

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT No. 0349 OF 2015

5 **BARCLAYS BANK UGANDA LIMITED PLAINTIFF**

VERSUS

ALEX MUSINGUZI DEFENDANT

10 **Before: Hon Justice Stephen Mubiru.**

JUDGMENT

a. The plaintiff's claim;

15 The Plaintiff sued the defendant for recovery of a sum of shs. 73,490,153/= being the amount
outstanding on a loan advanced to the defendant, interest thereon and costs. The plaintiff's claim
is that on or about 16th December, 2013 the defendant took out a loan of shs. 71,000,000/= from
the plaintiff repayable in monthly instalments of shs. 1,742,056/= over a period of seventy two
(72) months. The defendant defaulted on his loan obligations and the amount outstanding as a
20 result thereof is shs. 73,490,153/= which the plaintiff now seeks to recover.

b. The defence to the claim;

In his written statement of defence, the defendant denied the plaintiff's claim. The defendant
25 averred instead that he is not indebted to the plaintiff since he took that loan as a salary loan which
lapsed on 4th April, 2014 when he lost his employment. Instead, on or about 9th January, 2019
without authorisation nor a claim of right, the plaintiff unlawfully deducted a sum of shs.
37,025,188/= which the defendant counterclaims from the plaintiff.

30 c. Reply to the defence.

The shs. 71,000,000/= loan taken out by the defendant was a top-up loan since at the time the
defendant had an outstanding loan of shs. 37,636,788/= That debt was offset from funds disbursed

to the defendant as his top-up loan, in accordance with the terms of that borrowing. The plaintiff prayed that the counterclaim be dismissed.

d. The issues to be decided;

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The following are the issues to be decided by court, namely;

1. Whether the defendant is indebted to the plaintiff in the sum claimed.
2. Whether the plaintiff is indebted to the defendant in the sum counter claimed.
3. What remedies are available to the parties?

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e. The submissions of counsel for the plaintiff;

M/s KSMO Advocates, counsel for the plaintiff submitted that the defendant obtained the shs. 71,000,000/= from the defendant as a top-up loan since he had a pre-existing loan in the sum of shs. 37,636,788/= This transaction is backed by the relevant documentation. The terms of the contract permitted the plaintiff to offset the pre-existing loan against the top up loan. The defendant has not adduced proof of payment of the outstanding amount. Judgment should therefore be entered in favour of the plaintiff and the counterclaim be dismissed.

20 f. The submissions of counsel for the defendants;

Counsel for the defendant did not present any final submissions.

g. The decision;

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1st issue; whether the defendant is indebted to the plaintiff in the sum claimed.

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

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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 (ii) resultant damages.

5 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. The plaintiff relies on a memorandum of understanding dated 22nd October, 2014 (exhibit P. Ex.1). The first three defendants deny having executed the said contract while the 4th defendant claims that it paid in full for all supplies made. It is trite that subject to the provisions of any other law in force, no particular number of witnesses in any case may be required for the proof of any fact (see section 133 of *The*
10 *Evidence Act*). In the instant case, the plaintiff relies on the loan agreement dated 16th December, 2013 (exhibit P. Ex.1). Perusal thereof shows that the defendant borrowed a sum of shs. 71,000,000/= repayable in monthly instalments of shs. 1,742,056/= over a period of 72 months at a rate of interest of 21% per annum.

15 It was the testimony of P.W.1 Mr. Enoth Mweteise that the defendant defaulted on the terms of payment such that he owed the plaintiff a sum of shs. 73,490,153/= as at 29th January, 2015. As proof of this indebtedness, the witness adduced the repayment schedule (exhibit P. Ex.2A) and the bank statement (exhibit P. Ex.2B). Clause 5 (d) of the terms and conditions of the loan (exhibit P. Ex.1) provides as follows;

20 Any statement of the bank in writing concerning any amounts payable under the agreement from time to time including, without limitation, the amount of interest or the amount of each monthly repayment instalment shall in the absence of manifest error be conclusive.

25 Although jurisprudence abounds that, in civil cases, one who claims has the burden of proving it; however the general rule is that a party is not called upon to prove his negative averments, even when they may be necessary to his pleading. It is often impracticable to prove a negative with satisfactory evidence, hence a party should not be required to prove a negative. The two exhibits corroborate the testimony of P.W.1 and I have not found any manifest error in any of them. Where
30 the creditor introduces some evidence of the debt establishing a *prima facie* case, the burden of going forward with the evidence, as distinct from the general burden of proof, shifts to the debtor, who is then under a duty of producing some evidence to show payment.

Consequently, the evidential burden rests on the defendant to prove payment, rather than on the plaintiff to prove non-payment. When the existence of a debt is fully established by the evidence, the burden of proving that it has been extinguished by payment devolves upon the debtor who offers such defence to the claim of the creditor. The debtor has the evidential burden of showing
5 with legal certainty that the obligation has been discharged by payment.

It is a settled rule that once the plaintiff makes out a *prima facie* case in his favour, the evidential burden shifts to the defendant to controvert the plaintiff's *prima facie* case; otherwise, judgment must be entered in favour of the plaintiff. The defendant having failed to meet its burden of proving
10 payment, this issue must be resolved in the plaintiff's favour. The defendant's indebtedness to the plaintiff in the sum of shs. 73,490,153/= has been established on the balance of probabilities.

2nd issue; whether the sum of shs. 37,636,788/= was legally deducted by the plaintiff from the defendant's account.

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Clauses 6 and 7 of the loan agreement dated 16th December, 2013 (exhibit P. Ex.1) permit the plaintiff to offset top-up loans from existing loans. P.W.1. Mr. Enoth Mweteise testified that by execution of those terms and conditions, the defendant authorised the plaintiff to offset top-up loans from existing loans. At the time the defendant obtained the shs. 71,000,000/= he had an
20 outstanding loan of shs. 37,490,153/= due and owing. I find that this evidence is not controverted yet it is not inherently incredible. This issue therefore s answered in the affirmative.

3rd issue; what remedies are available to the parties?

25 A breach of contract is a violation of any of the agreed-upon terms and conditions of a binding contract, and this includes circumstances where an obligation that is stated in the contract is not completed on time. It is a failure, without legal excuse, to perform any promise that forms all or part of the contract. 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
30 perform his or her promise under the contract. For that reason the plaintiff is entitled to recover the amount outstanding, interest thereon since the filing of the suit and the costs of the suit.

In conclusion, judgment is entered for the plaintiff against the defendant, as follows;

- a) shs. 73,490,153/= outstanding balance.
- b) Interest thereon at the rate of 21% per annum from the date of filing the suit, i.e. 4th June, 2015 until payment in full.
- 5 c) The costs of the suit.

Dated at Kampala this 20th day of May, 2021

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Stephen Mubiru
Judge,
10 20th May, 2021.

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