

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

CIVIL SUIT No. 398 OF 2012

1. ARVIND PATEL
2. HIGHLAND AGRICULTURAL EXPORT LTD } **PLAINTIFFS**

VERSUS

1. FRED KABUJEEME
2. RONALD MENYA
3. ALLIED TEC CONTRACTORS LTD } **DEFENDANTS**

BEFORE: JUSTICE B. KAINAMURA

JUDGMENT

The plaintiffs brought this suit against the defendants for recovery of a friendly loan of UGX 870,000,000/= general damages, interest and costs of the suit.

The plaintiffs' case is that they advanced a friendly loan of UGX 900,000,000/= to the first and second defendants and by a deed of settlement agreed to have it re-paid in ten instalments. The defendants subsequently paid UGX 30,000,000/= and the balance of UGX 870,000,000/= is still in arrears which has caused the plaintiffs financial suffering and loss of income.

In the written statement of defence, the defendants' denied being indebted to the plaintiffs stating that the plaintiffs did not advance a friendly loan to them as alleged but the amount claimed arose out of interest accrued from a money-lending relationship. The defendants further stated that the deed of settlement and the cheques issued to guarantee payments were issued in error and without verification of actual payments that had already been remitted to the plaintiffs as was later confirmed by their Accounts offices. Additionally that the sums of money are so much in excess of

what could legally be due in terms of the money-lending relationship. They prayed that the suit be dismissed with costs and set out a counterclaim stating that;

The defendants on diverse occasions orally requested for financial facilities from the plaintiffs as moneylenders. They added that the defendants to the counterclaim have received more than what would be adequate to cover the principal sums lent with interest and any further payment would amount to unjust enrichment resulting from the unconscionable interest charges. They prayed for;

- a) Orders as shall be just for the re-opening of all transactions between the parties to determine whether the sums demanded and those already settled are not excessive.
- b) An order to take an account and relieve the defendants from payment of any sums that in the view of Court are excessive in the circumstances.
- c) An order to wholly set aside the deed of settlement and directing that no payment be made in respect of the security cheques in the possession of the plaintiffs.
- d) An order that any money found by Court to be in excess paid to the plaintiffs by the counter-claimants be refunded.
- e) Costs to the counterclaim and any other reliefs that the court would deem appropriate in the circumstances.

The plaintiffs filed an amended plaint and reply to the written statement of defence and counterclaim. In the amended plaint, the plaintiffs added the fact that on 15th August 2011 the defendants by written letter to the Plaintiffs' Lawyers M/S Kaggwa Advocates acknowledged their failure to honour the payment schedule in the agreement because of financial constraints but that they could still follow the agreed schedule since the said agreement had not yet expired. Further that after the expiry of the payment schedule and several demands on the defendants by the plaintiffs' Counsel, the defendants wrote to the plaintiffs a letter dated 10th February suggesting another payment schedule. The plaintiffs' lawyers rejected the said proposal and sought for earlier days than those proposed but the defendants refused to comply with the suggestion. The amended plaint prayed for; UGX 870,000,000/= at the time of payment, interest at the rate of 30% per annum from the date of breach until full payment, general damages, interest on the general damages at the rate of 8% per annum from the date of filing the suit until payment in full and costs of the suit.

In the defence to the counterclaim, the plaintiffs/defendants to the counterclaim stated that they were not moneylenders and not governed by the provisions of the Money Lenders Act. They stated

that they would show that they were appointed by the counterclaimants under a contract dated 18th March 2009 to provide them credit facilities for finance, goods and services in financial advisory. Furthermore that the counterclaimants on diverse occasions requested for financial services and goods from the counter defendants vide various letters dated 14th October 2009, 26th June 2009, 17th November 2008, and 12th February 2010. They stated also that the counterclaimants have never overpaid the alleged sum of UGX 1,418,150,000/= and the statement of account provided was not signed but rather just an afterthought. They stressed that Mr Arvind Patel was specifically known to the counterclaimants as their financial advisor and they should therefore not refer to him as a moneylender. They further stated that the counterclaimants are bound by their signatures on the deed of settlement and cheques which were dishonoured. Additionally that the counterclaimants paid the sum of UGX 150,000,000/= to the 1st counter-defendant vide a funds transfer slip of Cairo International Bank for the purpose of material supplies and plant charges. They prayed for dismissal of the counterclaim with costs and judgement as prayed for in the plaint.

At the commencement of the hearing, the following issues were framed,

- 1. Whether there was a contract between the parties**
- 2. Whether the defendants breached the contract**
- 3. What remedies are available to the parties**

Mr. Kagwa David and Sam Ogwang appeared for the plaintiffs and Mr. Samuel Ntende for the defendants.

Issue One: whether there was a contract between the parties

The 1st plaintiff Mr. Arvind Patel was called as PW1. It was his testimony that he and the 2nd plaintiff were appointed by the defendants under a contract dated 18th March 2009 to provide finance, goods and other services on credit. He added that the defendants by letter requested for financial assistance which they received through his advisory services including assistance to them to obtain bank guarantees from Diamond Trust Bank. He stated that the defendants issued to the plaintiffs cheques totalling UGX 900,000,000/= being payment for the services and goods which cheques when banked were returned with the words “account closed”. He was later paid UGX 30,000,000/= on 16th August 2011 by the defendants leaving a balance of UGX 870,000,000/= which is still outstanding.

The defendants called one witness Mr Ronald Menya who testified as DW1. It was his testimony that the relationship they had with the plaintiffs was that of a money-lender and borrower. He stated that the 1st plaintiff lured the defendants into signing the so-called deed of settlement the basis of this claim. It was also his evidence that the plaintiffs made him sign the deed of acknowledgement by duress. He stated that the 1st plaintiff brought police who made them acknowledge being indebted.

Submissions

Counsel for the plaintiff submitted that in the joint scheduling memorandum signed by both counsel, it was admitted that there was a contract between the parties and prayed that this issue be answered in affirmative. He cited Sections 91 and 92 of the Evidence Act [cap 6] arguing that when terms of the contract have been reduced into form of a document, no evidence shall be given in proof of the terms of the contract except the document itself. He added that the defendants do not deny the existence of the two agreements dated 18th March 2009 and 14th February 2011. He concluded by praying that the issue be answered in the affirmative.

Counsel for the defendant relying Order 15 rule 5(1) CPR which empowers the court at any time before passing of the decree to amend the issues as may be necessary for determining matters in controversy between the parties proposed that issue one be framed as; whether the contract between the parties was legal.

Addressing the proposed issue, Counsel drew court's attention to Sections 1(h), 2,6,10 and 11 of the Money Lenders Act (cap 273) and argued that there is no evidence that the plaintiff's business is carried on as required in the Act. He added that section 6 of the Act renders the deed of settlement unenforceable. Counsel stated that the plaintiffs' acts and omissions amount to illegalities which cannot be sanctioned by court. Counsel relied on the case of ***Uganda Railways Vs Ekwaru and others ULR (2008) 319-320***. Counsel further cited the decision of ***Jamba Soita Ali Vs David Salaam HCCS 400 of 2005*** and prayed that the suit be dismissed with costs.

Counsel for the defendants on the first issue as framed invited court to apply his submission on illegality of the contracts in resolving this issue. He submitted that Counsel for the plaintiff's had submitted that defendants are estopped from orally varying and/or denying the two agreements signed between the plaintiffs and defendants. Counsel submitted that court cannot rely on the said

documents which must be interpreted in the perspective of the **Contra Proferentum Rule** which requires court to review the contract and if it finds any clause questionable as in this case, it could have it determined and interpreted in favour of the party that prepare it. In conclusion, Counsel for the defendant contended that there was no contract as none of the documents signed are enforceable under law. He added that the **Contra Proferentum Rule** applies to the said contract in its entirety and therefore if court finds that there was a deed of settlement, then court should also find that it was procured in bad faith having included wrong interest calculations which are equally unenforceable.

In rejoinder, Counsel for plaintiff submitted that under paragraph 2 of the plaintiff's defence to the counterclaim, the plaintiff's had specifically denied that they are Money Lenders and accordingly the Money Lenders Act does not apply to them. Counsel further submitted that whereas court is empowered under O 15 r 5 (1) CPR to frame its own issues even at the time of writing the judgment, it is restricted to issues where evidence has been led on the issue. Counsel further argued that since the defendants asserted that the plaintiff's were Money Lenders, and as such the contracts were illegal, then it was incumbent on them to adduce evidence to that effect which they had not done. Counsel cited the case of ***Ecumenical Church Loan Fund (U) ECLDF Vs John Bwiza & 20rs HCCS No 614 of 2004*** where court observed that not every person that lends money is a Money Lender within the meaning of the Act and invited court to find that there was a contractual relationship between the parties.

Consideration by court

I will first deal with the application by Counsel for the defendant to frame a new issue in accordance with O 15 r 5 (1) CPR. It is indeed true that court may at any time before passing of the decree amend issues or frame additional issues. In ***Kahwa & Anor Vs Uganda Transport Company Ltd [1978] HCB 318***. It was held inter alia that:-

“Under O 16 r 15 (now O 15) the court is empowered to amend the issues or frame additional issues on such terms as it may think fit at any time before judgment and may, in a like manner, strike out any issues appearing to be wrongly framed or introduced”.

Court in that case went ahead to consider as an issue a matter which had not been specifically raised by the pleadings but had been raised by the evidence of the plaintiffs and addressed in the arguments of both Counsel. In the case under review, the first issue framed was whether there was a contract between the parties. Counsel for the defendant prayed that court should also consider as an issue whether the contract between the parties was legal. My view is that Counsel wanted court to consider the legality of the contract in particular reference to the provisions of the Money Lenders Act Cap 273. Court notes from the amended WSD that the defendants averred that the relationship between the plaintiffs and defendants was that of money lender and borrower. Further Counsel for the defendants brought out that issue in his *submissions*. In addition DW1 Ronal Menya in his testimony stated:-

“..... the inevitable recourse is to private money lenders. Our dealings with the plaintiffs were in that perspective i.e money lender to borrower”

In opposition to the framing of this new issue, Counsel for the plaintiff argued that in the plaintiffs defence to the counterclaim they had specifically denied that they are money lenders, that the defendants have not led any evidence on the point and it would be unfair to the plaintiff. With due respect to Counsel, i believe he is jumping the gun. Once the issue is allowed, then court will analyse the evidence adduced and come to a judgment on the issue. Accordingly Counsel for the plaintiff's objection is overruled and i will go ahead and consider the issue proposed by Counsel for the defendant. In doing this i will handle the issue concurrently with issue 1 earlier framed i.e whether there was a contract between the parties.

The plaintiff's case is premised on a deed of settlement dated 31st January 2011 signed amongst the parties and admitted in evidence as Ex D3 under which the defendant received financing to the tune of UGX 900,000,000/= (shillings nine hundred million only) from the 2nd plaintiff through its Managing Director the 1st plaintiff and issued 10 post dated cheques for the sums borrowed due between 31st March 2011 through 31st December 2011. The cheques issued were No's 000068, 000069, 000070,000071,000072,000073,000074,000075,000076, and 000077 all of Diamond Trust Bank (see Ex P2). According to testimony of PW1 Arvnid Patel, the cheques were all banked on the respective due dates but were returned endorsed with word "account closed". In their defence, the defendants through one Menya Ronald DW1 disputed receiving the sum of UGX 900,000,000/=

and claimed the sum arose out of interest calculations as detailed in 23 pages admitted in evidence as Ex D1. In his testimony DW1 Menya Ronald, the 2nd defendant, stated:-

“The terms of our dealings were that for any advances to be made available for any activity he (the plaintiff) set an interest chargeable and we had to issue cheques to him or in the names of the second plaintiff. That is the background in which cheques mentioned in the letters attached to Ex P3 and others were issued”

DW1 further states:-

“..... therefore there is no occasion at all when the amounts advanced to the 3rd defendant any sum of money UGX 900,000,000/=..... more particularly it is not true that on 31st of January 2011 or any day soon thereafter the plaintiff advanced UGX 900,000,000/= as he seeks to portray”

In his submission Counsel for the plaintiff took issue with the above evidence. According to him, DW1 was trying to vary the terms of a written agreement between the parties i.e the Deed of Settlement – Ex D3 - which as earlier noted is the basis of the plaintiffs case. Counsel argued, quite rightly in my view that this goes counter to the dictates of Sec 91 and 92 of the Evidence Act (cap 6). The sections in part provide:-

S.91 *“When the terms of a contract or a grant, or any other disposition of property have been reduced to the form of a document no evidence shall be given in proof of the terms of the contract..... expect the document itself”*

S. 92 *“When the terms of any such contract have been proved according to S.91, no evidence of any oral agreement or statement shall be admitted as between parties to any such instrument or their representatives in interest, for purposes of contradicting, varying, adding to or subtracting from its terms.....”*

On his part Counsel for the defendants submitted that not only were the documents prepared by the plaintiffs and their Counsel, but the said documents were void *ab initio* for being in contravention/breach of law and are accordingly unenforceable. Clearly the basis of the assertion by Counsel is the question of whether the contract between the parties was legal. Counsel argued that from PW1’s testimony it was clear that he earned his remuneration from interest levied on funds

advanced to borrowers which fits him in the category and description of a money lender as defined under Section 1(h) of the Money Lenders Act (cap 273). Counsel further argued that there was no evidence showing that his business was licensed and as such the 1st plaintiff was contravening the law and that since the transaction was a money lending relationship, then the plaintiffs were in contravention of the various sections in the Money Lenders Act. Counsel pointed out that the plaintiff's acts and omissions amount to illegalities and should not be sanctioned by court (see ***Uganda Railways Vs Ekwaru & ords ULR (2008) 319-320***).

On his part, Counsel for the plaintiff argued that Sec. 1(h) of the Money Lenders Act defines a money lender as every person whose business is that of money lending or who advertises or announces himself or holds himself out in any way as carrying on that business. Counsel submitted that since the plaintiff's had denied in the defence to the counterclaim that they were money lenders, then the burden of proof to prove they were, had shifted to the defendant. That to discharge this burden the defendants should have adduced evidence to that effect including supporting documents. Counsel relied on the holding in ***Ecumenical Church Loan Fund*** case (supra) where Bamwine J (as he then was) stated:-

“.....i must say that points of law are decided on the basis of pleadings and facts not disrupted. Where a point of law would be sufficient to dispose of the case one way or the other, it ought to be decided by the court without first calling witnesses. Where however issues raised in the pleadings require evidence, it is fair that court does not delve into those issues as to do so would deny the other side a chance to produce its evidence and therefore be condemned un heard”

I cannot agree more

In the case under review other than the statement of DW1 where he alleged that the relationship between the parties was that of money lender and borrower, the defendant in my view did not adduce any evidence to point to this allegation.

Rather it was a belated effort to explain away a business relationship that had spanned well over three years (see Ex P1 and Ex D1) including the 1st plaintiff attending and in fact chairing the meetings of the 3rd defendant where the 1st defendant and 2nd defendant were in attendance (see Ex P

12) Indeed as observed in *Litch field Vs Dreyfus [1906] 1 KB 584* quoted with approval in *Ecumenical Church Loan Fund* case (supra):-

“..... a man who carries on business as a money lender and is not registered under the [English] Act, cannot recover. But not every man who lends money at interest carries on business of money lending. **Speaking generally a man who carries on a money lending business is one who is ready and willing to lend all and sundry provided that they are from his point of view eligible** (emphasis added)

The above said it is also instructive to reproduce Sec1 (h) of the Money Lenders Act. It provides:-

“Money lender includes every person whose business is that of money lending or who advertises or announces himself or herself or holds himself or herself out in any way as carrying on that business whether or not that person also possesses or earns property or money derived from sources other than the lending of money and whether or not that person carries on business as principal or agent but shall not include:-

.....

.....

From the evidence on record and particularly in view of the relationship between the parties, i am of the view that the plaintiffs were indeed lending money to the defendants but there is no evidence adduced to point to the allegation that the 1st plaintiff was a money lender and was lending money to the defendants as such. As seen above lending money *per se* does not make one a money lender within the meaning of the Act.

I am of the further view that for reasons stated above the defendants have not been able to discharge the evidential burden to prove that the transaction under review arose from a money lender/borrower relationship.

Accordingly i must, but answer the issue of whether the contract between the parties was legal in the affirmative and the issue of whether there was a contract between the parties in the affirmative.

Issue Two: whether the defendants breached the contract

It was PW1's evidence that the defendants signed a deed of settlement acknowledging they were indebted to the plaintiffs in the sum of UGX 900,000,000/= and agreed to pay it back in ten instalments. It was his further evidence that the defendants defaulted in payment and on 15th August 2011 they wrote a letter to the plaintiffs' lawyers stating that they had failed to pay due to financial constraints but agreed to pay according to the schedule. They subsequently paid the 1st plaintiff UGX 30,000,000/= and have failed to pay the outstanding balance.

DW1 denied that the plaintiffs advanced UGX 900,000,000/= on the 31st of January 2011 as alleged but asserted that the debt arose out of interest calculations. In cross examination, he admitted having paid UGX 30,000,000/= to the plaintiffs leaving a balance of UGX 870,000,000/=. In re-examination, he stated that they did not pay the UGX 870,000,000/= after realising that there was an over payment of UGX 1,890,150,000/= through RTGS transfers.

Counsel for the plaintiffs submitted that the defendants acknowledged their indebtedness to the plaintiffs for the sum of UGX 900,000,000/= and paid UGX 30,000,000/= leaving a balance of UGX 870,000,000/=. He cited the decision in the case of ***Arch Joel Kateregga & Another Vs Uganda Post Ltd HCCS No. 20 of 2010*** where it was held that a breach of contract occurs when one or both parties fail to fulfil the obligations imposed by the terms of the contract. He prayed that this issue be answered in the affirmative as well.

Counsel for the defendant submitted that since there was no contract, there was no breach of contract. Counsel based his argument on the defendant's stand that the contract between the parties was illegal and therefore unenforceable.

Having answered the 1st issue and one framed subsequently in the affirmative, it is now incumbent on court to determine whether the contract was breached by the defendants.

It has been established that the defendants signed the deed of settlement dated 14th February 2011 and under paragraph 2 thereof issued 10 post dated cheques drawn on Diamond Trust Bank which when presented were returned unpaid. The reason for dishonour as noted by the Bank, was on account of "account closed".

Dw1 who was the sole witness called by the defendants denied the claim of the plaintiffs and relied on EX D1 and Ex D3. Ex D1 is a summary of loan account between the second plaintiff and the second defendant maintained between August 2008 and August 2010 and EX D3 is the Deed of

Settlement. DW1 invited court to look at these and make necessary interferences. Further in para 7 of his witness statement DW1 stated:-

“That to my knowledge and according to documentary evidence available between May 2008 and November 2011 the third defendant and ourselves remitted in the plaintiffs various Bank Accounts at least UGX 1,890,180,000/= (One Billion Eight Hundred Ninety Million One Hundred Eighty Thousand). The said sum of money is payment of principal and interest on the sums extended to ourselves as mentioned in paragraphs 4 herein above. The evidence of those remittances comprise EX.D4”

As noted in the testimony of DW1, the documentary evidence available covers the period between May 2008 and November 2011. However i note that the Deed of Settlement - EX D3 is dated 14th February 2011 and does not make any mention of the transactions mentioned in DW1’s testimony above. The statement of account dated 31st January 2014 mentioned in the last sentence of the 1st paragraph of the Deed of Settlement is EX D1 which DW1 refers to in his witness statement at paragraph 5 and calls upon court to look at it alongside EX D3 for necessary inferences.

In his submission Counsel for the defendant argued that in absence of plaintiffs evidence to show how the UGX 1,890,180,000/= was applied lends credence to the defendants argument that the plaintiffs received far more than they would have. On his part Counsel for the plaintiff argued, quite rightly in my view, that the defendant’s evidence under paragraph 7 (set out above) relies on unsigned documents, is contradictory and falls short of any proof whatsoever, and cannot be relied on to contradict the signed Deed of Settlement.

Counsel for the plaintiff argued – and i am in agreement- that the defendant cannot adduce parole evidence to alter a written document i.e the Deed of Settlement because it is barred by Ss 91 and 92 of the Evidence Act (cap 6) and hence they are estopped by deed.

Estoppel by deed has been stated in ***Halsbury’s Laws of England 4th Edition Vol.16 para 954*** to be:-

954. Estoppel by deed

“Where there is a statement of fact in a deed made between parties, an estoppel results and is called “estoppel by deed”, if upon the true construction of the deed the statement is that of both or all the parties, the estoppel is binding on each party”.

Further Section 114 of the Evidence Act (cap 6) provides:-

114. Estoppel

“Where one person has by his or her declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he or she nor his or her representatives shall be allowed, in any suit or proceedings between himself or herself and that person or his or her representatives, to deny the truth of that thing”.

The plaintiff through the testimony of PW1 was able to show that the deed of settlement (Ex D3) sets out the basis of their claim and as set out above the defendants are estopped to deny it and adduce any evidence to the contrary. More so in a letter Ex P3 dated 15th August 2014, D3 through its Director D2 stated and i quote:-

(at para 2) “it has not been possible to meet the payment schedule contained in the deed of settlement dated 14th February 2014 due to distortion of our cash flow resulting from delayed payments from clients.....”

And

(at para 14) “we wish to notify you that we have so far managed to disburse UGX 30,000,000/= towards the settlement of the outstanding balance. Other payments will follow in due course”

Cognizant of the evidence before me, i am not persuaded that the defendants were lured into signing the deed of settlement and that the cheques in question were issued in error.

In the result issue No. 2 is answered in the affirmative i.e the defendant breached the contract.

Issue 3: What remedies are available to the parties

Counsel for the plaintiff submitted that the plaintiffs pleaded and proved a sum of UGX 870,000,000/= (Uganda Shillings Eight Hundred and Seventy Million). In view of my earlier finding that the amount stated in the deed of settlement minus the UGX 30,000,000/= acknowledged by the plaintiff as having been paid, is due and owing to the plaintiff, i find that the above amount has been proved to the satisfaction of this court and the plaintiffs are entitled to it.

Counsel for the plaintiff prayed for general damages of UGX 100,000,000/= (Uganda Shillings One Hundred Million). In support of this claim Counsel for the plaintiff submitted that an award of general damages is in the discretion of court (see *Benedicto Tejuhirize Vs UEB HCCS No. 31 of 1993*) and that they are losses, usually but not exclusively non pecuniary which are not capable of precise qualification in monetary terms (*Harlsbury's Laws of England Vol 12 (2) para 813*)

I have considered Counsel's submission and claim. Considering the circumstances of this case, i am of the opinion that an award of UGX 30,000,000/= (Uganda Shillings Thirty Million) would adequately compensate the plaintiffs for the inconvenience subjected to them by the defendant's refusal/failure to pay them.

Counsel for the plaintiff prayed for interest on special damages at 30% per annum from date of breach until payment in full. I am, with due respect to Counsel, of the view that interest rate of 30% prayed for is rather on the high side and i will accordingly reject it and instead award an interest of 18% per annum from the date of breach (13th March 2011) until payment in full.

Counsel also prayed for an award of 8% per annum on general damages from the date of this judgment until payment in full.

I agree and award it.

Counsel for the plaintiff relied on Sec. 27 of CPA and argued that costs follow the event. I agree and award costs to the plaintiffs.

In the result judgment is entered for the plaintiff in the following terms:-

1. The plaintiffs are entitled to UGX 870,000,000/= (Uganda Shillings Eighty Hundred and Seventy Million) being the balance due on the Deed of Settlement.
 2. General damages of UGX 30,000,000/= (Uganda Shillings Thirty Million) is awarded to the plaintiffs.
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3. Interest is awarded on (1) above at a rate of 18% per annum from 13th March 2011 until payment in full.
4. Interest is awarded on (2) above at 8% per annum from the date of this judgment till payment in full.
5. Costs are awarded to the plaintiffs

B. Kainamura

Judge

18.08.2015
