

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
HCT - 00 - CC - CS - 336 – 2013

STANBIC BANK UGANDA LTD:..... PLAINTIFF

VERSUS

KASIBANTE JOHN:..... DEFENDANT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

J U D G M E N T:

Stanbic Uganda Limited herein after referred to as the Plaintiff brought this suit against Kasibante John who shall be referred to as the Defendant in these proceedings. The Plaintiff's claim against the Defendant is for recovery of UGX 1,239,251,357/= with interest thereon at a rate of 25% per annum all resulting from a breach of contract namely money advanced to the Defendant who defaulted in payment.

The facts constituting its claim as set out in the pleadings are that the Defendant applied for a term loan comprising two facilities whose purpose in Loan Facility 1 with a limit of UGX 1,000,000,000/= was to purchase property comprised in block 401 Plot 1171 land at Namulanda which is herein after referred to as the Property in these proceedings. It was the agreement of the

parties that the Defendant would provide security of two pieces of land namely the land at Namulanda block 401 Plot 1171 and another Kyandondo block 251 Plot 240. Facility 11 was granted to refinance the borrower's facilities which he at that time held at Fina Bank and that if there was any balance he would apply it to his other businesses, **Exh P1**.

There is evidence to show that out of the UGX 1,500,000,000/= the Plaintiff deposited only UGX 1,000,000,000/= on the 10th November 2011 onto the Defendant's account at Forest Mall branch. It is not in dispute also that this money was removed from the same account by the Plaintiff on the same day. Court was later to learn that it went towards payment of a debt one Ason Kasumba owed the Plaintiff.

The Plaintiff contended that the Defendant defaulted in the installments thus this suit. The Plaintiff therefore brought this suit seeking orders for immediate payment of UGX 1,239,251,357/= ,seeking interest thereon at a rate of 25% from date of filing till payment in full, general damages attracted interest at court rate and costs of the suit.

In response to the Plaintiff's claim the Defendant denied owing any money and contended that in October 2011 he was approached by a land broker called Zimbe who told him that the Plaintiff was selling nine acres of land at Namulanda and that the said Plaintiff was willing to finance him develop it. Zimbe took him and showed him some land which as we shall later on learn was not the land which the Plaintiff was selling. Finding the land suitable, he accepted to enter into a deal and that the following day Zimbe came to him with three bank officials putting on shirts with the Plaintiff's logo. One of those persons he had dealings with thereafter was Ronald Muzaale the Forest Mall branch manager of the Plaintiff. The Defendant further told court that the land was available for sale because the owner had defaulted in servicing his loan. He said Muzaale also told him that as bank manager he was ready to arrange for a loan to enable him purchase the land as long as he became a customer of that bank to which he agreed. The Defendant said that the bank manager took to him application forms for opening an account and for applying for the loans which he signed and thereafter Muzaale gave him a photocopy of the land title which would enable him open up the Property's boundaries. He gave Muzaale UGX 200,000/= for opening the account and thereafter operationalised the account by regularly depositing money on it.

The Defendant said in November 2011, Muzaale called him and informed him that the Plaintiff had accepted his application for the loans and that it was ready to give the UGX 1,000,000,000/= for the purchase of the land as soon as the Defendant would deposit UGX 300,000,000/= on his account. He further told him that the Plaintiff had also agreed to give him a further UGX 500,000,000/= which was to partly refinance his loan facility in Fina Bank and that if there was balance to use it for the development of the nine acres. On receiving this information he signed the necessary documents.

Convinced that things were moving in the right direction, he sent his surveyor one Ssebuyina to whom he gave the copy of the title deed to go to Namulanda and open up boundaries. That the next day the surveyor came back and informed him that the land on the copy was not the one by the roadside which he had been shown by the Plaintiff but was actually down in the swamp. He also went and saw, he rejected the land and went to Muzaale and told him that the land he had shown to him was not the one on the title and he was therefore not going to take it. That Muzaale then told him not to worry and still to take the loan because there were many other loan defaulters and the bank would arrange to give him any of their properties. That they left the matter at that but soon thereafter he was surprised to see that the Plaintiff had deducted UGX 57,300,000/= for servicing the loan. That when he sought clarity Muzaale told him that actually they had already given him the loan and the money had been used to pay on his behalf the land in Namulanda. That because he had not bought any land he stopped using that account. By way of counterclaim he sought for orders that the Plaintiff pays back special damages of UGX 72,300,000/=, general damages, interest at 25% per annum from date of counterclaim till payment in full and costs

The issues agreed by the parties during the hearing were as follows;

1. Whether there was a mortgage created between the parties;
2. Whether the Defendant is indebted to the Plaintiff and if so by how much;
3. Whether there was a breach of contract by the Defendant;
4. What are the remedies available?

On the first issue of whether there was a mortgage created between the parties PW1 told court that the Defendant refused to fulfill the requirements that would create a legal mortgage and that therefore the mortgage was not created. The Defendant also told court that he rejected the idea of

buying the land when he found out that it was a swamp which fact he brought to the Plaintiff who promised to give him alternative land. That the land was a swamp received support from PW1 in paragraph 17 of his written witness statement. He stated;

“In September 2014, the Plaintiff bank sought to dispose of the property. The Bank appointed Stanfield Property Partners to open up boundaries and also value the Property. The Bank confirmed that the property was in a swamp and that the Defendant had defrauded it by pledging swampy land to it.”

What makes this statement not only interesting but also amusing is for the Plaintiff to pretend that it did not know that the land was in a swamp. Before the Defendant came into the picture, this very property had been used by Ason Kasumba to obtain a loan from the Plaintiff. The Plaintiff could not have accepted that property as security without inspecting it to ascertain its value and status. In my view all the time Muzaale took to convince the Defendant to buy the land from Kasumba the Plaintiff knew it was a swamp. I am convinced that it was because of this that the Defendant refused to be vetted by URA a fact he brought to the attention of the bank. Since the requirements for creating a mortgage were not fulfilled none was created between the parties; **Fredrick J.K Zaabwe v Orient Bank Ltd & 5 Ors SCCA No.4 2006.**

On the issue of whether the Defendant was indebted to the Plaintiff it was the duty of the Plaintiff to show that it advanced the Defendant money for the purpose that they had agreed upon and that the Defendant had utilized the money on the agreed purpose or any other things for his benefit. Clause 2 of **Exh P1** clearly provided that the purpose of the loan was to purchase land at Namulanda. The Defendant told court that he refused the land because it was a swamp.

This evidence was not counteracted by calling Muzaale the person that the Defendant dealt with to tell court whether the Defendant indeed bought the land or rejected it. The Plaintiff relied on the sale agreement to credit the account of the Defendant. PW1 told court that they had agreed that Ason Kasumba sells the land. On cross examination PW1 did not produce any request from Kasumba to sell or any consent given by the Plaintiff to Kasumba to sell.

The Defendant's denial of ever signing the sale agreement brought it into issue. Kasumba who allegedly sold the property was not called by the Plaintiff. Neither did the Plaintiff call the Advocate who drew and witnessed the sale. The Defendant however called the Advocate

Ssebugwawo Marvin Paul who drew and witnessed the signing of the agreement. He appeared as DW2 and told court that the person who signed as Kasibante was not the Defendant in court.

This evidence remained undisturbed. In my view, Kasumba took some other person to DW2 with the sole purpose of obtaining an agreement that was required by the bank to transfer money onto Kasumba's account via the purported buyer the Defendant hereof. This was intended to absolve Kasumba of the debt and shift the burden on the shoulders of the Defendant. The position now however that is the Defendant not being a party to the sale agreement could not have purchased the property. Money was put on his account without his knowledge and for purchase of land he had rejected. He never benefitted from the transaction. His account was therefore just used as a conduit and whatever interest was deducted from the Defendant's account was wrongly deducted. The sum total is that he is not indebted to the Plaintiff.

On whether there was a breach of contract by the Defendant I have clearly analyzed that the Defendant rejected the land that was offered and did not benefit from the money that was put on his account. For those reasons and the fact that there was no mortgage created, it is my finding that the Defendant did not breach any contract.

The Plaintiff sought UGX 1, 239,251,357/= as principal and accrued interest. This was money put on the Defendant's account after he had been assured by Muzaale that they would get him a piece of land different from the swampy one in Namulanda. This was not done and the money which was put on his account was put there for a different purpose namely; to fund purchase of land for which he was not a buyer. No wonder it was whisked away on the same day it was put there. To brand this as a loan would be a breach to banking laws and certainly contrary to public policy.

In the premises, since there is no witness who participated in the creation of this relationship, the Plaintiff's case fails to satisfy even the balance of probability required here that the Defendant was privy to the transaction of the Namulanda land. An illegality was done by producing a sale agreement riddled with fraud and court certainly finds this unenforceable. The beneficiaries of that transfer of money via the Defendant's account to that of Ason Kasumba are well known to the Plaintiff itself and those are the ones that should be pursued.

The sum total is that since the Defendant was not privy to the purchase of the Property he cannot be found liable. Counsel for the Plaintiff submitted that the Defendant all along knew that money was being processed on his behalf. While that might be true, it is also true that the Defendant all along thought that another piece of land was being sought for him. That being the case, the Plaintiff's case cannot stand and it is dismissed with costs.

By way of counterclaim the Defendant contended that the Plaintiff had handled the transaction in an irregular manner by crediting his account and taking away the money in purchase of what he had rejected. He contended that the Plaintiff deducted from his account monthly installments to service the loan that he never benefitted from.

In the premises, he claimed the refund of special damages namely 1% of the loan amount and UGX 57,300,000/= that was deducted from his account by way of settlement. The Defendant also claimed general damages for loss and inconvenience suffered. I have already held above that the transaction was irregular and done in bad faith to benefit people other than the Defendant. The deductions were therefore wrongly done in as much they were not within his knowledge and he is entitled to a refund thereof.

Exh P4 shows the deductions that were made on his account which covered legal fees, general purpose debt, loan settlement and deductions amounting to UGX 75,196,529/=. These findings were not disputed. The Defendant's prayer was for UGX 72,300,000/=. I am inclined to award what he prayed for. It is therefore ordered by this court that the Plaintiff refund UGX 72,300,000/=.

The Defendant also in the counterclaim prayed for general damages for loss and inconvenience suffered. The damages that are envisaged in this situation are the sums that follow to be paid by breach of some duty or obligation, **Hall Brothers SS Company Ltd vs Young (1939)1 KB 748**. These damages are compensatory and their primary function is to place the Claimant in as good a position as he would have been had the breach complained of not occurred.

The Defendant did not make substantial submissions to help court in quantification of the award of general damages. This therefore left the duty of assessing the general damages solely on the court; applying the option and judgment of a reasonable man; **Hajji Asuman Mutekanga vs. Equator Growers (U) Ltd SCCA 7/95**. Taking all the circumstances into consideration, the fact

that the Defendant was deprived of his money since January 2012 and his being enlisted in the banks as a bad borrower it is my view that an award of UGX 20,000,000/= as general damages is appropriate and is hereby awarded. This award shall attract interest at court rate from date of judgment till payment in full.

The Defendant sought 25% interest on special damages. Interest is awarded at the discretion of court; **Uganda Revenue Authority vs. Stephen Mbozi SCCA 16/1995** but like in all other discretion court must exercise it judiciously taking into account all circumstances of the case; **Superior Construction & Engineering Ltd v. Notay Engineering Ltd. HCCS No. 24 of 1992.** Further, Section 26 Civil Procedure Act is to the effect that where interest was not prior agreed as between the parties the court could award interest that is just and reasonable.

The Defendant is a business man who would have used the money to further his ventures in sale and purchase of land and construction of houses. That notwithstanding the Defendant has not shown why they are entitled to an interest rate of 25% per annum which I find manifestly high. I would find that an award of an interest rate of 22% per annum is sufficient; it is so awarded.

The Defendant is awarded costs of the suit and counterclaim.

In conclusion, judgment is entered in favour of the Defendant/Counterclaimant against the Plaintiff in the following terms:

- a) Plaintiff pay UGX 72,300,000 /=-
- b) General damages of UGX 20,000,000/=
- c) Interest on a) at 22% per annum from January 2012 until payment in full.
- d) Interest on b) at court rate from the date of judgment until payment in full.
- e) Costs.

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David K. Wangutusi

JUDGE

Date: 7th February, 2017