obtain judgment”

The guidelines to follow were stated by the Court of Appeal of *East Africa in Auto Garage Vs Motokov (No.3) (1971) EA 514*. These are:-

- (i) The plaint must show that the plaintiff enjoyed a right
- (ii) That right has been violated and

(iii) That the defendant is liable.

It is should be noted that the plaintiff granted Powers of Attorney to the 1st respondent with powers to:-

1. take possession of, and use for borrowing and credit purpose of his land described in the certificate of title.
2. mortgage and deposit the original title with DFCU Bank Ltd as security in consideration for providing credit facilities to the Donee.
3. sign and execute any documents and instruments and take all such steps as may be necessary or expedient for giving effect to the said powers.
4. redeem, seek release of and recover the said certificate of title after the credit facilitate advance plus any interest thereon has been fully repaid.

The tenure of the Power of Attorney was limited to five years from 18th April 2007 to 18th April 2012.

Under **Section 146(1) of the RTA** the proprietor of any land under the Act may appoint any person to act for him or her by signing a Power of Attorney. The facts in this case show that the plaintiff granted Power to the 1st defendant; a duly incorporated company. The other defendants are Directors of the Company and are sued by virtue of the joint affidavit dated 3rd May 2007. The default in payment had an implication of transfer of the plaintiff's legal interest in the land which the plaintiff still enjoyed despite the fact that he had granted the defendants powers to use the title as security for the loan from DFCU.

I therefore respectfully disagree with the arguments raised by Counsel for defendants that the plaintiff has no cause of action because he had no contractual arrangement under which he paid the loan. In ***Fredrick J.K Zaabwe Vs Orient Bank & 4 others C.A No.4 of 2006*** court held that;

“The point to note here is that the donee of a power of attorney acts as agent of the donor, and for the donor”

There is a legal relationship between the plaintiffs and the defendants of donee and donor. The plaintiff as a principal had a right to redeem his property that was under threat of sale. I'm alive

the fact that the powers donated to the defendants include redeeming the property which they defaulted to do.

Clause 5 of the Power of Attorney was to the effect that the powers of attorney would remain in force until the financial facility secured, obtained and disbursed has been fully repaid together with all the interests accruing thereon. It is therefore not true as argued by Counsel for the defendants that the Power of Attorney has expired. Their purpose was to confer powers to use the plaintiff's land as security. The loan amount was paid by the plaintiff who now demands a refund of the sums he paid to redeem the property and rent arrears.

Accordingly, I hold that the case meets the conditions set out in the case of **Auto Garage Vs Motokov (supra)**.

I am satisfied that the plaintiff has demonstrated that he enjoyed a right which has been violated by the defendants and as such the suit discloses a cause of action against the defendants.

For the reasons stated above the preliminary objection is overruled.

B. Kainamura

Judge

14.05.2015