

THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO 418 OF 2016

OCHAMA EDWARD}.....PLAINTIFF

VERSUS

POST BANK UGANDA LIMITED}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT ON COSTS

On the 14th of June, 2016 the Plaintiff filed this action against the Defendant bank for a declaration that the registration of the mortgage on the land comprised in FRV 3262 folio 3 plot 40B at Kyarwanbuyamba Hoima by the Defendant is invalid, illegal, null and void because it was made without following the due process of the law; a declaration that the Plaintiff is entitled to statutory notice of default; a declaration that the Plaintiffs motor vehicle registration number UAV 525J Mitsubishi was wrongfully impounded by the Defendant; a declaration that the Defendant charged illegal and unconscionable interest, breach of banker/customer relationship, breach of duty of trust and confidence, breach of contract, a permanent injunction restraining the Defendant from selling the suit property; an order of compensation for the loss of earnings and costs of the suit. By amendment of the plaint the Plaintiff added a declaration that a loan agreement dated 11th of September 2014 between the Plaintiff and the Defendant is illegal, null and void for offending mandatory provisions of the law and secondly for charging illegal interest.

In reply the Defendant denied the claims and averred that the Plaintiff had been offered a loan facility of Uganda shillings 50,000,000/= to which the repayment instalment amount was duly communicated to the Plaintiff and the purpose of the loan was to purchase a motor vehicle by the Plaintiff. It is further averred that on 4th July, 2016 Uganda shillings 45,993,764/= remained

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outstanding and the Plaintiff had failed or ignored to repay the money as agreed. The Defendant prayed that judgment is entered for the Defendant in the counterclaim and the Plaintiff's suit is dismissed with costs. There are further pleadings between the parties that I do not need to refer to.

What is material is that by a written consent judgment executed by both parties on 2nd August, 2016 the suit was partially settled and it was agreed that the Plaintiff is indebted to the Defendant in the sum of Uganda shillings 36,331,383/=. It was agreed that the Plaintiff would pay this amount to the Defendant. The terms of payment are clearly set out and I do not need to go into them. Among other terms however it was agreed that the Plaintiff would pay Uganda shillings 10,000,000/= to the Defendant on 9th September, 2016 upon selling the motor vehicle pledged as security. Thereafter the Defendant would release the motor vehicle UAV 525J Mitsubishi to the Plaintiff. The vehicle had been impounded by the Defendant. The balance of Uganda shillings 26,331,383/= would be paid in instalments agreed upon. In paragraph 8 of the agreement it was agreed that each party bears its own costs. However the costs of the Defendant's agents Eventide Associates if any shall be paid subject to the court order or directions.

It is this last paragraph which has become the bone of contention between the parties.

The Defendant demanded 10% of the reduced loan balance for payment of the Defendant's agents amounting to Uganda shillings 3,633, 138/=

The Defendant relies on clause 10 of the standard terms and conditions which required the Plaintiff to meet all costs, expenses and fees connected with the recovery or attempted recovery of monies owing to the Defendant. He submitted that it was normal banking practice and also legal requirement that when a borrower defaults on the loan, the same is handed over to a debt collector for collection/recovery. When the Plaintiff defaulted, the same was done and the Plaintiff was handed over to Eventide Associates for debt collection. Under clause 9 of the Bank of Uganda Customer Protection Guidelines 2011, a Financial Institution has a right to take steps to recover the amount owing to it by the customer.

The Defendants Counsel submitted that the Defendant's agents entered into a service level agreement contract for debt collection in cases of default and this agreement is between the

Defendant and Eventide Associates. The said debt collector is entitled under clause 2.1 (1) to a commission of 10% of the outstanding loan balance and was duly instructed to recover the outstanding loan balance of the Plaintiff and on 3rd May, 2016. The Defendants agents executed its mandate as instructed and impounded all the securities pledged and advertised it in the Daily Monitor Newspaper. The outstanding loan balance before the consent judgment according to the Defendant's counterclaim was Uganda shillings 45,993,763/= according to the loan account statement annexure "E". During negotiations, the Defendant made a number of concessions which included waving of all penal interest; waving of all costs incurred by the Defendant during the impounding of the motor vehicles and advertising of the securities amounting to Uganda shillings 4,600,000/=. Enlarging the payment period to 18 months. The concessions are lost and the Defendant bank in as much as the Plaintiff is required to meet the expenses according to section 114 (2) of the Contracts Act Number 7 of 2010. It provides that the Plaintiff shall, where the goods are redeemed under subsection (1), pay any expenses which may arise from his or her default in payment or performance at the stipulated time. By the concessions the Defendant bank reduced the loan balance to Uganda shillings 36,331,383/=. In the premises he submitted that it was just and equitable that the Plaintiff meets the costs to the debt collector.

In reply the Plaintiff's Counsel objected to the annexure to the submissions for being filed after pleadings have been closed pursuant to Order 8 rule 18 (4) of the Civil Procedure Rules. He therefore submitted that he would restrict his submissions to the attachments to the pleadings.

Whether the Defendants agents should be paid by the Plaintiff and if so how much?

The Plaintiff's Counsel submitted that the Plaintiff never defaulted on its loan obligations like the Defendant wants the court to believe. It could only default where a stated notice of default pursuant to section 19 of the Mortgage Act Number 8 of 2009 was issued and which had not been done. He contended that it was premature to sanction recovery without following the procedure laid out under the Mortgage Act.

As far as clause 10 of the standard terms and conditions of the contract is concerned, it requires the Plaintiff to meet all costs, expenses and fees connected to recovery or attempted recovery. Part of the remedies sought by the Plaintiff was to declare the entire transaction illegal, null and

void for offending mandatory provisions of the law. The Plaintiff denies ever signing the standard terms and conditions of contract.

The Plaintiff's Counsel submitted that even if the Plaintiff had signed the contract, it would be unenforceable for lack of certificate of transformation that effect, which is a mandatory statutory requirement. The Plaintiff's Counsel relies on section 3 of the Illiterates Protection Act (cap 78) for the contention that the document is null and void. He contended that the Defendant knew that the Plaintiff is an illiterate person but did not follow the provisions.

The Plaintiff's Counsel further delays on Guideline 8 (1) (f) of the Bank of Uganda Consumer Protection Guidelines, 2011 which requires the financial services provider to give an oral explanation to the customer who does not understand English and a third-party to countersign as evidence that the explanation was given. He contended that the attached annexure to the Defendant's pleading does not show that a third party signed.

The Plaintiff's Counsel submitted that the Defendant purported to enter into a service level agreement with Eventide Associates. He submitted that section 65 of the Contract Act number 7 of 2010 prohibits strangers of the parties from enforcing a contract. He contended that this is a fundamental principle of law because it is only a party to a contract who can benefit from it. Without prejudice the Plaintiff's Counsel submitted that there was no binding contract between the Defendants and their agents Eventide. The service level agreement attached was executed on 19th March, 2014. Under clause 3.0, it was for a specific period of 12 months. The purported instructions to recover and the demand were issued on the 3rd of May, 2016 after the agreement had expired. He submitted that the Plaintiff in law cannot pick was based on an expired agreement thirdly, Uganda shillings 3,633,138/= which reflects 10% of the votes balance is unreasonable. He submitted that Guideline 9 (a) (i) of the bank of Uganda consumer protection guidelines, prohibits a financial service provider from claiming unreasonable costs and expenses incurred. He contended that there was no justification for the aforementioned sums.

The Plaintiff's Counsel further submitted that section 124 (2) of the Contracts Act does not apply to the Plaintiffs case. The Plaintiff did not plead his securities as goods for bailment to arise. Most of the concessions arrived at were due to the fact that the Defendant realised that it had

flawed legal requirements. He invited the court to disregard and reject the costs of the debt collector for lack of legal justification and the Defendant having waived off all costs for impounding and advertising securities.

Resolution of issue

I have carefully considered the submissions of the Plaintiff's Counsel and the Defendants Counsel.

Both Counsels relied on the consent judgment which contains clause 8. The Plaintiff's Counsel does not dispute the contractual clauses relied on by the Defendants Counsel to claim costs. What the Plaintiff's Counsel relies on are points of law arising from the facts. No evidence was led in this case and the matter was resolved by consent of the parties. There is no admitted evidence that the Plaintiff is an illiterate person. Secondly, there is no admitted evidence about Eventide Associates. Both Counsel give evidence from the bar.

In paragraph 1 of the consent judgment/decreed it is an admitted fact that the Plaintiff is indebted to the Defendant in the sum of Uganda shillings 36,331,383/= which was the outstanding loan amount on the loan the Plaintiff obtained from the Defendant secured with motor vehicles registration numbers UAU 837 & UAV 526 J together with land and developments which are also described. In paragraph 3 of the consent judgment it is agreed that upon payment of Uganda shillings 10,000,000/=-, the Defendant would immediately release motor vehicle registration number UAV 525J. In other words, it is confirmed that the vehicle had been impounded by the Defendant. In the plaint itself the Plaintiff pleads that he got involved in an accident and sought a revision of the loan terms. Furthermore it is admitted that on the 2nd of May 2016, the Defendant's agents led by one Kataregga Robert impounded the Plaintiff's motor vehicles without notice or colour of right. The Plaintiff averred that he was surprised to learn that his property had been advertised without a statutory notice of default.

I have also considered the written statement of defence where the Defendants claims an outstanding amount of Uganda shillings 45,903,764/=-.

As far as the Illiterates Protection Act is concerned, the Plaintiff is caught by the doctrine of waiver having agreed to pay the Defendant an amount of Uganda shillings 36,331,383/=. The consent judgment was signed by the Plaintiff and there was non-compliance with the Illiterates Protection Act. On the other hand I do not agree that the Plaintiff should pay 10% of the outstanding amount. The 10% relates to an agreement between the Defendant and Eventide Associates. Clause 8 of the agreement/consent judgment provides as follows:

"That each party bears its own costs; however costs of the Defendant's agents, Eventide Associates, if any, shall be paid subject to the court order and/or directions"

It is clear from clause 8 of the consent judgment that each party was to bear his/its own costs of the suit. What the Defendant is claiming is technically not costs of the suit but special damages or what can be defined as expenses incurred whether reasonable or not as a result of recovery measures for the loan. Such expenses are recovered as special damages. The Defendant was obliged to call evidence to prove this amount and also to show that it was a reasonable expense incurred pursuant to default of the Plaintiff. Without evidence the court has to grapple with the averments of the Plaintiff and the submissions of Counsel that there were no grounds or basis for pursuing recovery measures because no notice of default had been issued in terms of section 19 of the Mortgage Act 2009.

The question of expenses incurred by the Defendant pursuant to instructions to Eventide Associates cannot be recovered without evidence. Secondly it cannot be recovered without giving the Plaintiff a chance to prove that recovery measures were premature.

In the premises, there is no basis for the award of reasonable expenses incurred by the Defendant. Last but not least the Defendants written statement of defence and counterclaim does not aver or include a claim for Uganda shillings 3,633,138/= claimed by the Defendant. What is not pleaded in special damages cannot be proved. The claim for the special damages under the heading of reasonable expenses to Eventide Associates is accordingly dismissed. Each party shall bear its own costs of the above submissions pursuant to clause 8 of the consent judgment of the parties.

Judgment delivered in open court on 17th October 2016

*Decision of Hon. Mr. Justice Christopher Madrama Izama *~*~?+: maXimum728securityx 2016 style*

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Amanya Joseph for the Plaintiff

Plaintiff is in court

Defendants are not in Court

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

17th October 2016