THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

CIVIL SUIT No. 530 OF 2013

ABC CAPITAL LIMITED :: PLAINTIFF

VERSUS

1. MUYANJA HUSSEIN

2. DDUNGU WINNIE FREDRICK :::::::::::::::::::::::::::::::::::: DEFENDANTS

BEFORE: HON. MR. JUSTICE B. KAINAMURA

JUDGEMENT

The plaintiff brought this suit seeking for recovery of UGX 191,754,304/= jointly and severally from the defendants being the amount owed by the defendants as principal debtor and guarantor respectively as at 6th August 2013.

The brief facts of the case as set out in the plaint are that by a letter dated 15th April 2011, the first defendant applied for credit facilitated to the tune of UGX 170,000,000/= from the plaintiff for purposes of completing the purchase of land comprised in Block 632 Plot 39 Kigombe Bulemezi Luwero District where he had made an initial payment of UGX 30,000,000/=.

That by facility letter dated 11th May 2011, the 1st defendant was granted credit facilities by the plaintiff to the tune of UGX 170,000,000/=. That the facility was to be repaid by the borrower in 36 equal installments of UGX 6,492,374/= each commencing one month from the date of drawdown.

That the terms of the facility letter were accepted by the defendant. That the credit facility was guaranteed by the 2nd defendant and that the sum of UGX 170,000,000/= was remitted to 1st defendant's account No. 001000202000096 on 10th June 2011 held at the plaintiff's bank. That the 1st defendant has failed to pay the sums due.

In his WSD the 1st defendant denied the claim and stated that the sum claimed by the plaintiff is over exaggerated and does not reflect the true position of indebtedness of the 1st defendant as the several payments he made were never reflected.

The 1st defendant averred that the plaintiff was negligent during the credit appraisal process thereby granting to the 1st defendant excessive and unmanageable credit facility which led to the default by the 1st defendant.

The 1st defendant further averred that the plaintiff was in breach of its fiduciary duty to the 1st defendant when it extended to him a loan facility which could not be paid back using cash flows from the 1st defendant's existing business.

The 1st defendant also averred that the relationship between the plaintiff and the 1st defendant has been based on unfairness contrary to the Bank of Uganda Financial Consumer Protection Guidelines 2011.

In his WSD the 2nd defendant denied having ever guaranteed the loan facility to the 1st defendant.

During scheduling the following issues were agreed for determination.

1. **Whether the 1st defendant is indebted to the plaintiff and if so, in what sum?**
2. ***Whether the 1st defendant's loan from the plaintiff was guaranteed by the 2nd defendant.***
3. ***Whether the plaintiff has exhausted efforts regarding the sale of the mortgaged property.***
4. ***Whether the facility letter is valid and enforceable against the defendant.***
5. ***Whether there was misrepresentation by the plaintiff to the defendants.***
6. ***Remedies available to the parties.***

Issue One: Whether the 1st defendant is indebted to the plaintiff and if so, in what sum?

Counsel for the plaintiff contended that the 1st defendant is indebted to the plaintiff. He averred that the 1st defendant applied for a loan facility of UGX 170,000,000/= on 15th April

2011, and by the facility letter of 11th May 2011, the plaintiff offered the 1st defendant a loan facility of UGX 170,000,000/=.

Counsel for the defendants, on the other hand, contended that the actions of the plaintiff made it impossible for the contract to be performed. Counsel averred that the plaintiff was reckless while lending to the 1st defendant which subsequently frustrated the contract and brought about a failure to pay.

Counsel for the defendants averred that the plaintiff breached its obligation as a financial service provider. That financial transactions are based on principles of fairness, reliability and transparency which the financial institutions are obliged to follow yet the plaintiff failed in these principles. That Jackson Kiyaga (PW2) was ignorant of many obvious things in the bank. He had no knowledge about the loan approval process and was not involved at all.

In the loan application letter, the 1st defendant wrote;

> *"I wish to apply for a loan of 170m to finance the balance of purchase price of the above-stated property"*

This, therefore, shows that the 1st defendant on his own accord applied to the plaintiff bank for the loan. The 1st defendant also indicated that he wants to finance the balance of an already purchased land. The defendant's contention therefore that the plaintiff breached its duty of care to him when it did not asses the viability of the transaction does not hold any water. From the application letter, it is very clear that by himself, he wrote the letter, signed it. This means that he knew what he was doing when he decided to get a loan.

On 11th May 2011, a loan facility was granted to the 1st defendant and he signed all the pages of the facility letter. It is clear that he signed the facility letter and the fact that he had by his own accord applied for it means that no one forced him to sign the agreement that he alleges not to understand.

According to the statement of the account, on 10th June 2011, the loan of UGX 170,000,000/= was disbursed to the 1st defendant current account. The 1st defendant has not disputed the debt, neither has he disputed that it is still outstanding. He has not proved coercion or any factor that vitiates a contract. The logical conclusion thereof is that the 1st defendant is indebted to the plaintiff and is under contractual obligation to pay the sums due.

Accordingly issue one is answered in the affirmative.

Issue Two: ***Whether the 1st defendant's loan from the plaintiff was guaranteed by the 2nd defendant.***

Counsel for the plaintiff averred that the defendant's loan was guaranteed by the 2nd defendant. That the 2nd defendant executed a guarantee in favor of the plaintiff bank in consideration of the plaintiff bank giving time credit and/ or facilities and accommodation to the 1st defendant.

On the other hand, Counsel for the defendants averred that the guarantee document presented by the plaintiff is not valid for purposes of this transaction in question if it was ever executed by the 2nd defendant. Counsel also averred that the guarantee document was not dated.

Not dating a contract does not affect its legality. Normally, the effective date of the contract is either the date the contract states as the effective date, or if no specific effective date is set forth, then the date the last party accepts the terms by signing is the date of execution. If a contract does not specify its effective date, it goes into effect on the date it was signed by the person to whom the contract was offered for signature (see **Williston on Contracts § 6:1 (4th ed. 2009-2010**).

The guarantee contract was signed by the 2nd defendant, and there is no evidence to prove that the signature was forged. Under the circumstances, I find that the 2nd defendant executed the guarantee agreement and thus guaranteed the 1st defendants loan.

Accordingly issue two is answered in the affirmative.

Issue Three: ***Whether the plaintiff has exhausted efforts regarding the sale of the mortgaged property.***

Counsel for the plaintiff avers that all efforts to sell the mortgaged property by the plaintiff had been exhausted. That they issued a notice of default to the defendant and a notice of sale.

He further alleged that there are squatters on the land that are claiming an equitable interest in the land and this challenges foreclosure.

On the other hand, the defendants aver that the plaintiffs have not exhausted all the requirements. That according to the **Mortgage Regulations, 2012**. **regulation 8(2)** requires a mortgagor to advertise the property in the newspapers and **regulation 11** requires valuation of the property and a detailed report that will show that the land is squatted. And that all this has not been done.

Powers of a Mortgagee are provided for under **Part V** of the **Mortgage Act Section 19 (1)** of the said Act stipulates that where money secured by a mortgage is made payable on demand, a demand in writing shall create a default in payment. Secondly under Section 19 (2) where the Mortgagor is in default of any obligation to pay the principal sum on demand or any interest or other relief payment or part of it under a mortgage, or in the fulfillment of any common condition, express or implied in the mortgage, the Mortgagee may serve to the Mortgagor notice in writing of the default and require the Mortgagor to rectify the default within 45 working days. However, the notice has to be in the prescribed form under **Section 19 (3)** of the **Mortgage Act**. The remedy of a Mortgagee includes under **Section 20** of the **Mortgage Act** upon default of the Mortgagor to comply with the notice, issued and served under **Section 19**, the right to require the Mortgagor to pay all monies owing on the mortgage; appoint a receiver of the income of the mortgaged land; lease the mortgaged land; enter into possession of the mortgaged land or sell the mortgaged land.

Section 26 of the **Mortgage Act** provides that where the Mortgagor is in default of his or her obligations under the mortgage and remains in default after expiry of the time provided for the rectification of the default stipulated in the notice served on him or her under **Section 19**, a Mortgagee may exercise his or her power of sale of the mortgaged land.

Counsel for the plaintiff avers that by letter dated 26th February 2013, the plaintiff received a letter that the land was fully occupied by squatters and there are parties claiming equitable interest.

Counsel for the defendants averred, rightly, in my view that there is no evidence whatsoever to show this. All that the plaintiff is relying on is an opinion letter from his lawyers. (PEX 11).

I am inclined to agree with the defendants, there is no proof of the said squatters or their equitable interest claims. There is no evidence of any advertisement of the property to prove that the plaintiff exhausted the foreclosure remedy. I, therefore, find that the plaintiff did not exhaust efforts regarding the sale of the mortgaged property.

Accordingly issue 3 is answered in the negative.

Issue Four: ***Whether the facility letter is valid and enforceable against the defendant.***

It was Counsel for the plaintiff's contention that the facility letter is valid and enforced against the defendants, since the 1st defendant signed the facility letter.

In reply, Counsel for the defendants contended that accordingly to the evidence of PW2 the loan application was dated 15th April 2011. That the loan agreement is dated 11th May 2011 yet the bank received it on 11th June 2011. That it is questionable therefore how the loan application is received after the loan is approved. That the loan agreement is not stamped by the bank and that the signatories are not witnessed.

I have perused the loan agreement, and it is dully executed, having been signed by all parties. The fact that the application letter was received later or that the signatures are not witnessed does not invalidate the agreement. There is no evidence that the people who signed on behalf of the plaintiff are not authorized to sign for the bank. Under the circumstances, I find that the facility letter is valid and thus enforceable against the defendant.

Issue four is accordingly answered in the affirmative.

Issue Five: ***Whether there was any misrepresentation by the plaintiff to the defendant.***

Counsel for the plaintiff averred that there was no misrepresentation on behalf of the bank and that the defendants also did not plead particulars of misrepresentation.

The defendant's contention is that the bank misrepresented that the land was free of squatters and the defendants purchased it in confidence because it was held by the bank.

I have perused the pleadings and there are no particulars of misrepresentation being pleaded by the 1st defendant. Therefore, this issue is resolved in the negative.

Remedies

The plaintiff sought orders that the defendant pays the plaintiff UGX 191,754,304/= and interest thereon at a rate of 25% per annum from 6th August 2013 till payment in full and cost of the suit. From my finding in issue one the plaintiff is entitled to this order.

I have found that the plaintiff did not exhaust their foreclosure remedy, the loan was secured by a mortgage and the plaintiff registered a first legal charge of UGX 170,000,000/= over land and properties on Block No. 632 Plot 39 Kigombe Bulemezi, Luwero District registered in the names of 1st defendant.

The plaintiffs claim that the land is squatted but they did not adduce any evidence to that effect. I, therefore, order that the plaintiff should exhaust the foreclosure remedy since the loan had security.

In as far as the plaintiff's claim against the 2nd defendant is concerned, a guarantor's obligation is usually discharged when the creditor omits to do any act which his duty enjoins him to do.

This was upheld in the case ***Stanbic Bank Uganda Ltd Vs Cellular Galore Ltd & 2 ors (CIVIL SUIT NO 50 OF 2010) [2015]*** where court cited the case of ***China and South Sea Bank Ltd Vs Tan [1989] 3 All ER 839,*** and particularly the summary of principles from the quoted case of ***Watts Vs Shuttleworth (1860) 5 H & N 235, 157 ER 1171*** that if the person guaranteed (the creditor) does anything injurious to the surety or inconsistent with his rights or if he omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the surety will be discharged in equity.

In that case, the court discharged the guarantor from liability because the creditor omitted to pursue remedies under the Chattel Mortgage as well as the omission to consider the mortgaged property as a partial offset of the guaranteed loan.

In the instant case, the plaintiffs omitted to pursue remedies under the mortgage. In the premise, therefore, I find that the 2nd defendant's obligation is discharged in equity.

In conclusion therefore and as far as remedies are concerned, I find that the 1st defendant is still indebted to the plaintiff and the plaintiff can pursue remedies under the Mortgage Act and foreclose the security. However, the 2nd defendant is discharged from liability and is not liable to the plaintiffs.

In the result judgment is entered for the plaintiff against the 1st defendant in the following terms;

1. Payment of UGX 191,754,304/= to the plaintiff at an interest rate of 25% p.a from August 2013 till payment in full.
2. The plaintiff should first exhaust its remedies of foreclosure under the Mortgage Act failure of which the plaintiff will execute this judgment.
3. The plaintiff is granted costs of the suit.

Further the case against the 2nd defendant is dismissed with costs.

I so order

B. Kainamura

Judge

25.09.2018