

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA  
(COMMERCIAL DIVISION)  
CIVIL SUIT No. 0873 OF 2020**

5 **STANDARD CHARTERD BANK (U) LIMITED ..... PLAINTIFF**

**VERSUS**

10 **BOB SSEKAMATTE NSEREKO ..... DEFENDANT**

**Before: Hon Justice Stephen Mubiru.**

**JUDGMENT**

15 a. The plaintiff's claim;

The Plaintiff sued the defendant for recovery of a sum of shs. 87,875,236/= being money owing, outstanding and due from the defendant on a loan advanced by the plaintiff to the defendant. The plaintiff's claim is that on or about 23<sup>rd</sup> January, 2018 at the defendant's instance and request, it  
20 advanced the defendant an unsecured loan in the sum of shs. 100,200,000/= at a rate of interest of 18.9% per annum, repayable in monthly instalments within a period of seventy two (72) months. The respondent subsequently defaulted on repayment of the loan and failed to rectify the default despite multiple reminders. The amount outstanding as at 6<sup>th</sup> October, 2018 was shs. 87,875,236/= hence the suit.

25 b. The defence to the claim;

In his written statement of defence, the defendant denied having borrowed an unsecured sum as claimed by the plaintiff. He instead admitted having secured a salary loan of shs. 100,200,000/=  
30 on 23<sup>rd</sup> January, 2018. At the time he obtained the loan, he was an employee of the United Nations Mission in the Democratic Republic of Congo (MONUSCO). For the duration of his said employment, the plaintiff would deduct the monthly instalments from his salary as when they fell due. However, on or about 30<sup>th</sup> June, 2019 the defendant's employment contract came to an end

and was not renewed. During the month of October, 2019 the defendant notified the plaintiff of this development. The defendant therefore is not indebted to the plaintiff.

c. The issues to be decided;

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At the scheduling of the suit, the following issues were framed for the determination of court, namely;

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

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d. The submissions of counsel for the plaintiff;

M/s S and L Advocates, counsel for the plaintiff submitted that on 23<sup>rd</sup> January, 2018 a loan agreement was executed between the parties by virtue of which the defendant borrowed a sum of shs. 100,200,000/= repayable over a period of 72 months at a rate of interest of 19.9% per annum. The defendant began defaulting on his obligations during September, 2019. The defendant has not paid since then and as at 6<sup>th</sup> October, 2020 the balance outstanding was shs. 87,875,236/= The defendant's claim that repayment of the loan was pegged on his continued employment is unfounded. The plaintiff having proved that the amount claimed is owed by the defendant, the court ought to enter judgment in the plaintiff's favour.

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e. The submissions of counsel for the defendants;

When the suit was called for hearing, the defendant and his counsel was not in court. The plaintiff was granted leave to proceed ex-parte whereupon the plaintiff called only on witness and closed its case. Consequently, counsel for the defendant did not present any final submissions.

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f. The decision.

**1<sup>st</sup> issue:** whether the defendant is indebted to the plaintiff in the sum claimed.

5 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)  
10 a breach of a duty imposed by the contract; and (ii) 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. The plaintiff relies on a loan facility agreement dated 23<sup>rd</sup> January, 2018 (exhibit P. Ex.1). Its contents show that the defendant  
15 borrowed a sum of shs. 100,200,000/= repayable over a period of 72 months at a rate of interest of 19.9% per annum. In paragraph 7 of his written statement of defence, the defendant admits having obtained this amount as a salary loan. P.W.1 Nagasha Jackline testified that the defendant defaulted on the loan from 24<sup>th</sup> September, 2019 henceforth. This is corroborated by the bank statement relating to the defendant's loan account (exhibit P. Ex.2). That statement shows that as at 6<sup>th</sup>  
20 October, 2021 the outstanding amount was shs. 87,875,236/=

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  
25 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 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.

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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. In his written statement of defence, the defendant alluded  
10 to the fact that his performance of the contract was frustrated by his loss of employment. In law, a frustrated contract is one which subsequent to its formation, and without fault of either party, is incapable of being performed due to an unforeseen event (or events), resulting in the obligations under the contract being radically different from those contemplated by the parties to the contract.

15 The doctrine of frustration discharges both parties from their contractual obligations where following the formation of the contract, performance of the contractual obligations become either: (i) impossible; or (ii) radically different. At common law, obligations under the contract cease in event of frustration. This includes both primary obligations of the contract, and secondary obligations in relation to breaches, such as damages. Therefore, the general rule is that the loss lies  
20 where it falls.

Frustration will occur when: an unforeseen event occurs after a contract is entered into which is outside the control of the parties, and makes the contract either: physically or commercially impossible or illegal to perform; or transforms performance of the contract into something so  
25 radically different from the intended purpose that it would be unfair to hold the parties to their obligations. The frustrating event should be so fundamental that it strikes to the root of the contract and is entirely beyond what was contemplated by the parties when entering into the contract.

A contract is not frustrated simply because it has become more difficult to perform. For example  
30 in *Davis Contractors Ltd v. Fareham Urban District Council [1956] AC 696*, Davis agreed with the respondents to build 78 houses over eight months for £92,425. The building actually took

twenty-two months, because Davis did not have the required staff or materials. Davis argued the contract was frustrated due to their change in circumstance, i.e. that it was assumed that they would have a certain amount of staff and materials to work with, when in fact they did not. It was held that the contract was not frustrated. The obligations of Davis have become more difficult, but not radically different.

Similarly, an increased expense, no matter how onerous, can never frustrate a contract (see *Tsakiroglou & Co Ltd v. Noblee Thorl GmbH [1962] AC 93*). Where an event results in alteration of the manner of performance or impossibility by one party, there will not be frustration of the contract (see *Blackburn Bobbin Co Ltd v. Allen (TW) & Sons Ltd [1918] 1 KB 540*). The fact that the method for performance contemplated by a contract has been affected, or the burden of performance has been increased, by an event or events occurring without fault, does not amount to frustration unless performance in accordance with the contract has become commercially impossible, that is, impracticable in a legal sense. A contract will therefore not be frustrated where an alternative method of performance is possible, and where there is no fundamental difference between the two methods of performance.

There are a variety of ways in which the obligations under a contract can become impossible or radically different. They are; non-occurrence of an event (where to both parties such event was the foundation of the contract and no other purpose); destruction of subject matter (generally speaking, where the subject matter of a contract has been destroyed due to no fault of either party, the contract will be frustrated); illegality (the general rule is that this will frustrate the contract if the effect on the contract is serious enough. If the effect is minimal and only partial, the doctrine of frustration will not apply); outbreak of war (where both parties have assumed performance will be done in a specific way which is rendered impossible by the outbreak of war, this may amount to frustration); and delay or interruption (temporary impossibility or delay is not by itself a ground for frustration).

However, it may frustrate a contract in two circumstances: where time is “of the essence” or where the length or the extent of the delay amounts to frustration. Delay can lead to the discharge of a contract where the commercial purpose of the contract has been frustrated. In order for a delay to

frustrate a contract, the delay must be so abnormal, in its cause, its effects, or its expected duration, so that it falls outside what the parties could reasonably contemplate at the time of contracting).

5 In his written statement of defence, the defendant averred that at the time he obtained the loan he was employed as a driver with the United Nations Organisation Stabilisation Mission in the Democratic Republic of Congo (MONUSCO). It was secured by his salary and all the initial instalments were deducted from his monthly salary. His contract ended on 29<sup>th</sup> May, 2019 and was never renewed, which fact he brought to the attention of the plaintiff in October, 2019. Form the defendant's perspective, he was discharged of the obligation to pay the loan upon loss of his  
10 employment with MONUSCO.

The defence raised by the defendant is misconceived. The fact that he took out a salary loan cannot support his contention that repayment was by that fact alone intended to be made exclusively from his earnings as salary from that employment. Salary loans are for individuals who are employed,  
15 with a regular salary, pension or any other fixed compensation. Such borrowers are expected to repay their loans through monthly deductions or debit from salary deposits onto personal accounts maintained with the lender, for the loan period. Naturally, only an individual with a salary job is eligible for this loan. This is because the borrower can always pay back at the end of the month immediately the borrower receives his or her salary. A loan of this type is in essence an advance  
20 extended to salaried borrowers against their monthly salary.

An unsecured debt is backed only by the reliability and credit of the borrower. The requirement that the borrower is a salaried employee at the time of taking out the loan is never intended to constitute the salary as security for payment but rather to prove the borrower's creditworthiness  
25 and promise to repay. In the sense that no collateral is required for a salary loan, it is an unsecured debt where if the borrower defaults on this type of debt, the lender must initiate a suit to collect what is owed. Loss of employment by the defendant probably made it more onerous for the defendant to find alternative sources of income for repaying the loan but certainly did not make his performance impossible. It resulted in alteration of the manner of his performance of but not  
30 in frustration of the contract. The defendant did not offer any alternative proof of discharge of his obligations under the contract.

The defendant having failed to meet its burden of proving payment, this issue must be resolved in the plaintiff's favour. The defendant's indebtedness to the plaintiff in the sum of shs. 87,875,236/= has been established on the balance of probabilities.

5 **2<sup>nd</sup> issue;** what remedies are available?

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 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;

- 15 a) Shs. 87,875,236/= outstanding balance.
- b) Interest thereon at the rate of 19% per annum from the date of filing the suit, i.e. 24<sup>th</sup> November, 2020 until payment in full.
- c) The costs of the suit.

20 Dated at Kampala this 20<sup>th</sup> day of May, 2021

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Stephen Mubiru  
Judge,  
20<sup>th</sup> May, 2021.

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