THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT No. 0547 OF 2017

5 **DFCU BANK LTD ………………………………………………………………… PLAINTIFF**

VERSUS

JOHN MAGEZI ………………………………………………………………… DEFENDANT

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Before: Hon Justice Stephen Mubiru.

JUDGMENT

15 The plaintiff sued the defendant seeking recovery of shs. 54,833,498/= interest thereon at the commercial rate and the costs of the suit. The plaintiff's claim is that the defendant obtained two credit facilities from the plaintiff; one during October, 2013 by way of a commercial loan of shs. 120,000,000/= and the other during May, 2014 by way of an overdraft in the sum of shs. 30,000,000/= Both facilities were secured by the defendant's land comprised in Kibuga Block 26 20 Plot 640 at Namirembe, at Mengo.

By an arrangement between the defendant and Finance Bank Trust, the latter was assigned the outstanding amount on the commercial loan but not the overdraft. This was after Finance Bank Trust had sought information from plaintiff ascertaining the defendant's total outstanding balance 25 on the loan facilities extended to hi. The plaintiff inadvertently omitted to include the amount outstanding on the overdraft and advised Finance Bank Trust that the total outstanding loan balance as of December 17th 2014 was shs. 160,268,881/=

By a letter dated 15th December 2014, the defendant requested the Plaintiff to state the total 30 outstanding amount on credit obtained by the defendant from the plaintiff, and its response was that the balance as at December 17th 2014 was shs. 160,268,881/=. The On the 23rd December 2014 Finance Trust Bank fully paid up the said amount as requested by the Plaintiff. The plaintiff then requested the defendant to pay sum of shs. 2,000,000/= as additional interest, before it could

discharge the Certificate of Title. The defendant paid the said charges on 24th December, 2014 whereupon the Plaintiff handed to Finance Trust Bank the Certificate of Title for the Land as security and the Mortgage on the land was discharged by the plaintiff in favour of the defendant. Later the plaintiff claimed from the defendant a sum of shs 54,833,498/= being the overdraft facility of shs. 30,000,000/= advanced to the Plaintiff together with interest and costs. The defendant protested the claim, hence this suit.

In his written statement of defence, the defendant refuted the claim. When asked by Finance Trust Bank to state the defendant's total outstanding amount on credit obtained by the defendant, the plaintiff specified the amount as shs. 160,268,881/= When Finance Trust Bank fully paid up the said amount on 23rd December, 2014 the defendant ceased to be indebted to the plaintiff. This was fortified by the plaintiff's hand over of the defendant's title deed on 13th February, 2015 free from all encumbrances. The plaintiff is thus estopped form claiming any alleged outstanding balances.

Two issues were agreed upon by the parties at the scheduling conference, namely;

1. Whether the Defendant is indebted to the Plaintiff in the sum of shs. 54,833,498/=
2. What remedies are available to the parties?

1st issue; Whether the Defendant is indebted to the Plaintiff in the sum of shs. 54,833,498/=

It is not disputed that the plaintiff extended to the defendant an overdraft facility in the sum of shs. 30,000,000/= Therefore, this for the defendant seems to be a case of estoppel or nothing. According to section 114 of *The Evidence Act*, when one person has, by his or her declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he or she nor his or her representative shall be allowed, in any suit or proceeding between himself or herself and that person or his or her representative, to deny the truth of that thing. Estoppel by representation arises when a party (representor) makes a representation of fact about an existing state of affairs to the other party (representee) and induces the representee to accept that state of affairs as true such that it relies on that representation to its detriment.

The doctrine of promissory estoppel can be used as a "shield" to estop one party from: (a) exercising a particular contractual right, or exercising it in a particular way (so that they are bound to act consistently with the representation that had induced the representee to adopt the assumption); or (b) denying that there is a particular term of the contract (e.g. because the Parol Evidence Rule excludes it by operation of the law of contract); or (c) perhaps even denying that an enforceable contract exists altogether (e.g., because legal consideration or formality requirements were not satisfied when parties assumed, they had been).

Estoppel requires proof of: (i) the existence or anticipation of some form of legal relationship between the parties; (ii) a representation or promise about a past, present or future state of affairs made by one party. The representation must be clear, definite, unambiguous and unequivocal; (iii) reliance by the other party on the promise or representation. The promisor is affected only by reliance which he does or should foresee. The promisor making the representation must have had reason to expect reliance on the representation, while the party relying on the promise assumes the other will not enforce their strict legal rights under a contract; (iv) reasonableness; the party relying on the promise must have acted reasonably by adopting and acting upon the assumption in the way that he/she did (v) a detriment; the party relying on the promise must have suffered some sort of detriment or a detrimental change of position, i.e. the party must be in a worse position for having relied on the promise; and (vi) unconscionability; it must be shown that, in the circumstances, it would be unfair or inequitable to allow them to do so

i. <u>Existence or anticipation of some form of legal relationship between the parties</u>.

That there was a contractual relationship between the plaintiff as a banker and the defendant as customer is not disputed. This is evidenced by exhibit P. Ex. 2 by which the plaintiff offered the defendant an overdraft facility of shs. 30,000,000/=

ii. A a clear, definite, and unambiguous promise or representation was made.

The representation may be an express statement or implied by spoken words, by written words, or by conduct. However, the representation must be sufficiently clear and unambiguous. Silence can even give rise to an estoppel by representation if the "representor" knows that the "representee" has adopted a false assumption and fails to correct the mistake in circumstances where it would be unconscionable not to do so.

In the instant case, there was a representation made by the plaintiff to Finance Trust Bank by its letter dated 15th December 2014 (Exhibit P. Ex.1), when it requested the plaintiff for the outstanding balance on the total loan facilities advanced to the defendant as it wished to retire the defendants outstanding facilities held with the Plaintiff. The Plaintiff in its response by a letter dated 17th December 2014 advised that the total outstanding loan balance as at the date of the letter was shs. 160,268,881/=. It also made a representation that once the said sum is paid, the title deed would be released and the mortgage discharged. The plaintiff further made a representation by conduct as the Plaintiff also proceeded to hand over the title deed to Finance Trust Bank and released the defendant from the Mortgage (exhibit D. Ex.5 and D. Ex.6), after that sum had been paid by Finance Trust Bank.

By the expression "intentionally caused or permitted another person to believe a thing to be true," section 114 of *The Evidence Act* must be understood to mean that the party represents that to be true which he or she knows to be untrue. The implication is that estoppel will not arise where the representation or conduct of the plaintiff against whom the estoppel is being sought is due to ignorance founded upon an innocent mistake. The representation relied on must have been made with full knowledge of the facts by the party to be estopped, unless his or her ignorance was the result of gross negligence or otherwise involved gross culpability. Where the party, although ignorant or mistaken as to the real facts, was in such a position that he or she ought to have known them, the knowledge would be imputed to him or her. It is enough that the party making the representation means his or her representation to be acted upon, and that it is acted upon

accordingly. Forgetfulness exonerates the plaintiff from any moral fraud in the premises, but not from the legal consequences of his or her conduct.

Whatever a person's real intention may be, if he or she so conducts himself or herself that a
5 reasonable man would take the representation to be true, and believe that it was meant that he or she should act upon it, and did act upon it as true, the party making the representation would be precluded from contesting its truth. The same applies to conduct by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth (see *Freeman v. Cooke (1848) 2 Ex 654*).

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Where a duty is cast upon a person, by the usages of business or otherwise, to disclose the truth and he neglects or omits to discharge that duty, whereby another is misled in the very transaction to which the duty relates, he will not be permitted, to the injury of the one misled, to question the construction rationally placed by the latter upon his conduct (see *Leather Ming Nat. Bk. v. Morgan*
15 *(1885), 117 U. S. 96*). In the instant case, there was a contractual duty on the part of the plaintiff toward the defendant to give him correct information. The plaintiff took the responsibility of making a positive statement, upon the faith of which he knew the defendant was going to deal for valuable consideration. Conduct by negligence or omission, where there is a legal or contractual duty cast upon a person, by usage of trade or otherwise, to disclose the truth, will give rise to
20 estoppel. Want of reasonable care to see that statements, made under such circumstances, are true, should give rise to estoppel.

iii. The representation related to an existing state of affairs.

25 Representations about future conduct will not suffice. Generally, the representation must relate to a matter of fact or a matter of mixed fact and law. If the representor makes a representation as to its legal opinion, this will only prevent the representor from denying that it held the opinion, and not from denying that the opinion is correct. In the instant case, be exhibit P. Ex.1 dated 17th December, 2014 the plaintiff made a representation stating that the "total outstanding loan balance
30 of Magaezi John as at December, 17, 2014 is UGX 160,268,881/=" This statement related to related to an existing state of affairs.

iv. <u>The promisor must have had reason to expect reliance on the promise and the representee must have acted in reliance on the representation</u>.

5 The representation was addressed to Finance Trust Bank and not the defendant. Ordinarily only the promisee and not third persons are entitled to rely on the remedy of promissory estoppel against the promisor. However, if the promisor actually foresees, or has reason to foresee, action by a third person in reliance on the promise, it may be quite unjust to refuse to perform the promise. The general test for third-party reliance is the contracting parties' intention that the third party benefit 10 substantially from the promised performance. If a promise is made to one party for the benefit of another, it is often foreseeable that the beneficiary will rely on the promise. Reliance on the promise in such cases rests on the same basis and depends on the same factors as in cases of reliance by the promisee.

15 In the letter of inquiry, exhibit D. Ex.1 dated 15th December, 2014 Finance Trust Bank had indicated that it had "approved facilities for the above client [John Magezi] and hereby wish to retire his outstanding facilities held with you." It was thus clear to the plaintiff that the information sought from the plaintiff was for the ultimate benefit of the defendant. Although the defendant was not privy to the agreement between the plaintiff and Finance Trust, the plaintiff actually foresaw, 20 or has reason to foresee, action by the defendant in reliance on the representation.

That aside, the representation must have induced the representee to adopt a different course of action than it otherwise would have. It must be shown that it was reasonable in the circumstances for the representee to act upon the representation. The plaintiff's conduct must have been of such 25 a nature as to induce a normal person in the circumstances to act as the representee acted. It is enough if it was reasonable, as a matter of business, for the defendant to do what he did as a result of his belief in the plaintiff's statement. The representee must have held an honest belief in the truth of the statement.

30 The notion of reasonableness was expressly referred to in the case of *Low v. Bouverie [1891] 3 Ch 82*. In that case, the plaintiff proposed lending money to a borrower on the security of the

borrower's beneficial life interest in certain property. The plaintiff's solicitors wrote to the defendant, who was one of the trustees of the property, to inquire whether the borrower had mortgaged or parted with his life interest in the property. In his reply, the defendant disclosed the existence of two encumbrances on the property, but failed to disclose the existence of several others of which he had received notice, but forgotten. On the faith of that assurance, the plaintiff entered into the proposed transaction. The court held that the language on which estoppel is founded must be "precise and unambiguous." It need not be open to only one construction, but must be "such as will be reasonably understood in a particular sense by the person to whom it is addressed." It is essential to show that the statement was of such a nature that it would have misled any reasonable man, and that the defendant was in fact misled by it. The representee failed to discharge that onus since the "only fair meaning" which could be attributed to the representor's statements was that the encumbrances disclosed were all the representor was aware of at the time of writing.

In commercial transactions, the parties always have to act according to what is reasonable in view of the particular nature of their transaction and the circumstances involved, in particular the economic interests and expectations of the parties. In the instant case, the standard applicable is that of a reasonable borrower in assessing the basis of his belief in the correctness of plaintiff's statement. A reasonable borrower in the circumstances of the defendant would be expected to keep track of his indebtedness to the plaintiff on the two portfolios and to realise that the plaintiff was labouring under a mistake when it omitted a sum of shs. 30,000,000/= representing the overdraft.

By arguing that the plaintiff is now sopped from claiming that sum, the defendant is in a way relying on waiver by conduct. The question that arises in a matter such as the present, where there has not been an express waiver, but where reliance is instead placed on the conduct or spoken word of the party concerned, is whether the outward manifestations of what is relied upon as the expression of an intention to waive, are more consistent, on a reasonable view of it, with an intention to waive, than with any other theory.

Waiver is an intentional relinquishment of a known right or advantage, benefit, claim or privilege which except for such waiver the party would have enjoyed. Under the general contract law, a

party to a written contract can waive a provision of that contract by conduct or by oral representation, for example accepting late payments may constitute waiver of time provisions. The essential element of waiver is that there must be a voluntary and intentional relinquishment of a right. Waiver sometimes partakes of the nature of an election. Waiver is consensual in nature. It implies a meeting of the minds. It is a matter of mutual intention. The doctrine does not depend on misrepresentation.

A party seeking to rely on waiver does not need to show that they relied on the other party's conduct, or that they suffered any particular detriment; the conduct itself is sufficient. Waiver by conduct requires unequivocal acts of conduct evidencing an intent to waive express contract provisions. Waiver is the intentional relinquishment of a known right. It is necessary that the person against whom waiver is claimed intended to relinquish the right, advantage, or benefit and his or her action must be inconsistent with any other intent than to waive it. To constitute a waiver, other than by express agreement, there must be unequivocal acts or conduct evincing an intent to waive. Intent cannot be inferred from doubtful or ambiguous factors. An implied waiver requires unequivocal conduct which is inconsistent with any intent other than to relinquish a known right.

A party asserting that its performance is excused on the ground of waiver has the burden of proving that the other party intended to give up its contractual right to that performance after knowing all of the relevant facts. By reason of the fact that no-one is presumed to waive his rights, the acts relied upon as constituting a waiver of the provisions of a contract must be inconsistent with an intention to insist upon enforcing such provisions. If a party does not expressly waive a right, and waiver is to be inferred, the conduct relied upon must be such as are more consistent, on a reasonable view thereof, with an intention to waive the right in question. The conduct from which waiver is to be inferred, must be unequivocal, that is to say, consistent with no other hypotheses. The outward manifestations of intention must accordingly be adjudged from the perspective of a reasonable person in the position of the other party. The court must determine whether those statements and actions amounted to an understanding between the parties that the condition would no longer be enforceable. A party may waive a condition after a breach by failing to assert its remedies for that breach.

In the instant case, the conduct of the plaintiff is more consistent with an error of omission than waiver. By February, 2015 (exhibit P. Ex.3) the plaintiff had begun to demand for repayment of that overdraft which had expired during the year, 2014.

5 On the other hand, knowledge as an ingredient of the required intention must necessarily also include knowledge of the existence of a choice between, what are alternative and inconsistent rights. This therefore means that a mistake, whether in fact or in law, may be excusable, provided it is just. That it was an error of omission is the more natural, or plausible, conclusion from amongst several conceivable ones when measured against the probabilities. The defendant therefore has 10 neither proved reasonable reliance nor waiver.

v. <u>The representee has suffered loss as a result of its reliance on the representation; a consequent detrimental change of position.</u>

15 The authorities are not in accord on the precise meaning of the detrimental effect. Some courts have ruled that it is sufficient that the reliance be detrimental in the consideration sense; others have insisted that the reliance be injurious to the representee. Logically, injury or loss is required; without injury or loss, there would be no injustice in not enforcing the representation. The injury or loss does not need to be a monetary one, but it must be a real loss. At 20 the least, there must be a substantial change of circumstances which was not within the contemplation of the representee.

The Defendant submits that it suffered detriment by paying the outstanding sum through Finance Trust Bank and further interest of shs. 2,000,000/= to the Plaintiff following which the Plaintiff 25 released the Title to the Defendant through its Financier and discharged the Mortgage in favour of the Defendant. Being required to pay back money that was borrowed is not a substantial change of circumstances, and more importantly it was within the contemplation of the defendant at the time the overdraft was advanced.

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vi. <u>Injustice can be avoided only by enforcement of the promise</u>.

Even if a promise has induced foreseeable, substantial and reasonable reliance, the final question must still be answered. Will injustice result from its non-enforcement? While the threatened injustice to the representee is equity's first consideration, it is proper to consider the possible harshness to the promisor by enforcement of his promise.

The whole doctrine of estoppel is a creature of equity and governed by equitable principles. It was educed to prevent the unconscientious and inequitable assertion of rights or enforcement of claims which might have existed or been enforceable, had not the conduct of a party, including his or her spoken and written words, his or her positive acts and his or her silence or negative omission to do anything, rendered it inequitable and unconscionable to allow the rights or claims to be asserted or enforced.

Estoppel is an equitable doctrine that gives the courts discretion in its application; the court will enforce a promise only to avoid injustice. The remedies available to someone who has relied on a promise to their detriment are equitable. With the equitable underpinnings of good faith, conscience, honesty, and equity, in promissory estoppel, the court will enforce a promise only to avoid injustice. The court will not necessarily force the party to honour its promise, unless this is the only way to do justice. Failing to fulfil a promise does not of itself amount to unconscionable conduct, nor does mere reliance on a promise to a person's detriment. Something more is really needed such as encouragement by the party that the promise will actually be performed. Consequently, the party to whom the representation was made must have been without knowledge, or the means of knowledge of the real facts.

A Court of equity considers that, when the defendant saw the mistake into which the plaintiff had fallen, it was his duty to be active and bring it to the attention of the plaintiff. It would be dishonest of the defendant to remain wilfully passive in order afterwards to profit by the mistake which he might have prevented.

Secondly, it is noteworthy that the defendant opted not to testify in his defence. One of the general rules of evidence, of universal application, is, that the best evidence of disputed facts must be produced of which the nature of the case will admit. It is the reason why parties are expected to call all witnesses necessary to unfold the narrative of events unless there is a good reason not to do so. A decision of a party not to call a particular person as a witness whose evidence is material, particularly and uniquely available to that party, where there is no reasonable explanation for the failure to testify, will attract an adverse inference that the witness did not testify because the testimony would have been adverse to the interests of the party who, otherwise, would have been expected to call the witness (see *Talituka Feibe L. v. Abdu Nakendo [1979] HCB 275*; *Pushpa d/o Raojibhai M Patel v. The Fleet Transport Company Ltd [1960] 1 EA 1025; Sirley v. Tanganyika Tegry Plastics Ltd [1968] 1 EA 529; Bukenya and others v Uganda [1972] 1 EA 549; Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634* and *APC Lobo and another v. Saleh Salim Dhiyebi and others [1961] 1 EA 223*).

The defendant opted not to testify and explain to the court how his reliance on the representation made in exhibit P. Ex.1 was reasonable considering that he had a duty to pay back the two loans and was expected to have kept track of the outstanding balances thereon, what detriment, if any he suffered as a result of that reliance, and so on. That he opted not to testify otherwise, when he otherwise would have been expected to do so, inevitably attracts an adverse inference that he did not testify because his testimony would have been adverse to his interests. The equity of the case therefore is not in his favour. Hid defence of estoppel has accordingly failed.

2nd issue; What remedies are available to the parties?

The defendant's only defence having been estoppel which has been ruled unavailable, there is no alternative defence pleaded. What is left for the court, since the borrowing is not challenged, is to determine the extent of the defendant's indebtedness, and this depends on the terms of their contract.

When construing the terms of a contract, the courts will try to understand what the parties meant by the words they used and will seek to give effect to that meaning. In the instant case it involved novation when Finance Trust Bank took over part of the debt. Novation is a term of art

which has been judicially defined as an arrangement where a new contract is substituted for an existing contract, either involving the same or different parties, the consideration being the discharge of the old contract (see *Scarf v. Jardine (1882) 7 App Cas 345, 351*). In a novation the original contract is extinguished and is replaced by a new one in which a third party takes up rights and obligations which duplicate those of one of the original parties to the contract. It is possible to have a partial novation of a contract (see *Langston Group Corporation v. Cardiff City Football Club Ltd. [2008] EWHC 535 (Ch*).

In the case at hand, the purported novation of the entire contract between the plaintiff and the defendant did not take effect as the parties intended; they instead extinguished the existing contract and then created two new contracts; one between the defendant, and a new party, Finance Trust Bank (covering shs. 160,268,881/= being the amount outstanding on the commercial loan, which amount is secured by the defendant's title deed) and one between the original parties (the plaintiff and the defendant – covering shs. 30,000,000/= being the amount outstanding on the overdraft of and unsecured. That amount ans interst accruing thereon has remained unpaid since the year 2014.

According to Regulation 6 (2) (c) of *The Financial Institutions (Credit Classification and Provisioning) Regulations, 2005*, a credit facility without a fixed repayment program, such as an overdraft or other forms of open-ended credit, is considered non-performing when interest is due and unpaid for ninety days or more. Interest on a facility so categorised is placed on a non-accrual basis, that is interest due but uncollected should not be accrued as income, but instead should be shown as interest in suspense, until paid in cash by the borrower (see Regulation 9 (1) and (2). This this means that the interest is due to the bank, but it has not received it. The bank has money due as the result of a loan, but tits borrower has not paid on the loan per the agreement for the loan, although it is possible that the interest and loan payments may never be made.

The plaintiff seeks to recover accumulated interest and penalties since the year 2014. It is largely by the plaintiff's negligent omission that this part of the defendant's indebtedness was not cleared by Finance Trust Bank when it should have been cleared on 23rd December, 2014. The plaintiff cannot be seen to benefit from its own wrong, even if inadvertent, by recovering accumulated interest. That part of their claim fails.

Since the plaintiff has proved the defendant's indebtedness in the principal sum of the overdraft facility by reason of the defendant's failure to contest it, the plaintiff is only entitled to recover the principal amount at a commercial rate of interest from the date of judgment until payment in full. In the final result, judgment is entered for the plaintiff against the defendant, as follows;

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a) An award of Shs. 30,000,000/= as the principal sum.
b) Interest thereon at the rate of 20% per annum from the date of this judgment until payment in full.
c) The costs of the suit.

10 Dated at Kampala this 9th day of March, 2021

……Stephen Mubiru…………...
Stephen Mubiru
Judge,
9th March, 2021.

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