

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)**

CIVIL SUIT NO. 533 OF 2013

MK CREDITORS

LTD:.....PLAINTIFF

VERSUS

OWORA

PATRICK:.....DEFENDANT

BEFORE: HON. MR. JUSTICE H.P. ADONYO

Ruling on Preliminary Objections

Mr. Mugisha Samuel Mukeeri, learned counsel for the defendant raised a preliminary objection which was responded to by Mr. Male M. Kiwanuka who represented the plaintiffs.

The basis of the preliminary objection was that the main suit which is based on a credit agreement document as shown by Annexure A to the plaint under clause 4 ousts the jurisdiction of the court in as far as it for the enforcement of the agreement with no recourse to any court of law. That provision rendered the agreement not only void but illegal as it was against public policy.

Secondly, the defence counsel pointed out that the plaintiff was illegally engaged in the business of a financial institution without a license as provided under the Financial Institution Act of 2004, Section 4(1). That this said section prohibited the engagement by any into financial institution business in Uganda without a valid license granted under the law with a financial institution business being defined under Section 3 of the same Act to mean among others;

“... The lending or extending credit including a consumer and mortgage credit, the financial transaction, the recovery or foreclosure...”

This since this is what the plaintiff doing and had not shown that it had in its possession a license as required then it was operating in contravention of the law which even imposes criminal liability by the imposing the sentence of a fine not exceeding 350 currency points or imprisonment for 2 years or to both on one being found to have done so.

That since it was trite that agreements that contravene requirements of a statute to be considered void for illegality then ones upon which the plaintiff was trying to rely must be

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considered illegal with any action which purports to originate from such void agreement not to be enforced through a court of law.

Learned counsel pointed out that this requirement was what **Chitty on Contracts** paragraph 17 provides for and was the best example of criminality would disentitle a party to any contractual relief in a court of law if something is forbidden by a statute.

The other illegality which learned counsel pointed out was the plaintiff was engaged in the act of money lending business without a license as its pleadings did not reveal so but only had to attached a certificate. More so, learned counsel pointed further that the plaintiff was even engaged in transactions which involved the mortgaging of a kibanja property with but has not attached to the pleadings evidence showing that it had obtained the consent from the land owner as is required under the provisions of the Land Act as amended further showing that indeed the plaintiff was engaging itself in outright illegalities for the law was clear that for any bonafide or lawful occupant of a land to mortgage his kibanja, such a person must show that the consent of the land owner had first been obtained prior to any transaction taking place. Thus for those reasons, learned counsel for the defendant

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urged this honourable court to find that the underlying contract which the plaintiff relies for in instituting its suit against the defendant was illegal and should not be a basis for entertaining the plaintiff's case against the defendant in court thus rendering the whole suit liable to be dismissed with costs.

In response, Mr. Kiwanuka , who appeared on behalf of the plaintiff strongly opposed the preliminary objections raised by the defence. He submitted that the court should find that defence had misread the provisions of the credit agreement as it did not oust courts' jurisdiction but that the said clause was only put in the agreement to empower the mortgagee to sell the security without recourse to court in the case of default. He even alluded to the fact that in any in any case the court's jurisdiction could not be ousted by a mere contract as it was trite that dissatisfied party to a contract had a right to resort to court for reprieve as the court's doors could not be shut to an aggrieved party but only that the agreement was reflecting the powers granted to a mortgagee to sell his interest in a property without recourse to court as provided for under Section 27 of the Mortgage Act, Act Number 9 of 2009 where two options of either is given to a

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mortgagee to either resort to court or to sell its interests in a mortgage.

On the issue raised that the plaintiff was operating a financial institutional business without a licence as was provided for by the Financial Institutional Act 2004, the plaintiff's representative pointed out that the plaintiff was not a financial institution as defined by Section 3 of the said Act which defines a financial institutional business to include the acceptance of deposits and so and so forth. That in its ordinary day to day business, the plaintiff was not in the act of accepting deposits and was not doing anything which was listed in Financial Institutional Act but was only engaged in the act of lending money and thus was not bound by the provisions of the Financial Institutions Act. Furthermore, the representative of the plaintiff submitted that as far as Section 3 of the Financial Institutions Act was concerned a financial institution was defined to include a commercial bank, a merchant bank, a mortgage bank, a post office bank none of which described or was the activity within which the plaintiff business fell and that since its inception, the plaintiff had never been regulated by the central bank and so could not fall short of

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the provisions of the law under which it was being opined that it operated under and could therefore suffer the penalties provided for under Section 4 of the Financial Institutions Act.

In regards to the act of engaging in money lending business without a license, the plaintiff representative submitted that, the plaintiff had a proper licence and was operating in the act of taking mortgages on its interests even on kibanja under the Money Lenders Act Cap 223 with it being conscious of the fact that under Section 21(1) (c) of the said law , it was not which required to comply with the requirement where an interest is effected whether legal or equitable on immovable property as that section exempted such transactions by a money lender but that the said provision was intended for mainly for chattels.

As to whether the transaction alluded to by the plaintiff created a mortgage, the representative of the plaintiff argued that Section 3 of the Mortgage Act 9 of 2009 and Section 38(b) (iv) thereof provided that any person had powers to create a mortgage on deposit of any document which may be agreed upon by the parties as evidence to show that such a person had a right or interest in land in question and that since by the defendant

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deposited his kibanja agreement with the plaintiff in order to obtain a loan, then a mortgage showing the plaintiff's interest was created with no particular procedure required in law for creating such mortgage as was held by Justice Hellen Obura in the case of **DFCU Bank Ltd v Dottways Marketing Bureau and Another Civil Suit 26 of 2012** and even in the case of **Uganda Ecumenical Church Loan Fund Ltd v Harriet Nankabirwa Civil Suit 2002** and that of the **Investments Masters Ltd v Ambrose Kangangire Civil Suit 312 of 2005**.

In regards to the requirement to obtain consent for land which is being placed for mortgage, the representative of plaintiff submitted that Section 34 of the Land Act as amended struck out the requirements of an intending mortgager to obtain consent from the landlord if he was mortgaging merely his interests but only retained the requirements that such a person needed to obtain consent only if he intended to sublet, assign or sub divide the kibanja. That being so, the plaintiff representative, prayed for the court to find no cause for the preliminary objections which should be dismissed with costs.

In rejoinder, Mr. Mugisha Mukeeri invited this Honourable court to look at the entire clause of the agreement which did not only talk of the recovery of the mortgage but forfeiture which made the action to be that of total alienation of the kibanja which was the very act prohibited by the Mortgage Act and if the action included that where no any consent was obtained from the land owner, then that action would be illegal. That the court should also consider the fact that since the issuance of a licence provided for independent activities as listed, then it presupposes that an action such as those of extending credit as was being carried out by the plaintiff was part and parcel of Section 4 of Financial Institutional Act which was the activity the plaintiff was carrying out which thus was in contravention of the provisions of the Act.

In regard submissions on Section 3 of the Mortgage Act, Mr Mugisha Mukeeri rejoined that much as it allowed one to transact in land activities such as the mortgage of land such transaction must be in conformity with the law and the law requires that where a bonafide or lawful occupant of a kibanja wanted to transact in land he/ she was required to seek the consent of the land owner of the kibanja but where such prior consent is not

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sought then that would be in contravention of the Land Act as amended in 2010 and such transaction would be invalid from the very beginning.

In view of the fact that the instant matter appears so to contravene the law, learned counsel for the defendant invited this honourable court to find that the transaction carried out by the plaintiff was indeed in contravention of the law and thus should be struck out as being illegal.

From the submissions made by learned counsel for the defendant and the able reply made in that regard by the representative of the plaintiff which I have taken consideration of and my own perusal of the various pieces of legislation cited as well as the decided cases, I have this to state. Firstly, in regard to the submissions to the issue of money lending which is the act which was allegedly carried out by the plaintiff, I find that this was not in contravention of the Financial Institutions Act since my reading of the document which was used for the lending of the money, Annexure A, purely state that the said transaction was done under the Money Lenders Act which Act provides for such transactions. It is therefore not necessary to dwell further into the

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matter which in my view was legally carried out since even the pleadings of the parties before me appears to have cited the use of the provisions of the Money Lenders Act, Cap 273 of the Laws of Uganda to create the relationship which has since created the dispute which is intended to be resolved by this Honourable court. As the intentions of the parties were clear, I will therefore examine the circumstances under which the relationships between the parties were consummated and make findings as to whether they were within the ambit of the law. In regards to the agreement which is the primary cause of the conflict between the parties herein, it is observable that this document attached in these proceedings as Annexure A is said to be a credit loan agreement. Thus on the face of it, the document should speak for itself. My perusal of the said document shows that indeed it bases its legality on the Money Lenders Act. Both parties signified acceptance of it by signing it. My further perusal of the said document show however that within the conditions alluded to as arising from the Money lenders Act, there are obvious articles which were in clear contravention of the Money Lenders Act.

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One of such conditions show that the parties agreed in respect of interest payable for the loan granted to the defendant a provision that the said loan was to be repaid with an interest of 3.5% per day. When this figure is computed and translated into a yearly percentage for interest which would be paid for the loan, then total interest would amount to over 1,260% per year. This percentage when related to Section 12 of the Money Lenders Act, Cap 273, would appear abnormally high and would apparently be considered harsh and unconscionable since the said section actually prohibits any interest rate excess of 24% per annum. I would therefore be appropriately entitled to presume that any interest rate which had been agreed by the parties to exceeds the legally provided interest rate and thus would find it excessive and illegal. This finding would make the said agreement to be unenforceable in a court of law.

The other aspect of the agreement of interest which requires attention relates to the fact of it containing a provision that upon the failure of the defendant to honour his obligation under the loan agreement referred to earlier, then the property which he had placed as security for the loan would automatically transfer to

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the plaintiff who is the lender of the money. My perusal of the documents relating to this property show that it is a kibanja whose transfer is restricted by the Land Act as amended unless prior consent of the land owner is sought and received by any person who claims any interest in such a kibanja either by way of being a bonafide or lawful occupant. My take in regards to such provisions being placed in a loan agreement is that it clearly violates the law and is illegal *ab initio*. *This consideration* makes the argument by plaintiffs that the said loan agreement merely created a legal and/or equitable security over the land thus rendering the application of Section 21(1) of the Money Lenders Act e inapplicable to be hollow and hence inexcusable.

Considering that the agreement is said to be the basis of the cause of action in the instant matter and which arose under the auspices of the Money Lenders Act but which I have found to be in clear violation of the same, it is my conclusion that this illegality renders the cause of action in this matter unenforceable for it has been held that any illegality brought before the notice of a court of law renders such a case of action to be untenable and hence any action seeking redress from such an illegal act would be

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considered not actionable in any court of law though it is evident that the plaintiff had sought to call to its rescue equity yet equity demands that whomsoever comes before it must do so with a clean hands. Thus by failing to comply with the provisions of the law, the plaintiff is not in order legally to turn around to seek to make use the courts while it ignored the use of the laws themselves.

I find therefore that the plaintiff's claim to be a *non causa ab initio* and would not render services to actions arising an illegality.

The preliminary objections raised therefore by the defence are sustained leading me to conclude this matter by dismissing it with costs to the defendant.

Henry Peter Adonyo
Judge
29th January, 2015