THE REPUBLIC OF UGANDA

THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL COURT]

CIVIL APPEAL No. 2 of 2017

BANK OF AFRICA UGANDA LIMITED::::::::::::::::::::::::::::APPELLANT

VERSUS

MUBIRU JOHN FREDERICK::RESPONDENT

BEFORE: HON. JUSTICE DUNCAN GASWAGA

JUDGMENT

[1] This is an appeal from the decision of the Magistrates Court Mengo (His Worship Boniface Wamala as he then was) which was decided against the appellant.

[2] The brief background to this appeal is that the respondent instituted Civil Suit No.1031 of 2010 against the appellant seeking for an order directing the appellant bank to release/surrender the certificate of title for land comprised in Kyadondo Block 203 plot 2754 at Maganjo to the respondent, payment of Ugx 1,000,000/= illegally debited with the respondent's account held with the appellant bank in purported collection of the outstanding balance, interest and general damages arising out of the appellant bank's continued detention of the respondent's certificate of title and costs of the suit. Judgment was consequently entered against the appellant with orders to release the respondent's certificate of title, recovery of Ugx 1,000,000/= wrongfully

debited from the plaintiff's account by the defendant, payment of Ugx 20,000,000/= to the plaintiff as general damages, interest of 25% p.a on the rate of general damages from the date of deduction 19/06/2009 till payment in full and for the taxed costs of the suit. The appellant was dissatisfied with the said decision of court, the reason for this appeal.

[3] This appeal raises three grounds to wit;

(i) ***The learned Chief Magistrate erred in law and in fact when he failed or omitted to properly evaluate the evidence on record on the whole and in particular the documents exhibited by the respondent and found that the respondent was not indebted to the appellant.***

(ii) ***The learned Chief Magistrate erred in law and in fact when he failed to find that, from the evidence on record, the appellant was entitled to continue charging interest on unpaid sums due from the respondent and recovering monies owed under and until the loan facility was paid off in full in accordance with its terms.***

(iii) ***The learned Chief Magistrate erred in law when he awarded the respondent general damages of Uganda Shillings Twenty Million only (Ugx 20,000,000/=) which was manifestly excessive in the circumstances.***

[4] According to the case of **Kifamunte Henry v Uganda, Criminal Appeal No. 10 of 1997**, *"the first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."*

[5] The appellant submitted on ground 1 and 2 jointly and stated that the learned Magistrate erred at paragraph 2, page 4 of his judgment when he faulted the appellant for not leading evidence, which is not correct. That the appellant was unable to produce a witness in court and his witness statement was struck off the record. However, with consent of the respondent, the appellant presented exhibits i.e Exh D1 and Exh D2 and having admitted such documents, court was obliged to consider and evaluate their content which were referred to in the evidence of the respondent and the submissions of Counsel. That the respondent as PW1 admitted that he understood the terms and conditions in Exh P1 regarding interest which he would suffer upon default. That had the learned magistrate evaluated EXh P1 he would have found that interest, including penalty interest at defined rates would apply where there was a default.

[6] That as per clause 9 of Exh PI, the respondent was aware that the appellant could engage the services of a lawyer, an auctioneer or any other person or organization to recover all amounts due under the facility at the cost of the respondent. That there was no stipulation that the person engaged to recover the outstanding sums had power to negotiate payment terms or waive any interests or commissions payable. That the demand letter from CAL dated 06/02/2008 Exh P5 required the respondent to deposit the full amount of **Ugx 17,713,026/=** within seven days by making a deposit to CAL'S account by banker's cheque or by **contacting CAL on telephone for guidance on a scheduled payment plan**. This letter though made no mention that the respondent would discuss/ negotiate suspension, cessation or waiver of interest, commission and other costs. That in a letter written to the

respondent by the appellant on 27/02/2008, the appellant informed the respondent of the respondent's arrears that prompted the appellant to forward the file to CAL and confirmed the outstanding arrears of December 2007 and January 2008 in the sum of **Ugx 2,233,744/=.** The appellant allowed the respondent to cover all arrears by February after which the file would be recalled from CAL and subjected to the original payment plan. No waiver, suspension/cessation of interest, commissions and costs was offered. Also the payment plan was never adduced in evidence but Exh P6 which shows instalment payments over a period of time from 04/02/2008 to 19/06/2009. That the said instalments varied and this was indicative of the absence of a schedule. The payments varied between Ugx 15,000/=, 300,000/=, 600,000/= and sums in excess of Ugx 1,000,000/=. The said exhibit further shows that after deducting and crediting the sums demanded, there was an outstanding balance of Ugx 600,026/= however, there was no evidence indicating that this amount was paid off yet the onus was on the respondent to prove that.

[7] That Exh P1 was admitted in evidence by consent of the parties and that such documents once admitted ought to be evaluated together with the rest of the evidence. See **Bwanika and Ors Vs Administrator General [2005] 1 EA 1**. That a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of that entry and of the matters, transactions and accounts recorded in it. See Section 2 of the Evidence (Banker's Books) Act Cap 7. See also **Pearl Motors Ltd Vs Bank of Baroda (U) Ltd SCCA No. 15 of 2002** where it was held that; *the terms and conditions set out in the facility letter were enforceable and therefore un applied interest which was not*

reflected in the customer's statement was still contractually enforceable.

[8] The bank was therefore not entitled to release the securities until the interest was paid. That the same principle applied in this case and that the learned trial Magistrate erred in law when he did not fully evaluate the evidence in the exhibits which would have led him to the conclusion that interest and commission charges were never waived or suspended and would accrue until payment in full and that the deductions in respect of the commission from the respondent's account was lawful and in accordance with the terms of the facility and therefore the account was still in arrears after the protracted payment of the sums referred to CAL. That the respondents had the burden to prove, on the balance of probabilities that the entries were wrong because the appellant and respondent had entered into an agreement to suspend, waive or cease payments of interest and commission during the period from February 2008 to June 2009, which burden was not discharged and the learned trial Magistrate erred in law in failing to properly evaluate the evidence.

[9] In response thereof, the respondent submitted that the learned trial Magistrate at page 3 of the judgment fully evaluated the evidence on record particularly the documentary evidence and came to a right decision that indeed the respondent was not indebted to the appellant. That the trial Magistrate on **page 3 of the judgment (page 88) of the record of appeal** noted the inconsistencies in the demands made by the bank to the respondent and the actual amount given to CAL for recovery. That the learned magistrate later noted that the appellant had failed prove the continued charges on the loan facility given to the respondent. The Trial Magistrate also noted that the appellant did not

anywhere in their pleadings present a statement indicating the respondent's indebtedness as at the time they referred the loan to CAL. Therefore, since the entire amount forwarded to CAL (Ugx 17,713,026/=) was paid by 18/06/2009, a day before the expiry date of the facility, there was no way the said amount could have attracted any penalty or interest. The respondent prayed that this court finds that the appellant failed to prove the reason for the continued charges on interest on the unpaid sums due.

[10] It is indeed a fact that once one acquires a loan from a bank, the same will attract interest and penalty charges in the event of default. At this point, a number of financial institutions then have recourse to collection agencies in order to recover the monies due to them. The same happened in this case. Upon the respondent being informed that his arrears were to the tune of **Ugx** 2,233,744/=his debt was then transferred to Collection Africa Limited. When called and informed that he was supposed to pay Ugx 17,713,026/=, the respondent disputed the said amount and was referred to a bank official who confirmed that it was inclusive of charges and commission to CAL. It is therefore hard to understand why the appellant then presented a different balance upon confirmation from the collection agency that he had completed payment. I am indeed inclined to agree with the trial magistrate that the appellant gave no satisfying reasons to support the continued charges on the loan that had already been transferred to the collection agency. The only possible inference that can then be made is that the appellant bank desired to gain doubly from this transaction, at the detriment of its customer, the respondent. As such, the learned Trial Magistrate cannot be faulted for the decision he reached as he properly evaluated the

evidence on record as a whole before coming to the correct conclusion. Resultantly, ground one and two must fail.

Ground three

[11] In regard to ground three it was submitted that in the event that ground one and ground two are upheld then there would be no basis for an award of general damages. That the sum awarded was excessive in the circumstances since the respondent was fully aware of the terms and conditions of the facility and as such was, by own admission in default. That he had engaged the appellant several times over the disputed amount and there was justification for the appellant's delay with the title. That as such an award of Ugx 5,000,000/= would have been sufficient. That it is trite law that the appellate court will only interfere with the award of damages where the trial court acted on wrong principles or awarded damages that were inordinately high and excessive in the circumstances.

[12] It was submitted for the respondent that it is the law that general damages are awarded at the discretion of court and are always as the law will presume to be the natural consequence of the defendant's act or omission. That the respondent was informed by the appellant on 31/01/2008 through two notices indicating his loan balance as Ugx 3,460,867/= as at 10/01/2008 see Exh P2 and a balance of Ugx 3,518,517/= as at 14/01/2008 see Exh P3. The respondent was notified that failure to make payment by 24/01/2008 would result in transfer of his file to Collection Africa Limited. See exh P3. Some deductions were subsequently done on the respondent's account in the sums of Ugx 325,000/= and Ugx 200.734/= and he was informed that the same were for valuation and interest respectively. These were later refunded upon

objections from the respondent. See Exh P4. The respondent was then called by Collection Africa Limited to pick a letter indicating his loan balance that had been transferred from Bank of Africa, which amount he disputed. When he sought clarification from Bank of Africa's Carol Lwanga, he was informed that the said amount included commission to collection Africa Limited. He was then allowed by CAL to pay the amount in instalments as long as the payment was completed by 20/06/2009. That upon completion on 19/06/2009, he received a letter from CAL indicating that he had completed his payment and that his loan balance on the principal and interest was zero.

[13] The respondent was then referred to Rita Nakyeyune, a Bank of Africa credit official to pick his certificate of title. He deposited Ugx 1,000,000/= before proceeding to pick the title. Upon getting to Bank of Africa, he was informed that his loan balance had accumulated to Ugx 5,955,954/=. That he further received a letter dated 03/08/2009 indicating the outstanding balance of Ugx 6,351,443/=. That by the time the bank forwarded the respondent's file to Collection Africa Limited, the outstanding balance was Ugx 2,233,744/= see Exh P9. The appellant gave contradictory statements on the reasons as to why the loan balance shot up after it was transferred to CAL to wit; *interest charges, commission to CAL and legal fees*. That when the respondent asked for a loan statement he was given an abridged loan statement with some facts intentionally left out by the bank. See Exh P10. That the respondent can therefore not be denied general damages having been deprived of the use of his title and his money amounting to Ugx 1,000,000/= by the appellant for a period of 7 years as at the time of delivery of judgment by the lower court. See also **Katakanya and**

Others Vs Raphael Bikongoro HCCA No.12 of 2010 and **URA Vs Wanume David Kitamirike, Civil Appeal No. 43 of 2010**. That the trial Magistrate offered reasons for the award of damages and as such it cannot be said that the assessment and award of Ugx 20,000,000/= to the plaintiff or respondent was excessive in the circumstances.

[14] In the case of **Joweria Gava and Hawa Gava Vs Fausia Konde Gava Misc. Cause No.77 of 2010** it was held that;

> *"it is trite law that general damages are the direct or probable consequence of the act complained of. Such a consequence may be loss of use, loss of profit, physical inconvenience, mental distress, pain and suffering"*

[15] I have had opportunity to re-evaluate the evidence on record and especially the circumstances under which the impugned sum of damages was awarded. Clearly, the respondent suffered a lot of inconvenience and over a very long period of time while trying to settle his indebtedness to the bank. This inconvenience was well articulated by the learned trial Magistrate who also followed the correct principles in assessing the damages and subsequently gave convincing reasons for awarding general damages of Ugx 20,000,000/=. This quantum of damages cannot be said to be manifestly excessive in the circumstances and as such the court is reluctant to interfere with the learned trial Magistrate's award. Conversely, the proposed sum of Ugx 5,000,000/= by the appellant as general damages is too small and insufficient and I hereby reject it. This ground too must fail.

[16] In the circumstances therefore, the orders made by the trial Magistrate are hereby upheld while the appeal is dismissed with costs.

Dated, signed and delivered this 24th day of January 2022

Duncan Gaswaga

JUDGE