

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]
CIVIL SUIT No. 469 OF 2011

PENINAH KENSHEKA ::
PLAINTIFF

VERSUS

UGANDA DEVELOPMENT BANK ::
DEFENDANT

BEFORE: HON. MR. JUSTICE B. KAINAMURA

JUDGMENT

The Plaintiff brought this suit against the defendant seeking orders for; a) The refund of the sums UGX 84,000,000/=, b) Interest on the sum from the date of deposit with the defendant till payment in full ,c) General damages, d) Costs of the suit.

The plaint sets out the facts constituting the cause of action as:-

The defendant sometime in 2010 entered into a Trade Financing Agreement with M/S ABA Trade International Limited under which trailer trucks and other accessories would be imported. The plaintiff sought to purchase a Mercedes Benz Actros truck plus accessories from ABA Trade International Limited. Advised by a Senior Banking Officer of the defendant to secure her position as a purchaser, the

plaintiff paid UGX 84,000,000/= on an account, details of which were availed by the officer. Payment was by way of real time gross system (RTGs) from her account in Stanbic Bank.

However the Trade Financing Agreement between M/S ABA Trade International Limited and the defendant bank failed as a result of which the right of possession of the consignment was taken over by the bank. The consignment arrived and the plaintiff was not informed by the defendant bank that the trucks had arrived in Uganda. The trucks were subsequently sold to third parties by the defendant bank.

Despite several demands, the defendant has failed, neglected and/ or refused to refund the said monies. The plaintiff for this reason has suffered loss and damage for which the defendant is liable.

The defendant filed a written statement of defence in which it was stated that the plaintiff is not entitled to the remedies sought and will be put to strict proof. It was stated that sometime between January and March 2010, the defendant advanced a Trade Facility of Euros 1,142,056.00 to a company called ABA Trade International Limited to finance its business of importation of tyres, containers and trucks.

Under the facility the defendant was only responsible for the financing while ABA Trade was responsible for the marketing, sale and delivery of the goods, as well as settlement of the credit facility. The contractual relationship was therefore between

the plaintiff and the ABA Trade in respect of the goods. Any payment under the facility was effected by ABA Trade in fulfilment of its obligations under the trade finance facility. It is on this understanding that the defendant denies entering into any contractual relationship with the plaintiff and if it had intended so, there would have been a commitment by the defendant in writing. The defendant contended that it is not in the business of dealing in vehicles of any kind and never entered a transaction for the sale of a truck with the plaintiff.

At the commencement of the trial the following issues were framed;

1) Whether the Plaintiff is entitled to recover the sums claimed from the defendant.

2) Whether the parties are entitled to the remedies sought.

At the trial, Mr Rutisya Paul appeared for the plaintiff; and Ms. Olivia Kyalimpa Matovu appeared for the defendant.

Issue one - Whether the plaintiff is entitled to recover the sums claimed from the defendant

The plaintiff testified as PW1 and Ms. Beatrice Kasigazi testified as PW2.

PW 1 stated that the defendant and ABA Trade International entered into a Trade Financing Agreement on 16th March 2010 under which trucks and accessories

would be imported and sold by ABA Trade International. She sought to purchase a truck and accessories from ABA Trade International Limited and was advised by one Stephen Opeitum a Senior Banking officer at the defendant's office to make a deposit payment with the defendant bank to secure her position as a purchaser. She stated that thereafter Mr Opeitum provided the account details whereupon she deposited UGX 84,000,000/= by way of Real Time Gross System (RTGS) from her account in Stanbic Bank to the defendant's account in DFCU.

She further stated that the Trade Financing Agreement between the defendant and ABA Trade International failed upon which the defendant bank took possession of the consignment and sold the trucks to a third party without informing her about their arrival. She made several demands which the bank neglected or just refused to refund the money.

In cross examination PW1 stated that she was approached by one Robert Mwesigye an employee of ABA Trade who informed her that there was a business of selling trucks that the defendant was involved in and she would benefit from the trucks. She insisted on dealing with the bank directly and was introduced to Mr Opeitum a Senior Banking Official of the defendant bank. It was her testimony that she was informed that the defendant was selling trucks but added that she had no receipts to prove the payment of UGX 84,000,000/= that she made. She admitted dealing with a company known as Buy a Truck based in the UK through her

brother-in-law Justice Achungwire who handled the correspondences. She stated that she however had no knowledge of the arrival of the trucks and the defendant bank also did not inform her about it. PW1 emphasised that she was interested in trucks and not tyres. Furthermore, it was her admission that there was no agreement between her and ABA Trade for the purchase of the truck and she did not know how the money was receipted in the defendant bank since she just instructed her banker which followed the instructions but she never received any receipt to that effect. She emphasised that she met Mr Opeitum in the defendant bank and therefore she believed what he said. She added that after making the payment she waited for a call from the defendant bank but got none. She added that after payment was done, she did not know what happened because she did not get any receipt.

In re-examination, PW1 emphasised that she got to know about the sale of trucks through Robert Mwesigye who later introduced her to Mr Opeitum of the defendant bank. She testified that she insisted that she needed to deal with the defendant bank directly. It was her testimony that she got the details of the bank in which to deposit the money from Mr Opeitum. In conclusion, it was her admission that there was nothing in writing to show her dealing with the defendant bank nor was there anything of the sort with Mr Opeitum.

PW2 stated she was an Executive Banker at Stanbic Bank where the plaintiff holds an account. She testified that her duty was/is to manage relations with clients and bring new business and maintain the old ones. It was her testimony that the plaintiff transferred money from Stanbic Bank to DFCU Bank. She added that the plaintiff instructed her by phone to transfer the money and she requested the plaintiff to send a fax and confirm on the phone. It was her testimony however that the plaintiff only told her that she was buying a truck and did not give the other details.

In cross examination, PW2 testified that she received instructions to transfer money but did not record anywhere. She testified that she participated in the transaction by taking instructions and then transferred them to another department for authorisation.

In re-examination, PW2's stated that it is for transactions that involve money that exceeds UGX 20,000,000/= that the bank inquires into the purpose of the transfer. She added that she identified the RTGS and it came from the United Kingdom.

The defence called two witnesses: Mr Charles Orwothwun as DW1 and Mr Richard Babu Birungi Tibaleka as DW2. It was DW1's evidence that he was a certified International Trade Specialist with the Institute of Financial Services London and had worked in this field for six years in the employ of the defendant. It

was his testimony that the defendant approved the grant of a trade finance facility to ABA Trade in the sum of Euros 1,141,056.00 to finance importation of tyres, a container and tractor units. He added that he handled the account of ABA Trade together with Mr Stephen Opeitum who was the Director of the defendant whose whereabouts are now unknown. He added that the defendant bank received UGX 84,000,000/= in February 2010 and it received communication from ABA Trade that this transfer from an account of Peninah Kensheka in Stanbic Bank Limited to the defendant bank's account in DFCU Bank was payment of 30% of the security margin. He stated that a receipt was issued in favour of ABA Trade.

Upon arrival of the consignment the defendant bank was informed by ABA Trade that Markh Investments Limited had applied for a leasing facility from DFCU to purchase three of the four imported trucks for a total sum of USD 190,500. He further stated that upon delivery of the consignment, the defendant bank was informed that the consignment of tyres was not of good quality and as such; they were going to reject the same and take remedial measures to rectify the problem.

DW 1 further stated that sometime in June 2011, the defendant bank received a letter from the plaintiff's lawyers seeking recovery of UGX 84,000,000/= being monies deposited with the defendant bank for purchase of one of the trucks that ABA trade had imported. He added that this was a surprise because the money claimed was paid as part payment of the 30% Security Margin that ABA Trade had

to meet. He further stated that prior to this clam, sometime in October, the Managing Director of ABA Trade, Robert Mwesigye had fraudulently sold a truck to one Sebanakita at UGX 80,000,000/= without the defendant bank's authorisation nor that of the ABA Trade. He stated further that a suit was instituted by the defendant bank against ABA Trade and judgement was entered in favour of the defendant bank on the 11th of Jan 2013 wherein the purported sale was cancelled. He stated that the defendant bank does not enter into contractual arrangements with purchasers for the sale of the warehoused goods. Further still, all commitments that are made by the defendant bank to all parties regarding transactions are always in writing.

DW2 the Managing Director of ABA Trade International Limited testified that he initially served as Company Secretary from 2009-2010 and was appointed Managing Director in January 2011. He stated that the company since incorporation has been dealing in general trading such as the supply and sell of all kinds of merchandise and trade items, in particular, dealing in bitumen and tyres. In early 2009, the company ventured into the business of selling Motor Vehicles and their accessories and resolved to import Mercedes Benz Tractor Heads/ Trucks and tyres from Germany. He added that he and Robert Mwesigye had an agreement with the defendant bank to finance the venture.

The defendant bank then placed alien over the goods to ensure payment and this meant that the defendant bank had to first give consent before the goods were released from the ware house. He stated that sometime in February 2010, Robert Mwesigye told him that he had got receivables in the sum of UGX 84,000,000/= which was used as a partial payment of the company's security margin. It was his testimony that he later discovered that the plaintiff and Robert Mwesigye had a private arrangement regarding the company's importation of the consignment. DW2 confirmed that the plaintiff was never a purchaser of any of the goods the company imported but instead masqueraded as an agent of the company together with Justice Acungwire and changed the specifications of the tyres they had ordered.

In cross examination, DW2 stated that to the best of his knowledge the plaintiff never purchased anything from ABA Trade and was neither a customer nor supplier of ABA Trade. He added that the plaintiff did not owe the company any money. It was his testimony that the UGX 84,000,000/= was from receivables collected by Mr. Robert Mwesigye from those peoples who owed money to the company. He admitted that the money deposited by the plaintiff was converted and reflected to the defendant bank as payment of security margin. He also admitted that in the e-mails produced before court, the plaintiff's name was not mentioned anywhere as an agent of ABA Trade and there was no e-mail from the plaintiff

changing specifications of the tyres. Furthermore he stated that it could be possible that the plaintiff paid the UGX 84,000,000/= for the truck.

In re-examination, DW 2 stated that Mr Robert Mwesigye told them the money received was money owed to the company which he advised them to use to secure the company's security margin.

In his submissions, Counsel for the plaintiff stated that the plaintiff's case is a claim for money had and received given to the defendant as consideration for acquisition of a Mercedes Actros truck which has wholly failed and it will be unjust and inequitable that the defendant retains the sum claimed. He added that the remedy sought is an equitable one meant to prevent unjust enrichment by the defendant. Counsel cited the case of *Dr James Kashugyera Tumwine & Anor Vs Sr. Willie Magara and Anor HCCS 576 of 2004*, where it was held that a claim for money had and received is an equitable action that may be maintained to prevent unjust enrichment by the defendant when it obtained money which in equity and good conscience belongs to the plaintiff.

Additionally, Counsel submitted that the purpose for which the money was received is relevant when applying this principle as held in the case of *Shenoi Vs Maximov [2005] 2 EA 280*. He stated that as pointed out in DW2's testimony the purpose was for the purchase of a Mercedes Actros Truck. He stated that in the

case of *Dr James Kashugyera Tumwine & Anor Vs Sr. Willie Magara and Anor* (supra), it is immaterial that the plaintiff was negligent to a certain degree. The plaintiff is not precluded from recovering the amount from the defendant as money had and received.

Counsel further submitted that the plaintiff was dealing with Mr Opeitun a Senior Banking Official with the defendant bank and is acknowledged as such by the defendant bank. He added that the plaintiff relied on the representation of the defendant's employee and therefore equitable estoppel arises in favour of the party to whom the representation was made. (see case *Nuridin Bandal Vs Lambank Tanganyika Ltd [1963] EA 304 at 318 & 319* and *Halsbury's the Laws of England 3rd Vol 15 paragraphs 334 and 340*).

In conclusion Counsel submitted that if the defendant is not ordered to repay the sum paid to it by the plaintiff, the defendant will be unjustly enriched. The plaintiff made payment to the defendant for a truck which she did not receive. He thus prayed that the court orders the defendant to pay back the plaintiff's money.

In reply Counsel for the defendant submitted as follows;

The plaintiff is not entitled to recover the sum she claims from the defendant as she is claiming from a wrong party. She emphasised that from the evidence of, DW1 and DW2 it is evident that the defendant offered a trade finance facility to

ABA Trade. She added that the defendant was not a trading entity. Counsel pointed to the fact that when the plaintiff wired the UGX 84,000,000/=, ABA Trade advised the defendant that the money sent was part payment of the security margin from the company. Additionally, Counsel pointed out that DW1 gave evidence to the effect that a receipt of the UGX 84,000,000/= was issued in favour of ABA Trade International (see exhibit D19).

She further submitted that DW1 testified that when the consignment arrived in Uganda, it was stored under the Collateral Management and Storage Agreement and it is ABA Trade that marketed and sold goods to its customers upon which the defendant would consent to the release of the goods sold as long as the payment was made to the defendant to offset the ABA Trade obligation. Counsel also pointed out the fact that there was no evidence of an agreement between the plaintiff and ABA Trade International Limited or the defendant. She stated that the plaintiff's allegations against the defendant are unfounded. She also stated that the plaintiff's conduct exhibits another interest in the transaction other than what she raised in court.

Counsel stated that under the doctrine of unjust enrichment for the obligation to refund the money to arise, the defendant should have been enriched by the benefit, at the expense of the plaintiff. Then the retention of the benefit is unjust. She cited

a number of authorities like the case of *Moses Vs Macfarlane [1760]2 Burr at 10* where court held that;

“The principle of unjust enrichment requires; first, that the defendant has been enriched by the receipt of a benefit; secondly, that this enrichment is at the expense of the plaintiff and thirdly, that the retention of the enrichment is unjust. This qualifies restitution. ”

Counsel pointed to the fact that in the circumstances of the case the evidence on record shows that ABA Trade International was obligated to pay a security margin which it did and the defendant disbursed the facility and issued letters of credit. Counsel argued that the recipient of the money was ABA Trade International and not the defendant. The true purpose of payment is clear and the defendant complied with its own obligation to disburse the loan. Relying on the case of *Hon Hanifa Kawooya Vs AG & Anor, Constitutional Court Misc App. No.46 of 2010*, Counsel submitted that “he that comes to equity must come with clean hands”. She stated that from the evidence on record the plaintiff participated in unauthorised under hand dealings that in the long run have contributed to the company’s failure to discharge its obligations. She concluded saying that the defendant has suffered and continues to suffer loss due to this bad loan portfolio which should have been retired by now but has not.

I have perused the pleadings and considered the arguments by of both Counsel on this issue. The contention of the plaintiff is that she paid the defendant a sum of UGX 84,000,000/= ostensibly for the purchase of a Mercedes Benz Actors Truck plus accessories imported by M/S ABA Trade under a Financing Agreement between the defendant bank and M/S ABA Trade. She contends that payment was on the advice of a one Stephen Opeitum a Senior Banking Officer with the defendant bank. The defendant does not dispute receipt of the UGX 84,000,000/= but contends that it was on account of M/S ABA Trade being part of the security margin of Euros 200,000 which the defendant required from M/S ABA Trade before it could issue a Letter of Credit to the supplier.

As earlier set out, PW1 who is the plaintiff testified that she was advised by Stephen Opeitum a Senior Banking Officer with the defendant to deposit the UGX 84,000,000/= on the defendant's account with DFCU Bank whose details the said Opeitum supplied.

The plaintiff duly instructed her Bankers Stanbic Bank to effect the deposit and her bankers did so by Real Time gross System (RTGS). She stated that she was required to make the deposit with the defendant bank to, in her own words "secure her position as a purchaser". During cross examination, she stated that she was approached by a one Robert Mwesigye an employee of ABA Trade who interested her in buying the truck and informed her of the defendant's involvement in the sale

of trucks. That it was upon her insistence that she wanted to deal with the defendant bank directly that the said Mwesigye introduced her to the Bank Official Mr. Opeitum.

PW1 further admitted that there was no contract between her and ABA Trade for the purchase of the truck and that other than Exhibit P1- Application for RTGS transfer wherein she gave instructions to her Bankers Stanbic Bank to transfer the funds, there was no formal written instructions and/or acknowledgement from the defendant bank about the deposit of the funds in dispute.

The RTGS relating to the funds in issue – Exhibit P1 is dated 17th February 2010 and was effective 19th February 2010 the day it was reflected on the defendant banks account in DFCU Bank. The offer letter of facility to M/S ABA Trade by the defendant bank – Exhibit D1 is dated 8th February 2010. Under clause 12 thereof the borrower was required to pay a Security Margin of Euros 200,000 (Two Hundred Thousand Euros). By an undertaking dated 23rd February 2010 Exhibit D7 the borrower ie M/S ABA Trade undertook to deposit the security margin and referred to the amounts already deposited on the defendants account which included the sum of UGX 84,000,000/= transferred from Stanbic Bank on 18th February 2010.

One of the signatories to the undertaking was Robert Mwesigye the very Mwesigye the plaintiff mentioned in her testimony as having introduced her to the defendant bank officer Mr. Opeitum.

In his submission Learned Counsel for the plaintiff referred Court to a passage in Halsburys Law 235 para 408 as quoted in ***Shenoi & An Vs Maximou [2005] EA 280*** where Court stated:-

“According to Halsburys Law of England the principle is that where one person has received money from another under circumstances such as in this case he is regarded in law as having received it to the use of that other. The law implies a promise on his part or imposes an obligation upon him to make payment to the person entitled. In default the rightful owner may maintain an action for money had and received to his use. According to this authority the obligation to refund the money is imposed upon the person who received it”

It was Counsel’s argument that the plaintiff made a transfer from her bank to the defendant’s account in DFCU Bank. Counsel further argued that the purpose for which the money was received was relevant to the application of the principle of money had and received and that in the case under consideration the money was

advanced for the acquisition of a Mercedes Benz Actros Truck. To back this Counsel relied on the evidence of DW2 who testified that she had been verbally informed by the plaintiff when she issued instructions to transfer the money. Counsel further argued that it was immaterial that the plaintiff could have been negligent to a certain degree (cited *Dr. James Kasugyera Tumwine & Anor Vs Sr. Willie Magara & Anor HCCS No.576 of 2004*)

In its defence, the defendant bank through the testimony of DW2-Charles Orwothu Manager Development Finance with the defendant bank and Richard Babbu Tibaleka Managing Director ABA Trade sought to show that the money paid by the plaintiff from her account in Stanbic Bank was towards payment of the Security Margin of M/s ABA Trade to the defendant bank in fulfilment of ABA Trade's obligations under the Trade Facility Agreement.

I note that the RTGS transfer was effected on 19th February 2010. There was no written communication between the plaintiff and the defendant bank touching on the purpose of the transfer of funds. The defendant bank official a one Stephen Opeitum who was stated to have dealt with the plaintiff with regard to the monies in issue did not testify.

I further note that by a letter of undertaking (D7) dated 23rd February 2010 M/s ABA Trade identified the monies in issue as part of the Security Margin which

they were enjoined to pay before a Letter of Credit could be opened by the defendant bank in favour of the suppliers of the trucks. I also note that one Robert Mwesigye who was alleged to be privy to the reason why the plaintiff deposited the monies in issue on the defendant bank account was a signatory on the undertaking. (D7)

The plaintiff's case is premised on the principles on unjust enrichment. As set out in the India case of *Mahabir Kishore & Madhya Pradesh 1990 AIR 313*, the requirements are:-

“First that the defendant has been enriched by the receipt of a benefit, secondly that this enrichment is at the expense of the plaintiff and thirdly that the retention of the enrichment is unjust”

This principle has long been adopted and accepted in Uganda. In *Dr. James Kashugyera Tumwine & Anor Vs Sr. Willie Magara & Anor*. Bamwine J (as he then was had this to say:-

*“Money which is paid to one person which rightfully belongs to another, as where money paid by A to B on a consideration which has wholly failed, is said to be money had and received by B to the use of A. It is recoverable by action by A. The paying of A to B according to the Learned Author of *A Concise Law Dictionary by P.G Osborn 5th**

Edn 9th P. 212 becomes a quasi-contract an obligation not created by but similar to that created by contract and is independent of the consent of the person bound,..... The other view is that in the action for money had and received liability is based on unjust enrichment i.e the action is applicable whenever the defendant has received money which in justice and equality belongs to the plaintiff under circumstances which render the receipt of it by the defendant a receipt to the use of the plaintiff”

The facts of the case as set out by both parties are not in much dispute. What is in contention is to what purpose the plaintiff made a deposit on the defendants account. Counsel for the plaintiff submitted, quite rightly in my view, that the purpose for which the money was received is relevant to the principle of money had and received (see *Shenoi & Anor Vs Maximor supra*). However as argued by Counsel for the defendant, and i agree, the evidence on record point to one purpose for which the defendant received the money i.e part payment of the Security Margin.

It is, in my view instructive to highlight the sequence of events again;

- ❖ 8th February 2010 the offer of a facility letter is written to M/s ABA Trade by the defendant Bank. A Security Margin of Euros 200,000 is required.

- ❖ 17th February 2010 the plaintiff instructs her Bankers to transfer by RTGS UGX 84,000,000/= to the defendant account in DFCU Bank.
- ❖ 22nd February 2010 defendant bank issued receipt number 39278 to M/S ABA Trade acknowledging receipt of US\$ 41,584.15 equivalent to UGX 84,000,000/= being 30% towards opening LC.
- ❖ 23rd February 2010 M/S ABA Trade advise the defendant bank that the UGX 84,000,000/= deposited on the account is to be applied together with other payment towards the Security Margin.

It is quite evident that upon M/s ABA Trade getting the offer letter of 8th February 2010 the immediate concern was for it to pay the Security Margin to trigger the opening of a Letter of Credit. The defendant bank was advised that the funds in dispute i.e UGX 84,000,000/= deposited on its account was to go towards the Security Margin.

I am not persuaded by the testimony of the plaintiff that she was advised to pay the money so as to secure her position with the bank as a buyer. As pointed out in the testimony of DW1 Charles Owothrum, the Manager with the defendant bank, the bank is not a trading entity and that the bank strictly ensures that it does not engage in transaction with clients and/or the public without documentation. I find it inconceivable that an official of the bank could have advised the plaintiff to merely

deposit money on the bank account to “secure her position” and the plaintiff did that and sought no form of acknowledgement whatsoever. How then would her position be secured?

I am also of the view that at that time there was no position to secure with the bank as the plaintiff has failed to show or point to any nexus between her and the defendant bank.

The defendant went to great length to show and i would add successfully too, that the plaintiff was actively involved in the whole transaction with some officials of M/S ABA Trade which in my view explains the deposit of the funds in dispute on the account of the defendant bank for the account of M/S ABA Trade. That said there is also no scintilla of evidence to point to the fact that the defendant was enriched by the receipt on its account of the impugned deposit. From the evidence on record the funds deposited were part of the funds required for the Security Margin.

The evidence on record point to the fact that the plaintiff was working hand in hand with the said Officials of M/S ABA Trade to actuate the demands of the defendant bank so as to ensure successful importation of the goods. In my view the defendant bank cannot be held to account for dealings which were not within its knowledge. The plaintiff has in my view failed to demonstrate that payment she

made on the defendant banks account fits and answers to the tenets set forth in the *Mahabir Kishore case (supra)* relating to the principles of unjust enrichment for his court to answer this issue in the affirmative.

In the result this issue fails and is answered in the negative.

My finding on issue one in effect answers issue number two.

In the result this suit is dismissed with costs.

B. Kainamura

Judge

19.02.2015