

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL DIVISION)**  
**CIVIL SUIT NO. 0162 OF 2017**

**ARVIND R. PATEL** ::::::::::::::::::::::::::::::::::: **PLAINTIFF**

**VERSUS**

**1. JOSEPH KITAMIRIKE**

**2. FREDERICK OCHIENG OBBO** ::::::::::::::::::::::::::::::::::: **DEFENDANTS**

**(Before: Hon. Justice Patricia Mutesi)**

**JUDGMENT**

This suit arises from a loan agreement which was executed between the plaintiff and the defendants on the 23<sup>rd</sup> May 2012. The plaintiff filed this suit seeking recovery of UShs. 228,000,000/= as the unpaid balance of money received by the defendants under the loan agreement, plus general damages for breach of contract, interest and costs of the suit.

**The Plaintiff's case**

The Plaintiff claims that on the 23<sup>rd</sup> of May 2012 the parties entered a friendly loan agreement under which he advanced the defendants a loan of UShs 525,000,000 (Uganda Shillings five hundred and twenty five million) which they agreed to repay within period of 90 days i.e. on or before the 24<sup>th</sup> August 2012. As security for the loan the defendants gave him two postdated cheques for the sum of UShs. 262,500,000 (Shillings Two hundred sixty two million, five hundred thousand only) each. That after the defendants failed to pay the debt as agreed, he presented the cheques for payment but they were returned unpaid. Thereafter the plaintiff wrote to the Defendants notifying them that the cheques had been dishonoured and demanding payment, but they repaid only UShs 297,000,000/= (Uganda Shillings Two hundred ninety seven thousand only) and to date, they have not paid the balance of UShs. 228,000,000/= (Uganda Shillings two hundred twenty eight million only). The plaintiff

is seeking to recover the said sum, general damages for breach of contract, interest and costs.

### **The Defendants case**

10 The defendants admit that they entered the friendly loan agreement under which it was agreed that the plaintiff advances them a sum of US\$ 525,000,000 which sum was repayable within 90 days. However they aver that contrary to the said agreement, the plaintiff only advanced them a total sum of UGX 297,000,000 (Uganda Shillings Two hundred ninety seven thousand only) which sum they fully repaid thereby discharging their obligation to the plaintiff. The defendants contend that the Loan Agreement was fraudulent in as far as it falsely purported that the defendants had been advanced the sum of US\$ 525,000,000/- yet he only advanced them US\$ 297,000,000/-. That the plaintiff is fraudulently claiming for an unpaid balance of US\$ 228,000,000/= well knowing that the same is not due to him at all and they are not liable to repay the claimed sum which they have never received from the plaintiff. They prayed that the suit be dismissed with costs.

### **Issues for determination**

In the joint scheduling memorandum, the parties agreed on the following issues for determination by this court;

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1. Whether the plaintiff advanced the sum of US\$ 525,000,000 being a friendly loan, to the defendants.
2. Whether the plaintiff's claim against the defendants is fraudulent.
3. Whether the terms of the friendly loan agreement were illegal and unconscionable.
4. Whether the defendants are indebted to the plaintiff for the sum of US\$ 228,000,000/=
5. What are the remedies available to the parties.

30 At the trial the plaintiff was represented by Mr. Benson Tumasirwe while the defendants were represented by Mr. Isaac Bakayana. The plaintiff and both defendants made witness statements which they further confirmed under oath in



court, and they were duly cross examined on the same. Both parties filed written submissions which are on record.

I have duly considered the pleadings and evidence adduced by the parties, plus their counsel's written submissions and now proceed to determine the issues as below.

**Issue No. 1: Whether the Plaintiff advanced the sum of UShs. 525,000,000/=, being a friendly loan to the Defendants.**

10 The plaintiff (PW1) testified that pursuant to the loan agreement he advanced the defendants the sums of UShs. 100,000,000, UShs. 33,000,000 and UShs. 164,000,000/= which were paid to the bank accounts of the 2<sup>nd</sup> defendants' law firm and Sembuule Steel Mills, for the benefit of the defendants. He adduced documentary evidence of the said payments vide his bank statement, a cheque stub and counter foil (Exhibits **P4**, **P5** and **P6** respectively). He further testified that he handed over an additional sum of UShs 228,000,000 in cash to the 2nd defendant and the parties confirmed receipt of the same by signing the Agreement. That in total he advanced the defendants a total sum of UShs 525,000,000.

20 Counsel for the plaintiff submitted that the defendants' acknowledging receipt of UGX 525,000,000 is a fact duly proved by the Agreement itself as documentary evidence. He submitted that the Agreement (**Ex P1**) speaks for itself, in particular clause 1 thereof which states that the lender (the Plaintiff) advanced to the borrowers (the defendants) a sum of UShs. 525,000,000/=*, 'receipt of which the borrowers acknowledge by signing on the agreement.'* That both defendants had admitted to signing the agreement freely and without any coercion and as well educated gentlemen i.e. a senior Engineer and Advocate, they cannot claim to have been ignorant or misled about what they were signing. He also cited their issuance of two cheques (**Ex P2 & P3**) to the plaintiff for the total sum of UShs 525,000,000 as proof of receipt of the said sum.

30 On the part of the defendants, they testified that they never received the sum of UGX 525,000,000 as alleged and that contrary to the Agreement, the plaintiff only advanced them a total of UGX 297,000,000 (not in cash) which they repaid in full. They adduced evidence of the relevant bank statements and deposit slips (Exhibits **D4 &**

D5) showing payments amounting to UShs 297,000,000. Counsel for defendants submitted that the Plaintiff had equally only proved the disbursement of only UShs. 297,000,000. He noted that the Agreement provided that the 'amount payable' would be UGX 375,000,000 if the loan was repaid in 30 days and UGX 450,000,000 if it was repaid in 60 days. He argued that this confirms that the plaintiff did not advance UGX 525,000,000 since it is illogical that a person would be required to pay a lesser sum than what was purportedly borrowed.

10 This is a case where the defendants are disputing the content of an agreement which they admitted to freely signing without any coercion or duress. The defendants claim that whereas Clause 1 of the Agreement states that the plaintiff advanced them UShs. 525,000,000/= they only received the sum of UShs. 297,000,000/=. On the other hand the plaintiff argues that the Agreement speaks for itself in stating that the defendants received UShs. 525,000,000/=.

20 Since there is a written agreement between the parties the parole evidence rule is applicable in this case. This common law rule is to the effect that once the terms of a contract are reduced into writing any extrinsic evidence meant to contradict, vary, alter or add to the express terms of the agreement is generally inadmissible. (See **Halsburys Laws of England (4<sup>th</sup> Ed) Vol. 9(1) para 622; and Chitty on Contracts 24<sup>th</sup> edition Vol. 1 page 338**) In the case of **DSS Motors Limited V Afri Tours and Travels Limited & Amin Tejani; Civil Suit No. 12 of 2003** Honourable Justice Yorokamu Bamwine held that under the parole evidence rule evidence cannot be admitted (and if it admitted it cannot be used) to vary or contradict a written agreement. However fraud is one of the exceptions to the parole evidence rule.

30 In this case the defendants averred that clause 1 of the Agreement which states that they received UGX 525,000,000 in cash is false and that the plaintiff is falsely claiming payment of a sum which he never advanced to them. They contend that both the Agreement and the claim for an unpaid balance are fraudulent in as far as they are based on a false statement of fact. Thus parole evidence is admissible in this case specifically to prove or disprove the disputed fact of whether the plaintiff advanced UShs 525,000,000/= to the defendants.

When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. (See **Section 101(2) Evidence Act Cap 6**). In civil cases the



burden of proof lies on the plaintiff who desires the court to give judgment in their favour (See **Section 101 of the Evidence Act**). In the case of **Lugazi Progressive School & Immaculate Mutua V Serunjoji & Others; (2001-2005) 2 HCB 121** it was held that in civil matters, with regard to burden of proof, he who alleges must prove. The burden lies on the plaintiff to prove his case on a balance of probabilities. Where the plaintiff fails to prove and discharge the burden of proof placed on him or her, the claim will be dismissed (See **A. Nsubuga V P. N. Kavuma (1978) HCB 307**). The onus is therefore upon a plaintiff to prove his case to the required standard of proof, i.e. on a balance of probabilities, and where they do not adduce evidence to the required standard their case will be dismissed.

In the present case the plaintiff has the burden to prove on balance of probabilities that he advanced the claimed sum to the defendants. The plaintiff adduced a bank statement and cheque slip (Exhibits **PX4 & PX7** respectively) showing that on 23<sup>rd</sup> May 2012 he paid US\$ 100,000,000 into the account of the 2<sup>nd</sup> defendant's law firm in Bank of Baroda. Further on 23<sup>rd</sup> May 2012 the plaintiff drew a cheque in the names of the intermediary John Nsamba for US\$ 200,000,000 (Exhibits **PX6, PX7**). He testified that from this money Mr. John Nsamba an intermediary, paid US\$ 33,000,000 to the 2<sup>nd</sup> defendant's law firm and US\$ 164,000,000 to the account of Sembule Steel Mills as part of the loan. This documentary evidence proves payment of a total sum of US\$ 297,000,000/=. The plaintiff testified that he paid the defendants an additional US\$ 225,000,000 in cash at the time of executing the agreement. However apart from the Agreement he did not adduce any documentary evidence to prove paid the defendants the claimed sum.

The defendants also adduced documentary evidence proving that the plaintiff advanced to them a total of UGX 297,000,000. They adduced an account statement (Exhibit **DX4**) showing that on 23<sup>rd</sup> May 2012 a cheque for US\$ 100,000,000 was deposited onto the 2<sup>nd</sup> defendants law firm account no. 95010200000199 in Bank of Baroda. The statement also shows that on the same date US\$ 33,000,000 deposited by John Nsamba on the same account. The defendants further adduced a copy of the deposit slip (Exhibit **DX5**) which shows that US\$ 164,000,000 was deposited by John Nsamba onto the account of Sembule Steel Mills and they testified that this was part of the loan.

Whereas both parties adduced documentary evidence proving that the plaintiff paid US\$ 297,000,000 to the defendants, there is no similar documentary evidence to show payment of an additional US\$ 228,000,000 which would prove the claim that the plaintiff advanced the defendants a total sum of US\$ 525,000,000. Counsel for the plaintiff submitted that the Agreement is sufficient documentary evidence which proves that the defendants received US\$ 525,000,000, as reflected in clause 1 thereof.

10 However in light of the defendant's claims that clause 1 of the Agreement is a false statement of fact, it was not sufficient for the plaintiff to rely on the Agreement alone as proof of payment. This is more so in light of the inconsistencies in the Agreement itself. For instance whereas clause 1 of the Agreement states that the plaintiff advanced the defendants US\$ 525,000,000 'in cash' at the time of signing the agreement, the documentary evidence on record shows that for instance part payment was made to the account of Sembuule Steel Mills. Furthermore clause 1 which indicates that the defendants received US\$ 525,000,000 appears to be contradicted by clause 4 and the Schedule to the Agreement which provided that the 'amount payable' would be US\$ 375,000,000 if the loan was repaid in 30 days, and US\$ 450,000,000 would be the amount payable if it was repaid in 60 days.

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The plaintiff in paragraph 4 and 7(iv) of his witness statement attempted to explain this 'discount' by stating that the parties had agreed that the loan was his investment in their business venture i.e. the purchase of Sembuule Steel Mills and that even if they were to pay the discounted sum he would not suffer loss because he would still remain as a partner in the venture in which they intended to agree on the terms of sharing future profits. On the other hand the 1<sup>st</sup> defendant testified that US\$ 525,000,000 was the sum total of the plaintiff's expected benefit when they acquired Sembuule, and if for instance Sembuule was acquired at eg US\$ 1 billion, 525,000,000 would be his value in the company. Further that it was agreed that the defendants  
30 issue two cheques worth US\$ 525,000,000 in order 'to hold' the plaintiff's expected position in Sembuule and this amount reflected the sum total of his expected benefit when they acquired the company. That however it was agreed that if the negotiations for acquiring Sembuule failed then the defendants would repay the loan (US\$ 297,000,000) in accordance with the discount schedule. However such evidence as to



how the loan was intended as an investment in Sembuule is inadmissible under the parole evidence rule, since it was agreed outside the terms of the written agreement.

I find in regard to the discount schedule that it is not plausible that the plaintiff would lend the defendants such a substantial sum money and require them to repay a lesser amount on account of early payment. Therefore the more probable conclusion of this discount schedule is that the sum of UShs 525,000,000 was never paid to the defendants.

- 10 The plaintiff also sought to rely on the fact that the defendants had issued two cheques totaling the sum of UGX 525,000,000/= as proof of their indebtedness for this sum. However these cheques do not independently prove the fact of actual payment or receipt of the said sum, especially since the discount schedule provided that UShs 525,000,000 would be repaid if the loan was repaid in 90 days, but the 'amount payable' would be less upon earlier repayment of the loan.

- 20 Upon evaluation of all the evidence adduced by the parties, on a balance of probabilities it appears to me that the plaintiff did not advance the defendants the sum of UShs 525,000,000/= and I find that the defendants are not indebted to the plaintiff for the sum of UShs 228,000,000. Accordingly Issues No. 1 and 4 are answered in the negative. In light of the determination of Issues 1 & 4 above, there is no need for me to consider and resolve Issues No. 2 and 3. Consequently this suit is dismissed with costs awarded to the defendants.

Dated this 13<sup>th</sup> day of March 2023



Hon Justice Patricia Mutesi