

5 **THE REPUBLIC OF UGANDA**
IN THE HIGH COURT OF UGANDA
[COMMERCIAL COURT]

CIVIL SUIT No. 531 OF 2013

KAAYA L. ENTERPRISES LIMITED ::::::::::::::::::::::::::::::::::::::: PLAINTIFF

10 **VERSUS**

KCB BANK (U) LIMITED ::::::::::::::::::::::::::::::::::::::: DEFEDANT

BEFORE: HON. MR. B. KAINAMURA

JUDGEMENT

The plaintiff is a limited liability company incorporated and carrying on business in Uganda. It brought this action against the defendant bank for general and special damages for breach of contract and fiduciary duty owed by the defendant to the plaintiff as its customers; a permanent injunction restraining the defendant from excising powers of advertising, auctioning and sale of mortgaged property comprised in Busiro Block 313-320 plot 1544, which was pledged by the plaintiff to the defendant as security for a loan facility; an order directing the defendant to compensate the plaintiff for all the losses suffered as a result of the said wrongful actions and breach of contract and fiduciary duty owed by the defendant to the plaintiff. An order of reconciliation of the plaintiffs account held by the defendant and interest on special and general damages.

The defendant in their amended written statement of defence denied the claim and averred that the plaintiff was personally responsible for its losses. The defendant further counter claimed against the defendant seeking the recovery of UGX 127,308,931/= being the principle and accrued interest of a loan facility.

The plaintiff disputed the claim in the counter claim stating that it emanates from a doctored loan statement which does not reflect the payments that were made to reduce the indebtedness.

30 During scheduling, the following issues were framed for determination by court.

1. Whether the defendant is in breach of contract and fiduciary duty owed to the plaintiff
2. Whether the plaintiff is indebted to the defendant/ counterclaimant.

3. What remedies are available to the parties

Issue One: *Whether the defendant is in breach of contract and fiduciary duty owed to the plaintiff.*

The plaintiffs case is that the defendant breached its duty of care when it deliberately and eventually declined to send letters of credit to the manufacturer after the assuring the plaintiff that they were going to do so.

On the other hand, the defendant averred that the defendant bank was not under any obligation to send letters of credit as there was no basis and or collateral security. The securities presented had been absorbed in the first loan of UGX 150,000,000/= which had not been paid by the time the plaintiff came at the bank seeking for the 70 percent.

From the evidence before me, Deborah Kigongo Managing Director of plaintiff company (PW1) in her testimony stated that the plaintiff was a successful bidder for three tenders of Uganda National Roads Authority (UNRA) to supply spare parts for road construction and maintenance. The plaintiff needed financing and thus approached the defendant bank for a contract financing and was advised to open up an account with the defendant bank.

That UNRA then instructed Stanbic Bank, their bankers to issue irrevocable letters of credit in favour of the plaintiff as the beneficiary guarantying to pay the contract price. Thus on this promise and the plaintiffs security, the defendant paid the plaintiff's supplier USG PRODUCTS (FE) PTE LTD 30 percent of the contract price as an advance payment. The supplier then shipped the goods and required the plaintiff to pay the 70 percent before handing over the bill of landing, which was a condition precedent before URA would make payments.

According to Micheal Ssekyondwa Managing Agency and Digital banking with the defendant bank (DW1), the plaintiff came back to the bank for the 70 percent funding. It appears that the bank was reluctant to give the defendant another loan because there was already a USD 40,000 that had not been paid because URA needed to see the shipping documents before it could pay.

According to the PW1, the supplier needed cash so as to deliver the shipping documents because the contract between the two was a cash contract.

According to exhibit PEX17, it is clear that the defendant bank, wrote to the supplier requesting them to accept letters of credit instead of cash. In their reply, on 24th November 2011 the suppliers communicated that it was hard for them to accept the letters of credit

because the understanding was for full payment of the contract price and it was a cash price contract. The defendant bank wrote back to the supplier stating that;

5 *“we understand that the client had committed that she would first pay all the cash but she did not receive the money she expected. As her banker, we are willing to give her a letter of credit to your selves, then you send us the bill of lading and after receipt of the same, we shall remit the specified amount by telegraphic transfer within a period of one week”.*

Following this persuasion from the bank, the supplier in their email to the plaintiff allowed receiving letters of credit instead of cash. They wrote and stated;

10 *Dear Madam Deborah,*

We accept your L/C payment based on the following conditions

1. *Kaaya company to issue us an IRRIVOCABLE SIGHT LC and the LC need to be reconfirmed by our banker in China.*
2. *You have to accept all the shipping documents (B/L, Invoice, packing list and*
15 *COO) on hand,*
3. *All the banking charges need to be paid by KAAYA company.*

Kindly send us your L/C draft for confirmation,

Thank you.

20 Following this acceptance, the defendant bank asked the plaintiff to extend the expiry date of the letters of credit. In fact, Dw1 emailed the defendant bank’s business banker asking for a favour. He copied in the plaintiff in the email and stated;

Hi Isaac,

25 *As you are aware, i will be away for the whole of next week. In light of the communication between the client and supplier below, your immediate action therefore should start with the application of CQ for a LC secured on the back of UNRA/Stanbic irrevocable LC which I am sure is cash covered. In the meantime, advise the customer to pursue with UNRA to extend the expiry date of their Stanbic L.c to at least 31/1/2012.*

After the CQ approval of the LC, the client will fill in the LC application forms and then a draft LC will be sent to a supplier for comfort. Also ask the client to obtain additional information from the supplier regarding the bank they want to confirm the LC of their country.

5 The defendant successfully applied to UNRA to extend the expiry dates on the letters of credit. The understanding here was that the defendant bank was going to issue letters of credit to the supplier who would in turn send them the original documents upon which the Stanbic Bank would pay the irrevocable letters of credit.

The plaintiff was copied in the email, and the bank in doing so acted as though it was going to
10 send letters of credit to the supplier. The plaintiff therefore expected the bank to do so. In fact, the plaintiff wrote to the defendant bank asking how far the bank had reached in sending the letters of credit to the supplier.

I note that it was the defendants that were negotiating with the supplier and asking them to accept the letters of credit. In fact, they promised to send the letters of credit to them in one
15 week.

As regards the duty of banker to customer, it is stated in a book titled ***“The Law Relating to Domestic Banking” Volume 1*** by **G.A. Penn, A.M. Shea and A. Arora** at page 65 that:-

*“It is not the case that a banker has a duty to honour all his customer’s instructions. Rather, there is a duty to honour all instructions which the banker has, at the time of
20 the original contract, or subsequently, undertaken to honour, and this depends on any specific undertakings in a particular case, and on the general “holding out” of those things which the banker will do, which arises from the nature of the bankers business....”*

The nature of the banker’s duty is also stated at page 66 of the same book to the effect that:-

25 *“The duty is to obey the mandate, and in obeying it to do so with reasonable care so as not to cause loss to the customer”.*

I am of the opinion therefore that the defendant held out that they were going to send the supplier letters of credit. They promised the supplier that they will send it in a week, DW1 wrote to the business banker and asked him to start the application of the Letters of credit from
30 the CQ and even asked the plaintiff to apply for the letters of credit to be extended by UNRA.

The supplier had already sent the goods to Mombasa and it was of uttermost importance that the plaintiff gets hold of the original documents from the supplier which he could only send after receiving the letters of credit. The defendant bank knew the urgency of the situation.

PW1 stated that she went to the defendant bank and was later informed by the credit analyst
5 that they will not be able to send the letters of credit to the supplier.

The defendant's state that they were not under duty to send the letters of credit i agree they were not under duty to send the letters of credit. As a financial institution, they can or not send letters of credit depending on the financial situation of the transaction. However, the defendant bank in the circumstances had negotiated with the supplier and conducted themselves in a
10 manner that made the plaintiffs believe that they were going to send the letters of credit to the supplier and they did not.

In fact, they did not even inform the plaintiff's that they would not send the LCs and probably advise her to use another bank. They simply did nothing and time was going. The plaintiff had to first go to the bank inquiring if the LCs were sent and that is when they told her that they
15 will not send the LCs.

PW1 testified that after learning that the bank would not send the letters of credit, she had to go to Stanbic Bank to ask them to send the letters of credit to the supplier.

It should be noted that Stanbic bank was not the plaintiff's bank but was UNRA's bank. It therefore, did not owe the plaintiff any duty to send letters of credit to its supplier. The original
20 plan was for Stanbic bank to promise the defendant, which was the plaintiff's bank, that it will pay the contractual sum. The defendant bank, therefore had security because the letters of credit were amended as they had asked.

PW1 stated that she then went to UNRA and asked them to amend the letters of credit and send them to the supplier in Singapore instead. Thus, in the letter dated 19th January, 2012, (DEX 7)
25 UNRA wrote to Stanbic bank asking for the cancellation of the previously amended Letter of credit and instead open another letter of credit to be sent to the supplier who in Singapore. The process of having the letters of credit amended obviously took some time because the supplier allowed to accept letters of credit on 2nd December 2011, the defendant had promised to send the letters of credit in a weeks' time which it never did. It took aver 2 months for the
30 letters of credit to be sent and in the meantime demurrage was accruing because the goods were already at Mombasa.

It apparent that the plaintiff suffered a loss because of the defendant bank's conduct of holding themselves out in a way that they were going to send letters of credit to the supplier but did not. Having held themselves out to the plaintiff that they were going to send letters of credit to the supplier, the defendant was duty bound to send the letters of credit. At the very least, the bank would have told the plaintiff's right away that they were not going to send the letters of credit. By the bank promising that they would send letters of credit to the supplier and then failed to and did not even communicate to the plaintiff that they will not send them occasioned delays which caused; losses to the plaintiff.

Under the circumstances therefore, I find that the bank breached its duty of care when it failed to send the letters of credit to the supplier while they had agreed to send them. According issue 1 is answered in the affirmative.

Issue Two: Whether the plaintiff is indebted to the defendant/ counterclaimant.

The defendant counter claimed against the defendant seeking the recovery of UGX 127,308,931/= being the principle and accrued interest of a loan facility.

The plaintiff disputed the claim in the counter claim stating that it emanates from a doctored loan statement which does not reflect the payments that were made to reduce the indebtedness.

The plaintiff does not deny having borrowed money to clear the goods at Mombasa but she disputes the amount of the money she owes the defendant.

The principle of law is that special damages must be claimed specifically and proved strictly. Lord Macnaghten in **Bolag Vs Hutchson**.

[1950] A.C. 515 at page 525 laid down what we accept as the correct statement of the law that special damages are:-such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character and, therefore, they must be claimed specially and proved strictly.

The question then is whether the special damages of UGX 127,308,931/= were specifically pleaded and proved.

Paragraph 3 of the counter claim made the claim for the special damages but strictly speaking the particulars were not given. But even if it is accepted that the way those damages were pleaded met the requirements of pleading, were they strictly proved?

PW1 stated that they paid UGX 30,000,000/= and that reduces the indebtedness to UGX 80,000,00/= The plaintiff adduced an internal transfer form [PEX 42] that shows a loan payment of USD 11,606.48 on 11th March 2013. Indeed the bank statements show the transfer of UGX 30,340,689/= on the 11th March 2013. This therefore means that the plaintiff paid
5 UGX 30,000,000/= of the loan. There is no evidence of further payments.

The counter claimant however made a total claim of UGX 127,308,931/= with no deduction of the UGX 30,000,000/=. It is hard for this court to tell which sum is a claim of interest and which one is a principle claim. It appears to me that the only proved claim is the arrear of UGX 80,000,000/=.

10 Accordingly issue is answered in the affirmative.

Remedies

Damages, generally, are that sum of money which will put the party who has been injured, or who had suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting compensation or reparation. (See Lord
15 Blackburn in *Livingstone Vs Rawyards Coal Co. (1850) 5 App. Cas. 25* at page 39).

Asquith, CJ. in *Victoria Laundry Vs Newman [1949] 2 K.B. 528* at p. 539 said damages are intended to put the plaintiff "... in the same position, as far as money can do so, as if his rights had been observed."

If the defendant had sent the letters of credit like they had promised to, there would not have
20 been delays and the goods would have been cleared sooner. Therefore because of the defendant's failure to send the letters of credit, the plaintiff suffered loss.

The plaintiff claimed special damages under the following heads;

In addition he tendered in evidence the exhibits appearing against each claim. The exhibits were all unchallenged by the defendant.

- 25 a. That because of the defendants delay and ultimate refusal to send the letters of credit, the plaintiff paid demurrage costs under the following heads;
- Sums amounting to Ksh 152,470/= to Kenya Revenue Authority; The plaintiff attached receipts and invoices from Kenya Revenue Authority [PEX 50] proving the payment of demurrage expenses to the total sum Ksh 152,479/=.

- Sums amounting to USD 5, 356 to Gulf Badr Shipping Company Limited. The plaintiff attached receipts proving payment of demurrage to Gulf Badr Shipping Company. [PEX 52].
 - Sums amounting to Ksh 1,328656.42 to Kenya Ports Authority, the plaintiff attached receipts proving payment of demurrage to Kenya Ports Authority. [PEX 51].
 - Storage fees paid to Kenya Ports Authority amounting to Ksh 3,420. [PEX 51].
- b. Value of the container auctioned by Kenya Ports Authority as unclaimed goods USD 38,965. (no supporting document]
 - c. Loss of the profit on the contract USD 87,467.29 [PEX 59]
 - d. Money recalled by UNRA due to non-delivery of one of the containers USD 53,313.9. [PEX 13]
 - e. KCB charges on the purported preparation of letters of credit amounting to USD 3,031.13

15 Of the above claims it is only the monies paid to Kenya Revenue Authority, Gul Badr Shipping Company and KCB charges which were specifically claimed. Since i have found they were proved, then the plaintiff is entitled to the sums proved. The claims for the value of the container and goods auctioned by Kenya Port Authority, loss of profit, money recalled by UNRA are accordingly disallowed.

20 The plaintiff also sought an award of general and exemplary damages. It is trite that general damages are such as the law will presume to be the natural consequence of the defendants act. On the other hand a claim for exemplary damages must be specifically pleaded together with the facts relied on. In most instances they are awarded where there has been oppressive or arbitrary action by servants of the defendant.

25 Taking the facts of this case into consideration, i am persuaded that the plaintiff deserves an award of general damages but does not deserve an award of exemplarily damages. I accordingly award general damages of UGX 100,000,000/= (Uganda Shillings One Hundred Million Only) to the plaintiff. The plaintiff will get costs of the suit.

30 As earlier found under issue two the counter-claim succeeds in part and the counter-claimant/defendant is awarded a sum of UGX 80,000,000/= (Uganda Shillings Eighty Million Only) the counterclaimant/defendant will get costs of the counterclaim.

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

1. Special damages of Ksh. 1481,126 and USD 8387,13.
2. General damages of UGX 100,000,000/=.
3. Interest on 1 above at rate of 13% p.a on Ksh award and 2% p.a on USD award from date of filing the suit till payment in full.
- 5 4. Interest of 20% p/a on 2 above from date of judgment till payment in full.
5. Costs of the suit.

Further; Judgment is entered for the counter claimant/defendant against the counter defendant/plaintiff in the following terms.

1. Payment of UGX 80,000,000/=.
- 10 2. Interest of 20% p.a on above sum from date of filling the suit till payment in full.
3. Costs of the counterclaim.

I so order

15 **B. Kainamura**
Judge
30.08.2018