

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL DIVISION)**  
**CIVIL SUIT NO.24 OF 2012**

**HAMWE INVESTMENTS LTD:::PLAINTIFF**

**VERSUS**

**BABIGUMIRA ANDREW AHABWE:::DEFENDANT**

**BEFORE HON. MR. JUSTICE HENRY PETER ADONYO**

**JUDGMENT**

**1. Background:**

The dispute between the parties herein arose from a loan offered by the plaintiff company to the defendant on the 1<sup>st</sup> September, 2009 amounting to **Uganda Shillings Sixty Five Million Four Hundred Fifty Thousand Shillings only (Ug. Shs. 65,450,000/=)** at an interest rate of 1% per month for the first five months and the 5% per month after the agreed initial period of five months. The Plaintiff is a money lender and contends that apart from part payment of **Uganda Shillings Twenty Million Shillings Only (Ug.Shs. 20,000,000/=)** the defendant refused and or failed to repay the balance of the loan to date.

The defendant agrees that he borrowed some money from the plaintiff amounting to **Uganda Shillings Sixty Five Million Four Hundred and Fifty Thousand Only (Ug. Shs. 65,450,000)** which was loaned to him by the Plaintiff Company on the stated date of 1<sup>st</sup> day of September, 2009 with interest at the rate of 1% per month for 5 months and that in partial fulfillment of his loan obligations he surrendered his motor vehicle valued at **Uganda Shillings Twenty Million Shillings only (Ug. Shs. 20,000,000)** leaving an outstanding balance of **Uganda Shillings Fifty Three Million Twelve Thousand Seven Hundred Forty Seven Shillings only (Ug. Shs. 53,012,747)** which the plaintiff changed goalposts and was now claiming with interest at 24% per annum together with costs of the suit. The defendant contests this of the plaintiff and states that previously he had even obtained various loan facilities from the plaintiff dating from the 26<sup>th</sup> day of August, 2007 at an interest rate of 15% per month but denies ever borrowing did not the sum of **UGX 65,450,000 (Sixty Five Million Four Hundred Fifty Thousand Shillings only)** in a single lump sum as stated as that was in his view a continuation of all the various loans he had been taking from the plaintiff out of which he had since repaid **Uganda Shillings One Hundred Eighty Seven Million Eighty Five Thousand Only (Ug. Shs. 187,085,000)** and had even surrendered his property consisting of a Mercedes Benz Reg. No. UAK 871V valued at **Uganda Shillings Twenty Million only (Ug. Shs. 20, 000,000)** together with an Isuzu

Bighorn motor vehicle Reg. No. UAL 549P also valued at **Uganda Shillings Twenty Million only (Ug. Shs.20, 000,000)** and land comprising of Kyadondo Block 192 Plot 1368 at Buwate registered in the names of Herbert Babigumira valued at **Uganda Shillings Seventy Million only (Ug. Shs. 70,000,000)**. In the view of the defendant the disagreement between the parties required a review of the entire transactions between the parties so that a correct conclusion is reached.

## **2. Issues:**

At scheduling, the following issues were jointly formulated by both parties and admitted by this Honorable Court.

- (i) Whether the defendant is indebted to the plaintiff in the sum of UGX 53,012,747/= Fifty Three Million Twelve Thousand Seven Hundred Forty Seven Shillings only) as claimed?
- (ii) Whether the defendant is entitled to re-open the loan transaction between himself and the plaintiff between 26<sup>th</sup> July, 2007 and 8<sup>th</sup> December, 2009?
- (iii) Whether the interest charged on the loans was harsh and unconscionable?
- (iv) What remedies are available to the parties?

## **3. Procedural:**

Both parties adduced evidence relating to this dispute by way of witness statement on oath and documents all of which are on record and have been carefully considered.

**4. Whether the defendant is indebted to the plaintiff in the sum of UGX 53,012,747/= (Fifty Three Million Twelve Thousand Seven Hundred Forty Seven Shillings Only):**

The facts relating to this issue is directly garnered from the evidence adduced on behalf of the plaintiff company by Mr. Happy Charles (PW1), its Managing Director whose testimony is to the fact that on the 1<sup>st</sup> of September, 2009 the plaintiff company advanced **Uganda Shillings Sixty Five Million Four Hundred Fifty Thousand Shillings Only (Ug. Shs. 65,450,000/=)** to the defendant in form of a loan which was to be repaid with an interest at the rate of 1% per month of the first months and then 5% thereafter per month in the event of default. This witness testimony is to the fact that since the loan was offered and taken on the date in question, the defendant has only volunteered to make part payment of **Uganda Shillings Twenty Million Shillings Only (Ug. Shs. 20,000,000/=)**. The witness tendered in evidence the loan agreement document as Exhibit P1.

On his part, the defendant admits to having entered into the stated loan agreement as is seen from his paragraphs 5 and 6 of his witness statement on oath. In fact he adds that between August, 2007 and December, 2009 he actually borrowed from the plaintiff company a total sum of Uganda Shillings One Hundred Eleven Million Five Hundred Thousand Only (Ug. Shs.111, 500,000) and that the loan of 1<sup>st</sup> September, 2009 was part of those very many loans he had got. Strangely

though, during his cross examination, the defendant denies having entered any loan agreement with the plaintiff company on of the date of 1<sup>st</sup> day of September, 2009 which I find to be a marked contradiction to his testimony in his the witness statement given that he even failed to contest veracity the same loan agreement when he chose not to cross examine the plaintiff's witness PW1 on this loan agreement yet denies the existence of the same in his cross examination without clarifying the seemingly contradictory position.

The plaintiff company on the other through the testimony of PW1 produces in court a payment receipt Exhibit P4 for Uganda Shillings Twenty Million (Ug. Shs. 20,000,000/=) which it states was part payment made by the defendant in respect of the 1<sup>st</sup> of September, 2009 loan. What is interesting is that while the receipt was issued by the plaintiff company to the defendant and the defendant also relies on it as his Exhibit D4 which clearly states that it was for the payment of interest and part payment on the loan of 1<sup>st</sup> September, 2009. The defendant owns the receipt so it is surprising that having stated that while the defendant denies ever enter any loan agreement on 1<sup>st</sup> September, 2009 with the plaintiff, he produces a similar receipt with similar wordings with those of the plaintiff company and which refers to the same date.

As to what motivated the defendant to deny the loan of that date seemingly raises a lot of curiosity to the extent that it leaves the defendant in the precarious position

of having his cake and eating it at the same time. This leads to the only conclusion that since the defendant himself produces a similar receipt with that of the plaintiff company and does not deny the borrowing of the loan on that particular date then the finding of this court would be to the effect that indeed the defendant got a loan from the plaintiff on the date in question for the stated sum which I do find accordingly.

In regards as to how the plaintiff arrived at a sum of Uganda Shillings Fifty Three Million Twelve Thousand Seven Hundred Forty Seven only (Ug. Shs.53,012,747/=) it is the plaintiff company's case that at the time of instituting this suit, the defendant had repaid Uganda Shillings Twenty Million Only (Ug. Shs.20,000,000/=) with the sum claimed being arrived at by subjecting the unpaid balance to the terms of the loan agreement of 1% per month for the first 5 months and then 5% per month for every month upon default. The plaintiff company states that this calculation was not challenged during cross examination of its witness (PW1). This position is to be contrasted with the of the defendant who challenged the amount claimed by plaintiff when he states that he paid his full indebtedness to to the plaintiff company by way of documents his documents marked as Exhibit D4a and Exhibit D4d with these documents being receipts from the plaintiff company to the defendant dated the 23<sup>rd</sup> day of January, 2009 for Uganda Shillings Fifty Million only (Ug. Shs. 50,000,000/=) and that of 17<sup>th</sup>

October 2009 for Uganda Shillings Thirty Million Shillings Only (Ug. Shs. 30,000,000/=) respectively. The defendant did not explain how the repayment of the 23<sup>rd</sup> January, 2009 payment, which pre-dates the loan of 1<sup>st</sup> September, 2009 relates to issue at hand while challenging the amount in question claimed.

However, I note that during cross examination the defendant when referred to a loan agreement marked as Exhibit D6 which showed that he had borrowed Uganda Shillings Sixteen Million Nine Hundred Fifty Thousand only (Ug. Shs 16,950,000/=) went on disown the contents of the said agreement yet he sought to rely on the same agreement in his trial bundle as evidence of the loans he had acquired from the plaintiff over time. The contradictory nature of the defendant's statements in respect of this loan was further manifested when he sought to challenge the amount claimed when in his paragraph 10 of his statement on oath he states that he had signed two agreements of sale for two motor vehicles whose value totals to Uganda Shillings Forty Million Shillings Only (Ug. Shs. 40,000,000/=) yet on close scrutiny of these two documents Exhibit it is clear that one of them, Exhibit PE5 is for a Car Sale Agreement between the defendant and one Happy Charles for motor vehicle Reg. No. UAK 871V, a Mercedes Benz with this sale emanating from an Addendum to a Loan Agreement arising from the 1<sup>st</sup> day of September, 2009 where the defendant pledged the motor vehicle as security. This particular addendum was admitted uncontested as Exhibit PE2 with the

defendant using the proceeds from the said car sale agreement therein to make a part payment on the loan of 1<sup>st</sup> September, 2009 though he denies the existence of the said addendum during cross examination yet he did not contest its admission during tendering and chose not even to cross examine the PW1 on it yet he owned the receipt of the payment of Uganda Shillings Twenty Million only (Ug. Shs. 20,000,000/=) directly arising from the same agreement.

In regards to the Exhibit D5 which was a car sale agreement between the Defendant and Mr. Happy Charles for Uganda Shillings Twenty Million Only (Ug. Shs. 20,000,000/=) unlike the sale of motor vehicle No. UAK 871V, the proceeds from the sale of Motor vehicle No. UAL 594P were not used to make payments on the loan of 1<sup>st</sup> September, 2009 but for the loans acquired on 4<sup>th</sup> November 2009 as Exhibits D4c and D6ac show meaning that any challenge by the defendant to the amount claimed as stated in paragraph 11 of his statement on that he released land comprised in Block 192 Plot 1368, land at Buwate valued at **UGX. 70,000,000/=** (Seventy Million Shillings only) cannot be believed since in respect of this loan and by his own statement the land belonged to Herbert Babigumira, his brother which was merely borrowed for he had no legal authority over it including any power of attorney to pledge it in order to acquire a loan. This is even more so because PW1 during re-examination clarified that this particular transaction referred to a completely different loan with a different individual apart from the



defendant and this issue was not rebutted by the defendant at all with the defendant failing to connect by any iota the brother's title and the loan forming the subject matter of this instant suit.

In view of the above I find that the defendant apart from making part payment of Uganda Shillings Twenty Million Shillings only (Ug. Shs. 20,000,000/=) whose evidence is well established was done towards repayments of the loan facility the 1st September, 2009 one and thus would be liable to that the extent.

**5. Whether the defendant is indebted to the plaintiff in the sum of UGX 53,012,747 (Fifty Million Twelve Thousand Seven Hundred Forty Seven Shillings only) as claimed:**

From the evidence of PW1's it is stated that the sum of Uganda Shillings Sixty Five Million Four Hundred Fifty Thousand only (Ug. Shs. 65,450,000) was lent to the defendant in a single lump sum on the 1<sup>st</sup> day of September, 2009 with only Uganda Shillings Twenty Million only (Ug. Shs 20,000,000) thus repaid by way of proceeds from the sale of Motor vehicle Reg No. UAK 871V. This fact is not doubted with the defendant's principle evidence in respect of the lump sum borrowing being that he does not doubt his signature on page 2 of Exhibit PE1 but seems not to recollect page 1 of the same though he agrees that he took short term loans from the plaintiff company even if he states that for all the period he did not obtain original documents nor obtain a full statement of account and which was

the basis for his desire to reconstruct the record of his financial dealings with the plaintiff throughout. However, I note that though the defendant seems to show that having borrowed the sum of Uganda Shillings Sixty Five Million Four Hundred Fifty Thousand (Ug. Shs. 65,450,000) on the 1<sup>st</sup> day of September 2008 he seems to contend that he repaid the sum of Uganda Shillings Sixty Two Million Shillings only (Ug. Shs. 62,000,000) on the 17<sup>th</sup> day of October, 2009 as shown by Exhibit D4b which is a receipt said to have been acknowledged by PW1 during cross examination. This assertion, however, raises doubt on the contention that the defendant having borrowed the sum of Uganda Shillings Sixty Five Million Four Hundred Fifty Thousand (Ug. Shs. 65,450,000) on the 1<sup>st</sup> day of September 2009 could have repaid the by the 17<sup>th</sup> day of October, 2009. My finding is that the dealings between the plaintiff and defendant are intrinsically and intricately interwoven by myriad borrowings and repayments that it I may not be possible to separate the one transaction from the other to establish with certainty what was due and on which loan vis-a vis what was paid. In view of the uncertainty, I would find that the indebtedness in the sum of Uganda Shillings Fifty Three Million Twelve Thousand Seven Hundred Forty Seven only (Ug. Shs. 53,012,747) difficult to discern and as such not proven as there are no clear records of those transactions.

*6. Whether the defendant is entitled to re-open the loan transaction between himself and the plaintiff, and;*

*7. Whether the interest charged on the loans was harsh and unconscionable?*

These two issues are handled together for they seem to have a pointer to the previous issue. It was the defendant's that wish that the transactions between the two parties be reopened because what he claims he had repaid appeared to exceed what he borrowed and that the interest rate imposed by the plaintiff was harsh and unconscionable. However, I must point out that under **Order 8 Rule 2 of the Civil Procedure Rules**, it is provided that where any defendant seeks to rely on any ground to support a right or contradictions in the plaintiff's case he or she shall in his or her statement of defence state specifically that by way of counterclaim. I find that the need to have the transactions reopened by court to be out of procedure for it should have been referred in the first instance to an expert to produce contextual evidence for court to determine the veracity of the transactions.

In regards to the issue of the interest rate as in the said agreement which was stated to be 1% per month for first five (5) months and then 5% per month upon default to be contrary indeed to **Section 12 of the Money Lenders' Act cap 273** which provides that; **Section 12:**

**“...where the interest rate on a loan exceeds 24% per annum, such a loan will be deemed excessive and unconscionable...”**

Thus it would appear to me that when such an interest rate as provided for in the law is reduced to a monthly rate, then the said 24% per annum rate would translate to 2%. Though it was argued by the plaintiff company that its rate of 1% per month was below the statutory rate, the fact that the agreement contained the rate of 5% per month upon default after the first five months clearly made to be it outside the law for that would make the total rate payable in a year to be 40% making the said transaction not comply with the relevant provisions of the law and hence was unconscionable.

**8. (ii) Whether the defendant is entitled to re-open the loan transactions as between himself and the plaintiff and**

**(iii) Whether the interest charged on the loans was harsh and unconscionable:**

My finding in the above issues shows that the interest rates charged by the plaintiff company were harsh and excessive. Thus this calls for the examination further of **Section 11 (1) of the Money Lenders Act Cap 273** which provides thus;

**Section 11 (1):**

**“Where proceedings are taken in any court by a moneylender for the recovery of any money lent after the commencement of this Act or the enforcement of any agreement or security made or taken after the commencement of the Act, in respect of money lent either before or**

after the commencement of this Act, and there is evidence which satisfies the court that the interests charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals of any other charges, are excessive, and that in either case, the transaction is harsh and unconscionable, or is otherwise such that a court of equity would give relief, the court may re-open the transaction and the account between the money lender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, re-open any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of the principal, interest circumstances, may adjudge to be reasonable; and if any such excess has been paid, or allowed in account, by the debtor, may order the creditor to repay it; and may set it aside, either wholly or in part, or revise or alter any security given or agreement made in respect of money lent by the moneylender, and if the moneylender has parted with the security may order him or her to indemnify the borrower or other person sued.

It thus appears to me that if the interest rate charged was 1% per month and thereafter 5% per month was charged after default then the penal interest itself to be evidence of a harsh and unconscionable rate.

I would therefore find that from the evidence adduced before court , clear evidence of an harsh excessive and unconscionable interest rates was adduced that as required by **Section 11 of the Money Lender's Act** all previous dealings between the money lender and the person sued are subject to reopening and since PW1 admitted that he did not have vouchers indicating sums lent to the plaintiff and of having issued the defendant a statement of account of all their dealings, I find that there was no proper records of the transactions since **Section 9 of the Money Lenders Act** requires the maintenance of record books of such transaction which then would be examined by the court to render a just decision for in the case of **Alice Okiror & Michael Okiror v Global Capital Save Ltd & Anor HCCS No. 149 of 2010**, the Lady Justice Hellen Obura found that;

**“Interest charged at 12% per month would translate to 144% per annum. It is harsh and unfair for a money lender to charge sun amount of interest in disregard of the money lenders Act. In circumstances like this, the court is obliged to exercise its discretion to award reasonable interest...I instead exercise the discretion given to this court by the**

**provisions of the above stated laws and award an interest of 25% per annum as proposed by the plaintiffs.**

I concur with the finding of my learned colleague and thus when that finding is related to the instant matter, it is clear to me that it is fatal for a money lender not to follow the provisions of the law for such failure would render such transactions not possible to be claimable in a court of law where there is no performance. Indeed that followed the ratio decidendi in the case of **Alpha International Investments Ltd v Nathan Kizito HCCS No. 131 of 2001**, which were it possible would make it pertinent to reopening of the transactions between the plaintiff and defendant to enable a true account to be had of what was due for the truth would be established but as seen from the contradictory pieces of evidence adduced in this court that course of action would be difficult to undertake for no proper books of accounts was kept by the plaintiff to enable the court resort to such a venture and thus this court is only left with the decision to make based on the evidence it has received would find that while it was prudent to reopen the transactions between the parties to establish the truth, the difficulty posed here were no proper books of accounts were kept and only scattered information adduced renders such an exercise to be one in futility and since it is the legal duty of the money lender to keep proper books of accounts and in the instant one failed to do so then, the resolution of the benefit of the impasse would tend to favour the defendant and thus having stated

so find that the plaintiff has not enabled the court to arrive at the truth of the transaction between itself and the defendant through its negligent application of the law which required it to keep proper books of accounts and so it is difficult for the court even to resort to reopen the transactions between the parties to prove the amount owed by the defendant.

**9. Remedies are available to the parties:**

It has been difficult for this court to established truthfulness of indebtedness of the defendant to the plaintiff to tune of Uganda Shillings Fifty Three Million Twelve Thousand Seven Hundred Forty Three Shillings only (Ug. Shs. 53,012,743/=) for there were no appropriate documents tendered to prove the same as very scanty information regarding the transactions were exhibited contradictory figures different from what was said to have been loaned. The other aspect of this matter is that the stipulated interest charged on the loan was not in accordance with the law as it was s well above that allowed under the **Money Lenders' Act** in contravention of **Section 12** thereof and thus was excessive and unconscionable. Thus this being the case I am constrained to dismiss this suit with costs to the defendant for the plaintiff has not proven tis very critical aspect of the issue relating to the amount of the loan rendered and the interest rate chargeable as required under the law.

**10.Orders:**



The plaintiff has failed on a balance of probability to prove its case against the defendant and thus this suit is dismissed with costs.

**Henry Peter Adonyo**

**Judge**

**18<sup>th</sup> February 2015**