THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT)

CIVIL SUIT NO. 729 OF 2016

POST BANK (U) LIM ITED :: PLAINTIFF

VERSUS

HENRY SSALI TAMALE :: DEFENDANT

(Before: Hon. Justice Patricia Mutesi)

JUDGMENT

Introduction

On the 12th July 2011, the defendant borrowed a sum of UGX 90,000,000/= (Uganda Shillings Ninety million) from the plaintiff at an interest rate of 24% p.a. payable in monthly installments of UGX 4,758,399/= (Uganda Shillings Four million, Seven hundred fifty-Eight Thousand, Three hundred ninety-nine only) for a period of 24 months. The defendant secured the above said sum of money with his property comprised in Kyaggwe Block 110, Plot 1869, at Seeta. The defendant made part payments and left an outstanding sum which the plaintiff sought to recover by selling the mortgaged property. However the sale of the mortgaged property was challenged for lack of spousal consent in HCCS 480 of 2012 (Land Division) filed by a one Lunkuse Ruth who claims to be the defendant's wife. A temporary injunction was issued by the Land Division restraining the sale of the mortgaged property until disposal of the suit. The plaintiff then sought to recover the outstanding loan sum from the defendant personally.

The plaintiff instituted this suit by summary procedure under Order 36 Rule 2 of the Civil Procedure Rules for recovery of UGX 92,258,305/= (Uganda Shillings Ninety-two million, Two hundred fifty-eight thousand, Three hundred five) being the money borrowed and interest accrued thereon, plus costs of the suit. It was averred in the supporting affidavit that the plaintiff was entitled to recover its debt as money had and received under the loan agreement to mitigate its loss.

The defendant was granted leave to appear and defend the suit and filed a Written Statement of Defence in which he admitted to having taken the loan facility of UGX 90,000,000/= in the terms stated above, and that he made payments of 6 instalments and then defaulted on his monthly loan repayment obligations. He contended that the sum claimed arises out of a mortgage/loan agreement whose legality is under scrutiny by the High Court Land Division *vide* **HCCS 480/2012: Ruth Lunkuse Vs Henry SSali Tamale & Post Bank Uganda Limited** and that if the said transaction is declared illegal therein, the claims in the instant suit shall become irrecoverable against an illegal contract. He also contended that the claimed sum could not be recovered from him on the ground that the mortgage executed between the parties was illegal for lack of spousal consent for the security comprised in Kyaggwe Block 110 Plot 1869 at Seeta which secured the said loan facility, as admitted to by the plaintiff. The defendant further averred that any loan obligations between the parties were written off and therefore not recoverable.

Representation and hearing.

The Plaintiff was represented by Mr. Stanley Omony of M/s Stanley Omony & Co. Advocates while the Defendant was represented by Mr. Edwin Busuulwa of M/s Buwule & Mayiga Advocates. The Plaintiff produced one witness in support of its case namely Brenda Irene Nantaba (**PW1**), the Plaintiff's Securities Officer in the Securities Unit, who testified on oath and was cross examined. Whereas the defendant filed a witness statement, he never appeared in court on the scheduled hearing date to confirm his statement on oath and was never cross examined on the same. As such the said statement has no evidentiary value and is hereby expunged from the record. Both counsel filed their respective written submissions which have been taken into consideration.

Issues

The parties had previously agreed on the following issues for determination by court;

1. Whether the Defendant breached the loan Agreement?
2. Whether the Plaintiff can recover from a loan agreement whose legality is still subject of HCCS 480/2012; Ruth Lunkuse vs. Henry Tamale Ssali & Postbank (U) Ltd?

3. Whether the Plaintiff can recover from an illegal contract, if so declared in HCCS No. 480/2012; Ruth Lunkuse vs. Henry Ssali Tamale & Post Bank (U) Ltd.
4. If yes, how much is recoverable from the Plaintiff?
5. What remedies are available to the parties?

It is my view that the framed Issues No. 2 and 3 are academic and speculative in as far as they are based on a hypothetical question as to whether the High Court Land Division will declare the mortgage / loan agreement as illegal. However none of the parties formally applied for court to stay proceedings in the instant suit pending determination of the suit in the Land Division. Furthermore whereas the suit pending in the Land Division is essentially challenging the legality of a mortgage, the instant suit is essentially seeking recovery of money had and received by the defendant, who is not a party in the former suit. I accordingly strike out Issues 2 and 3.

Under **Order 15 rule 3 of the Civil Procedure Rules** court has discretion to amend or frame additional issues in order to resolve the dispute between the parties. I have therefore framed the following issues which arise from the pleadings / joint scheduling memorandum (and in particular the defendant's admission that the plaintiff advanced him UGX 90,000,000/- which he part paid), and also the evidence on record. The issues framed for resolution of the dispute between the parties are;

1. Whether the Defendant is indebted to the Plaintiff, and if so for how much?
2. Whether the Plaintiff is entitled to recover the sums claimed from the Defendant?
3. What are the available remedies?

Whereas the plaintiff in their submissions made arguments related to the plaintiff's indebtedness and whether the plaintiff is entitled to recover the claimed sums, the defendant did not respond to them and opted to restrict their arguments to the previously framed Issue No. 2 only. Therefore there is no need for the parties to make additional submissions on the newly framed issues.

Determination by Court.

Issue 1: Whether the Defendant is indebted to the Plaintiff, and if so, for how much?

Whereas it was stated in par. 4(a) of the plaint that the defendant had borrowed the sum of UGX 80,000,000 (Uganda Shillings Eighty million), the defendant admitted in par. 4(a) of the Written Statement of Defence that he was advanced a loan facility of UGX 90,000,000/= (Uganda Shillings =Ninety million). In their Joint scheduling memorandum and written submissions both parties concurred that the plaintiff advanced the defendant a loan facility of UGX 90,000,000/= at an interest of 24% per annum payable in monthly installments of UGX 4,758,399 for a period of 24 months. As such it is apparent that the paragraph 4(a) of the plaint which averred that the defendant was advanced UGX 80,000,000 was made in error.

From the record it is not in dispute that the defendant applied for a loan from the plaintiff which advanced him the sum of UGX 90,000,000/= in the above stated terms, and that he partly paid the debt leaving an outstanding part of the debt unpaid. What is in dispute is how much the defendant had paid back to the Plaintiff at the time of default.

Section 101 of the Evidence Act Cap 6 provides that *"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist."* **Section 102 of the Act** states that *"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."* Thus the plaintiff had the burden to prove their claim on a balance of probabilities.

The Plaintiff led evidence through Brenda Irene Nantaba (PW1), a Securities officer in the Plaintiff who handled the loan facility granted to the Plaintiff. **PW1** testified that on the 12th July 2011, the Defendant borrowed the sum of UGX 90,000,000/= (Uganda Shillings Ninety million only) from the Plaintiff at an interest rate of 24% per annum payable in monthly installments of UGX 4,758,399/= within a period of twenty four (24) months from the date of disbursement. She further testified that that out of the UGX 90,000,000/= disbursed to the Defendant, the Defendant only made payments of 6 installments totaling UGX 31,683,525/= (Uganda Shillings Thirty-one million, Six hundred eight three thousand, Five hundred twenty-five only) and defaulted on

his loan repayment obligations upon which the plaintiff issued demand notices which were not satisfied by the defendant. She also testified in cross-examination that the loan was written off as of 15/03/2013, as reflected in Exhibit **PE3**.

On the other hand the defendant asserted in the Joint Scheduling Memorandum that out of the sum advanced to him he part paid the sum of UGX 52,677,414/= and was left with an outstanding debt of UGX 37,322,258/=. **Section 103 of the Evidence Act** provides that *"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."* Thus the defendant having disputed the plaintiff's claim and figures, he had a duty to prove his claim that he had repaid UGX 52,677,414/=.

However the defendant did not adduce any evidence on oath to prove payment of UGX 52,677,414/= and failed to discharge his burden of proof. As such the plaintiffs evidence was uncontroverted. This leaves this Court with no any other option but to get the difference between the amount admitted to have been advanced to the defendant which is UGX 90,000,000/= (Uganda Shillings Ninety million) and the payments admitted by the plaintiff to have been made by the defendant at the time of default, which is UGX 31,683,525/= (Uganda Shillings Thirty one million, Six hundred eighty three thousand, Five hundred twenty-five). This leaves a total outstanding debt of UGX 58,316,475/= (Uganda Shillings Fifty-eight million, Three hundred sixteen thousand, Four hundred seventy-five).

Accordingly, I find that the defendant is indebted to the plaintiff in the sum of UGX 58,316,475/= (Uganda Shillings Fifty-eight million, Three hundred sixteen thousand, Four hundred seventy-five only) as the amount due at the time of default.

<u>Issue No. 2:</u> Whether the Plaintiff is entitled to recover the sums claimed from the Defendant?

From the record, the loan facility was secured by property comprised in Kyaggwe Block 110 Plot 1869 at Seeta. The defendant part paid the loan and left outstanding sums which the plaintiff sought to recover by sale of the mortgaged property. However the sale of the mortgaged property was challenged for lack of spousal consent by a one Lunkuse Ruth who claims to be the defendant's wife

in HCCS 480 of 2012 at the High Court Land Division. A temporary injunction was issued by the Land Division restraining the sale of the mortgaged property until disposal of the said suit. In the said suit, the defendant (who is the plaintiff herein) conceded to not having obtained the required spousal consent, and the plaintiff now asserts that this concession left the loan to the defendant unsecured, hence the filing of this suit for recovery of money from the defendant.

However counsel for the defendant argued that whereas the plaintiff claims that its admission of not having obtained spousal consent left the loan unsecured, the plaint and exhibits show that the mortgage/loan agreement is the basis of the instant suit. Further that PW1 in cross examination stated that the plaintiff is still interested in the security, which contradicts the claim that the loan is unsecured. He submitted that the sums due are not recoverable under the said mortgage/loan agreement as the same was executed without spousal consent which made the transaction illegal.

In rejoinder the plaintiff submitted that the instant suit is seeking recovery of monies as had and received by the defendant. The Plaintiff further submitted that it has a wide range of recovery modes under Section 20 of the Mortgage Act, one of which includes an action for recovery of money secured by the mortgage.

From the onset I wish to state that a claim based on money had and received is an equitable relief available to parties whose money has been advanced to another but the same cannot be recovered under the law governing the transaction between the parties, as in the instant case. Since the plaintiff admitted to not have obtained spousal consent in the mortgage transaction entered into with the defendant, this means that the security cannot be enforced. Therefore the plaintiff cannot insist on exercising reliefs under the Mortgage Act in realization of its monies under a mortgage agreement which was secured by property without spousal consent, *and* at the same time base its claim on an action for money had and received. However notwithstanding the foregoing, a claim based on money had and received is maintainable in the circumstances of this case where the plaintiff is seeking for recovery of monies advanced to and not repaid by the defendant.

The concept of an action for money had and received was explained in the case of ***Shenoi & An Vs Maximou [2005] EA.280,*** where the Court stated that;

> *"The principle is that where one person has received money from another under circumstances such as in this case, he is regarded in law as having received it to the use of that other. The law implies a promise on his part or imposes an obligation upon him to make payment to the person entitled. In default the rightful owner may maintain an action for money had and received to his use."*

In an action for money had and received, liability is based on the principle of unjust enrichment. Thus in the Indian case of ***Mahabir Kishore & Madhya Pradesh 1990 AIR 313***, the court observed that;

> *"First that the Defendant has been enriched by the receipt of a benefit, secondly that this enrichment is at the expense of the Plaintiff and thirdly that the retention of the enrichment is unjust."*

The said principle has long been adopted and applied in Uganda. In the case of ***Dr. James Kashugyera Tumwine & Anor Vs Sir. Willie Magara & Anor HCCS No.576 of 2004***, Bamwine J. (as he then was) observed that:

> *"Money which is paid to one person which rightfully belongs to another, as where money paid by A to B on consideration which has wholly failed, is said to be money had and received by B to the use of A. It is recoverable by action by 'A'. The paying of A to B according to the learned author of 'A Concise Law Dictionary' by P.G Osborn 5th Edn 9th p. 212 becomes a quasi-contract an obligation not created by, but similar to that created by, contract and is independent of the consent of the person bound. The author gives* ***the basis of the action for money had and received as being rooted in a quasi – contract on the footing of an implied promise to repay. The other view is that in the action for money had and received liability is based on unjust enrichment*** *i.e. the action is applicable whenever the defendant has received money which, in justice and equity belongs to the plaintiff under circumstances which render the receipt of it by the defendant a receipt to the use of the plaintiff.*
>
> ***Whichever way it is looked at, there must be evidence of the payment sought to be recovered."*** (Emphasis added)

Similarly in the case of ***Jamba Soita Ali Vsd David Salaam HCCS No. 400 of 2005*** Bamwine J in explaining an action for money had an received, stated that liability thereunder was based on an implied promise to repay and the principle of unjust enrichment. Further that for the Plaintiff to succeed there must be evidence of the payment sought to be recovered.

In the instant case it is not disputed by the defendant that the plaintiff advanced him a loan facility of UGX 90,000,000/= under terms that were agreed upon by the parties. From Issue No. 1 above I have already found that at the time of default, the defendant had paid back to the plaintiff a sum of UGX 31,683,525/= thereby leaving a total outstanding debt of UGX 58,316,475/= (Uganda Shillings Fifty-eight million, Three hundred sixteen thousand, Four hundred seventy-five only). I find that it would amount to unjust enrichment of the defendant to have received the said amount and not pay it back despite a clear promise to do so.

The defendant also raised an argument that his loan obligations with the plaintiff were written off and therefore not recoverable. In reply the plaintiff's counsel submitted that a write off is the decision by the company to accept that a debt no longer holds value. That usually loans are written off when they are 100% provisioned and there are no realistic prospects of recover. Counsel submitted that writing off a loan does not entail forgiving the debt, and the borrower still owes money to the bank. He cited ***Karlis Bauze, Non-Performing Loan Write-offs; Practices in the CESSE region, Policy Brief, 2019 p.2.***

The question which arises from the parties arguments is: *Whether borrower is absolved of his obligations under a loan agreement upon a debt being written off?*

In the case of ***Samuel Black T/A S B Coaches v DFCU Bank Ltd Civil Suit No. 416 of 2009 [2015] UGHCCD 69 (20 August 2015)*** Lady Justice Hellen Obura considered the provisions of the **Financial Institutions Credit Capitalization and Provisioning Regulations, 2005 in determining** whether by writing off a debt the plaintiff was discharged from liability to pay the bank. Her Lordship held as follows;

> *" As I pondered these questions, I also reviewed* ***the Financial Institutions Credit Capitalization and Provisioning Regulations, 2005.*** *Under regulation 6, Financial Institutions are required to classify a facility as non-*

performing if such a facility has a pre-established repayment schedule but the principal or interest due is unpaid for a period of ninety (90) days. ***By regulation 11 of the aforesaid regulations, financial institutions are required to provision for non-performing facilities periodically and write off the same after ninety (90) days if the same is not regularized. By provisioning, the Financial Institution applies its own funds to offset the debt and write it off in its balance sheet. However, the Financial Institution is expected to pursue recovery of the debt from the borrower and reimburse itself.***

This is discerned from regulation 14 (2) which provides that the Financial Institution shall initiate procedures to realise any security or collateral once the credit facility becomes non-performing. The rationale for requiring Financial Institutions to provision is to ensure that the depositors' money that they apply to extend credit to borrowers is not tied down and unavailable to the depositors when needed due to defaults by borrowers. The Financial Institution is nonetheless expected to recover the money and reimburse itself for the money it applied to provision the non performing credit facility.

It cannot therefore be said that by writing off a debt the borrower is discharged from liability to pay as wrongly argued for the plaintiff. *If that were the position then there would be many deliberate loan defaulters with a view of benefitting from the write off. That would be contrary to the banking laws, customs and practices and a disincentive for banks to lend money and in my view it could not have been the intention of the makers of the* ***Financial Institutions Credit Capitalization and Provisioning Regulations 2005.*****"** (Emphasis added)

I wholly agree with the above interpretation of the said Regulations, which is to the effect that where a financial institution writes off a debt this does not discharge a borrower from liability to repay. This interpretation is also reflected in the decisions other jurisdictions.

The Court of Appeal of Kenya in ***Nicholus Mahihu Muriithi Vs Barclays Bank Kenya Limited Civil Appeal No. 340 of 2012*** considered the question of whether the Appellant was absolved from his obligation under the charge or loan agreement upon the debt being written off. The Court stated that the fact that

a bad debt has been written off does not suggest the absence of a legitimate claim against the debtor whose debt is being written off. Rather it is done for purposes of taxation and book keeping and only if there are no or only slim chances of recovering the debt. See ***Mohammed Gulamhussein Farzal Karmali and Another Vs C.F.C. Bank Limited and Another (2006) eKLR***. But if the debtor's financial status improves, nothing stops the creditor from pursuing and recovering the debt.

The Supreme Court of India in ***Salim Akbarali Nanji Vs Union of India & Others, Civil Appeal No.6715 of 2004*** explained this banking concept thus;

> *"It is no doubt true that amounts advanced by banks must be recovered. Such debts should not be permitted to become none (sic)-performing assets. However, one cannot lose sight of the realities of the situation. Having regard to the nature of banking business, it is possible that the bank may commit an error of judgement in advancing funds to a particular party or industry …**The write-off is only an internal accounting procedure to clean up the balance sheet and it does not affect the right of the creditor to proceed against the borrower to realize the dues."***(Emphasis added)

The Supreme Court therefore held that by writing-off the debt owed to it by the Appellant, the Respondent bank did not absolve the former from liability and the Respondent was not barred from following up on recovery.

Accordingly, in respect of the foregoing, I agree with the plaintiff's counsel that the bank in writing off the debt owed by the defendant, did not mean that the debt was forgiven and this did not discharge the defendant from liability. Therefore the defendant still owes money to the bank and it is recoverable.

Consequently, I find that the plaintiff is entitled to recover from the defendant the sum of UGX 58,316,475/= (Uganda Shillings Fifty-eight million, Three hundred sixteen thousand, Four hundred seventy-five only) as the outstanding debt at the time of default. Issue No. 2 is resolved in the affirmative.

<u>Issue No. 3</u>: What are the available remedies?

As determined in Issue No. 2 above, I find that the plaintiff is entitled to recover UGX 58,316,475/= (Uganda Shillings Fifty-eight million, Three hundred sixteen

thousand, Four hundred seventy-five only) from the defendant, as money had and received.

The plaintiff sought for interest as accrued on the principal loan. However, as I earlier noted, this is a claim based on money had and received and not a claim to be enforced under the Mortgage Agreement between the parties. Nevertheless it is trite that a plaintiff who has been wrongfully deprived of his or her money is entitled to interest. The basis of an award of interest is that the defendant has taken and used the plaintiff's money and benefited from it. Consequently, they ought to compensate the Plaintiff for the money. (See ***Sietco versus Noble Builders (U) Ltd S.C.C.A No.31 of 1995***.)

It is now over ten years since the defendant defaulted in paying the plaintiff's money, thereby depriving the bank's use of the same. It is obvious that the defendant benefited from the use of the said money and as such, the plaintiff qualifies to be compensated. The award of interest is a matter of discretion of the court. Accordingly, I award the plaintiff interest at the rate of 15% per annum on the amount due to them of UGX 58,316,475/= (Uganda Shillings Fifty-eight million, Three hundred sixteen thousand, Four hundred seventy-five) from the date of filing the suit until payment in full.

It is trite that costs follow event unless Court for good cause orders otherwise, and accordingly the Plaintiff being the successful party is awarded costs of the suit.

In the result, judgement is entered for the plaintiff in the following terms;

a. The defendant shall pay the plaintiff **UGX 58,316,475/= (Uganda Shillings Fifty-eight million, Three hundred sixteen thousand, Four hundred seventy-five only)** which was the outstanding amount at the time of default, as money had and received.

b. The defendant shall pay interest on (a) above at the rate of 15% per annum from the date of filing the suit until payment in full.

c. Costs of the suit are awarded to the Plaintiff.

It is so ordered.

Dated this 31st day of March 2023.

Patricia Mutesi

JUDGE