THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT No. 0338 OF 2019

DR. WARREN NAAMARA …… PLAINTIFF

VERSUS

JAMES DIERS MWANGUSYA …… DEFENDANT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

a. The plaintiff's claim;

The Plaintiffs sued the defendant seeking recovery of US $ 256,066, British pounds 9,800 and shs. 160,000,000/= that he lent to the defendant, general damages for breach of contract, interest and cots. His claim is that by an oral agreement made during or around the year 2004, the defendant borrowed the said sums of money from the plaintiff for diverse purposes including; completion of his Masters and doctorate degrees, and for investment in his assets financing and project planning training business. The loans were extended to the defendant based on false representations of having started the business whereas not. The defendant instead spent the money on luxuries and thereby failed to pay back.

b. The defence to the claim;

In his written statement of defence, the defendant denied the plaintiff's claim. He contended the claim was based on illegal contracts of money lending or in the alternative were time barred or in the further alternative is premature, hence unenforceable. The plaintiff agreed with the defendant and his wife, to invest the said sums of money in their business, known as "Cashbox," as a joint venture.

c. The issues to be decided;

The defendant never turned up in court on the day the suit was fixed for hearing. The trial proceeded *ex-parte* and the following were adopted as the issues to be decided by court, since the first two issues in the joint memorandum of scheduling cannot be considered in absence of evidence from the defendant.

1. Whether the plaintiff lent the defendant the sum of US $ 256,066, £ 9,800 and shs. 160,000,000/= as claimed.
2. Whether the plaintiff is entitled to the remedies sought.

d. The submissions of counsel for the plaintiff;

Counsel for the plaintiff M/s Kasirye, Byaruhanga and Co. Advocates, submitted that the purpose for which the plaintiff lent the money claimed to the defendant was to meet; fees for the defendant's post-graduate studies, investment in the defendant's "cashbox" money lending business, loan asset financing for the defendant's "Kampala Project Planning and Management Centre," and the defendant's Gayaza Farm project. Although the £ 9,800 claimed was lent to the defendant during the year, 2004 the defendant acknowledged that debt by an email dated 11th May, 2018 thereby reviving the cause of action for its recovery. The agreement between the plaintiff and the defendant was partly oral, partly in writing and parts of it can be deduced from the parties' conduct. Requests for the funds were made orally, disbursements were made in writing (as shown by exhibits P. Ex.6, P. Ex.7 and P. Ex.8), promises to repay were partly in writing and partly deduced from conduct (as shown by exhibits P. Ex.1 to P. Ex.8). Tis evidence is corroborated by the findings of P.W.1 who audited the available documentation. The plaintiff is therefore entitled to recovery of the funds so lent. The plaintiff is as well entitled to general damages as a result of the emotional pain and inconvenience occasioned by the defendant's conduct. This was evident during the plaintiff's testimony when he broke down on several occasions having been overcome by the emotional pain caused to him by the defendant. The plaintiff is as well entitled to interest and the costs of the suit.

e. The decision;

1st issue; whether the plaintiff lent the defendant the sum of US $ 256,066, £ 9,800 and shs. 160,000,000/= as claimed.

The plaintiff testified as P.W.2 and stated that the defendant is son of his brother, the eldest child in their big family and they as a family accorded him that leadership position, nurturing him to be a leader. During or around the year 2004, the plaintiff agreed to extend a loan of £ 9,800 to the defendant, to help him finance his postgraduate studies in the United Kingdom. He was unable t repay the loan after completion of his studies but instead requested for another loan to help him set up set up a business. On divers dates thereafter he lent him a total of US $ 256,066 and shs. 160,000,000/= The defendant instead used the money living a life of luxury with his wife and to-date has never repaid it.

The plaintiff assumed the defendant would take a leadership position before he passes on just like the plaintiff's brother had passed on the previous year. The plaintiff believed the defendant would hold the mantle. The plaintiff's dealings with and support to the defendant was all intended to empower the defendant. He had looked after him, paid his fees in Mbarara University, and also in Bradford University for his post-graduate studies. Had he not supported him, the plaintiff would not have set a good example for the rest of his nephews and nieces. The plaintiff supported the defendant for his wedding in London. He paid 12 cows odd, as bridal wealth from his herd while he was away. He did not withhold any love or support. Until the day he testified in court, the plaintiff did not have any reason not to trust the defendant. The depth of that relationship is reflected in the absence of proper contract documents. The plaintiff had all the trust in the defendant, standing by him throughout his childhood, university education, and marriage; he had no reason to mistrust the defendant. The defendant abused the plaintiff's love and magnanimity. The defendant turned to be an extremely selfish individual, a glutton of immense proportion. The defendant did not share the plaintiff's vision of a stronger supportive family in times of trouble. The defendant had an absurd view of society revolving around himself and his wife. Nobody should suffer the anguish the plaintiff suffered. No child should emulate this example. No parent should ever be subjected to what the plaintiff has been subjected to; he had taken a beating.

In support of the plaintiff's case, P.W.1 a Public Certified Accountant of twenty four years' standing, Mr John Walabyeki testified that upon the instructions of the Kampala Metropolitan Police, he was required to determine how funds that the plaintiff had advanced to the defendant had been applied to two investments including the "Kampala Project Planning and Management Centre" and an entity called "Cash Box." He produced a forensic audit report which he introduced in evidence as exhibit P. Ex.9. The methodology he adopted is outlined at page 35 of the report; obtaining the facts of the complaint at a meeting held at the Central Police Station, he obtained files from the police that included financial information of the two firms, he prepared an inventory of the items in the box provided by the police and used the information to ascertain the receipt and disbursements of funds by the plaintiff and defendant respectively.

Together with his team, they examined the financial information of the two firms. This formed the basis of this report at page 28. They conducted interviews with the plaintiff and the defendant at the police station during that meeting. The summary of the finding is at page 32 of the report. At page 55 is an appendix showing details of the plaintiff's statement and the transactions. It has dates of each transaction. It was wired or EFT from the account of the plaintiff to that of the defendant. They determined that the plaintiff had transferred funds to the defendant. They were disbursed on re-payment terms. They were loans based on the information they found. They did not find evidence of repayment by the defendant to the plaintiff directly from him or any of the two firms. This was based on several letters which they included as appendices to the report, e.g. at page 50 of the report. They also found that the two firms did not maintain proper financial documents and it was not possible to establish what the funds had been used for. They determined that US $ 241,066 and shs. 160,000,000/= had been disbursed to the defendant on various dates.

In all civil litigation, the burden of proof requires the plaintiff, who is the creditor, to prove to court on a balance of probability, the plaintiff's entitlement to the relief being sought. The plaintiff must prove each element of its claim, or cause of action, in order to recover. In other words, the initial burden of proof is on the plaintiff to show the court why the defendant / debtor owes the money claimed. Generally, a plaintiff must show: (i) the existence of a contract and its essential terms; ii) a breach of a duty imposed by the contract; and (iii) resultant damages.

According to section 10 (5) of *The Contracts Act, 7 of 2010*, a contract the subject matter of which exceeds twenty five currency points (500,000/=) must be in writing. This requirement is satisfied by any signed writing that; (i) reasonably identifies the subject matter of the contract; (ii) is sufficient to indicate that a contract exists; and (iii) states with reasonable certainty the material terms of the contract. For a contract to come into existence, there must be an offer made by one party which is, in turn, is accepted by another party. An offer is a promise to provide something specific if the other party agrees to do something specific in return. The acceptance must be stated either by words spoken or written or by conduct. Either words or conduct constitute acceptance of an offer if it occurs in accordance with and in response to the specific terms of the offer. A contract may be partly in writing and partly oral.

Multiple writings relating to each other can be combined to show that a single contract exists to satisfy this requirement. While this provision is designed to avoid fraudulent enforcement of contracts that never took place, that the contract was carried out can also be powerful confirmation of the agreement. Therefore in a contract for the provision of material and services, delivery of the material and services and acceptance thereof by the other party is a sufficient substitute for writing. The agreement is enforceable to the extent of the material and services delivered and accepted. In other words, performance renders an oral contract for material and services enforceable, but only to the extent of the delivery and performance by way of services rendered. In considering whether these requirements are met, the court should focus on substance rather than form and consider how a reasonable person in the position of the parties would have understood the documents exchanged, given their terms and the context in which they were written. When interpreting the contract the court should be mindful of the fact that it is not the function of the court to improve the parties' bargain (see *Wood v. Capita Insurance Services Ltd, [2017] 2 WLR 1095; [2017] AC 1173; [2017] 4 All ER 615*).

In the instant case, the plaintiff has adduced proof of transfer of funds from his bank account to that of the defendant (exhibits P. Ex.6, P. Ex.7 and P. Ex.8). He has also adduced evidence of acknowledgement of receipt of the funds by the defendant (exhibits P. Ex.1, P. Ex.2 P. Ex.3, P. Ex.4 and P. Ex.5). As part of the acknowledgements, the defendant expressly stated the purpose for which the funds had en received, i.e. investment in Cashbox money lending business and as a

loan for asset financing. Although the plaintiff claimed this was the plaintiff's contribution towards a joint business, I have not found evidence of an agreement for undertaking a business in common. In the email of 6th February, 2019 the defendant unequivocally acknowledges the money as "funds owed" to the plaintiff. Therefore I find that there is sufficient evidence that proves, on a balance of probabilities, the existence of loan agreement between the plaintiff and the defendant.

According to section 84 (1) (a) of *The Tier 4 Microfinance Institutions and Money Lenders Act, 18 of 2016* it is an offence to carry on business as a moneylender without a money lending licence. However, not every transaction of money lending is prohibited. It is trite that whether a person carries on business of a money lender depends on the facts of each case (see *Litchfield v. Dreyfus [1906] 1 KB 584*). The words "carries on business" implies a repetition of acts, and whether one isolated transaction carried amounts to carrying on business, within the meaning of the statute, must depend on the particulars or circumstances attending the transaction (see *Kirkwood v. Gadd [1910] AC 422*). Although the word "business" may often denote a degree of repetition and continuity, it need not always do so (see *Kenny v. Conroy and another [1999] 1 WLR 1340*). A court need only first see whether at the time of the loan, the party's business was that of moneylender. If not, the court then investigates if the person held themselves out as carrying on such a business. A person who makes a business of lending money is not any the less a money-lender because he carries on some other business as well on a much larger scale (see *North Central Wagon Finance Co. Ltd v. Brailsford [l962] 1 All E.R. 502 at 508B*).

The Act was intended to apply only to persons who are really carrying on the business of money-lending as a business, not to persons who lend money as an incident of another business or to a few old friends by the way of friendship, For example in *Litchfield v. Dreyfus [l906] 1 KB 584* an art dealer occasionally advanced money to friends in the trade. Farwell J. said at 589; -

> Not every man who lends money at interest carries on the business of money-lending. Speaking generally, a man who carries on a money-lending business is one who is ready and willing to lend to all and sundry, provided that they are from his point of view eligible. I do not of course mean that a money-lender can evade the Act by limiting his clientele to those whom he chooses to designate as "friends" or otherwise; it is a question of fact in each case.

It is therefore not enough merely to show that the plaintiff had on several occasions lent money at remunerative rates of interest, there must be a certain degree of system and continuity about the transactions (see *Newton v. Pyke [l908] 25 TLR 127*). There has to be some repetition and some regularity in the pattern to establish the carrying on of a business. To prove that the plaintiff carried on such a business at all, the defendant had to show that the plaintiff at the very least had made several transactions of loans at interest to others, over a relatively short period. The defendant did not adduce such evidence.

I find on the facts of this case that all loan transactions were with the defendant based on considerations of natural love and affection existing between uncle and nephew. There is nothing in the transactions that imports the necessary element of system, repetition and continuity necessary to constitute a money-lending business. They are more or less a one-off adventure with the defendant which cannot by themselves constitute a trade or business. The Act is not intended to cast such a wide net as this. I thus find that the contracts did not offend *The Tier 4 Microfinance Institutions and Money Lenders Act, 18 of 2016* and the contract is therefore enforceable.

The onus is on a party to prove a positive assertion and not a negative assertion. It therefore means that, the burden of proof lies upon him who asserts the affirmative of an issue, and not upon him who denies, since from the nature of things he who denies a fact can hardly produce any proof (see *Jovelyn Bamgahare v. Attorney General S.C. C.A. No 28 of 1993* and *Maria Ciabaitaru M'mairanyi and Others v. Blue Shield Insurance Company Limited, 2000 [2005]1 EA 280*). For a debtor to succeed in asserting the defence of payment in full, he or she must introduce evidence which is sufficiently persuasive. It was the testimony of P.W.1 that when he audited the documentation relating to these transactions, he did not finds any evidence of payment. The defendant having failed to meet its burden of proving payment, this issue must be resolved in the plaintiff's favour.

2nd issue; whether the plaintiff is entitled to the remedies sought.

Under section 64 (1) of *The Contracts Act, 2010* where a party to a contract, is in breach, the other party may obtain an order of court requiring the party in breach to specifically perform his or her promise under the contract. The plaintiff having sent an email on 11th May, 2018 acknowledging the indebtedness, this revived the plaintiff's cause of action. According to section 24 (4) (5) of *The Limitation Act*, an acknowledgment of any debt binds the acknowledger ans has the effect of reviving the case of action (see *Tuf foam (U) Ltd v. PTF Partners, H. C. Misc. Application No. 91 0f 2017*; *Jones v. Bellegrove Properties Limited [1949] 2 ALL E.R. 198* and *Dungate v. Dungate [1965] 3 ALL ER 393*). The plaintiff's cause of action having ben revives, he is entitled to the recovery of the sum of US $ 256,066, £ 9,800 and shs. 160,000,000/= as claimed.

The common law does not award general damages for delay in payment of a debt beyond the date when it is contractually due (see *President of India v. La Pintada Compagnia Navigacia SA ('La Pintada') [1985] AC 104*). Under section 26 (2) of *The Civil Procedure Act* where and insofar as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

A Plaintiff is entitled to such rate of interest as would not neglect the prevailing economic value of money, but at the same time one which would insulate him or her against any further economic vagaries and the inflation and depreciation of the currency in the event that the money awarded is not promptly paid when it falls due (see *Mohanlal Kakubhai Radia v. Warid Telecom Ltd, H. C. Civil Suit No. 234 of 2011* and *Kinyera v. The Management Committee of Laroo Boarding Primary School, H. C. Civil Suit No. 099 of 2013*).

Interest can be demanded only by virtue of a contract express or implied or by virtue of the principal sum of money having been wrongfully withheld, and not paid on the day when it ought

to have been paid. Interest falls due when money is wrongfully withheld and not paid on the day on which it ought to have been paid (see *Carmichael v. Caledonian Railway Co. (1870) 8 M (HL) 119*). If a party does not pay a sum when it falls due the aggrieved party is entitled to interest from the time payment is due to the time of payment. The other justification for an award of interest traditionally is that the defendant has kept the plaintiff out of his money, and the defendant has had the use of it himself so he ought to compensate the plaintiff accordingly. An award of interest is compensation and may be regarded either as representing the profit the plaintiff might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation (see *Riches v. Westminster Bank Ltd [1947] 1 All ER 469 at 472*).

Interest is a standard form of compensation for the loss of the use of money. The award should address two of the most basic concepts in finance: the time value of money and the risk of the cash flows at issue. As per the coerced loan theory, the plaintiff was effectively coerced into providing the defendant with a loan at the date of the original breach, and therefore deserves to earn interest on this forced loan at the unsecured borrowing rate. Compensation by way of interest is measured by reference to a party's presumed borrowing rate in the relevant currency because that rate fairly represents the loss of use of that currency (see *Dodika Limited & Others v. United Luck Group Holdings Limited [2020] EWHC 2101 (Comm*). The borrower typically pays interest on a loan at a rate equal to the base rate plus an agreed applicable margin.

The Ministry of Finance noted that foreign currency denominated loans decreased to an industry average of 4.7 per cent in December, 2020 from 5.6 per cent to November, 2020 (see the "*Daily Monitor*" Newspaper of Wednesday 24th March, 2021). The primary goal of an award of interest should be the realistic compensation, in commercial terms, of the plaintiff for loss of the use of money. Interest should not as a general rule be payable at a punitive rate. The general rule should be that entitlement to interest should be neutral as between the parties so that neither benefits from delayed payment. Considering that this rate may be significantly lower than the rates prevailing in the year 2019 when payment fell due, the plaintiff should not be prejudiced by averaging it at 6% per annum on the award of US $ 256,066, £ 9,800 from the date of filing the suit, i.e. 3rd April, 2019 until payment in full.

As regards the award of shs. 160,000,000/= the Ministry of Finance noted that foreign currency denominated loans decreased to an industry average of 17.5 per cent in December, 2020 from 19.6 per cent to November, 2020 (see the "*Daily Monitor*" Newspaper of Wednesday 24th March, 2021). Considering that this rate may be significantly lower than the rates prevailing in the year 2019 when payment fell due, the plaintiff should not be prejudiced by averaging it at 19% per annum from the date of filing the suit, i.e. 3rd April, 2019 until payment in full.

In special circumstances where the loss did not arise from the ordinary course of things, general damages are awarded only for such losses of which the defendant had actual knowledge (see *Hungerfords v. Walker (1989) 171 CLR 125*). In the instant case, the conduct of the defendant cause the plaintiff emotional pain of having to recover the loan against a close relative through litigation, serious inconvenience considering that this was his life's' savings. For that General damages of shs. 8,000,000/= and interest thereon at the rate of 6% per annum from the date of judgment until payment in full.

The general rule under section 27 (2) of *The Civil Procedure Act* is that costs follow the event unless the court, for good reason, otherwise directs. This means that the winning party is to obtain an order for costs to be paid by the other party, unless the court for good cause otherwise directs. I have not found any special reasons that justify a departure from the rule. Therefore in conclusion, judgment is entered for the plaintiff against the defendant, as follows;

a) US $ 256,066, British pounds 9,800 and shs. 160,000,000/= outstanding balance.
b) Interest thereon at the rate of 6% on the US dollar and British pound component of the award and at the rate of 20% per annum on the U shs. Component, all from the date of filing the suit, i.e. 3rd April, 2019 until payment in full.
c) General damages of shs. 8,000,000/= and interest thereon at the rate of 6% per annum from the date of judgment until payment in full.
d) The costs of the suit.

Dated at Kampala this 22nd day of April, 2021

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Stephen Mubiru
Judge,
22nd April, 2021.