THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO.0966 OF 2019

TOPLINE INVESTMENTS LTD::::::::::::::::::::::::::::::::::::::PLAINTIFF

VERSUS

1. **NAMULI JENIPHER KIGGUNDU]**
2. **ZIMBE BERNARD NAKIBINGE]:::::::::::::::::::::: DEFENDANTS**

Before Lady Justice Patricia Kahigi Asiimwe

Judgment

Background:

1. The Plaintiff extended a loan facility to the 1st Defendant of a sum of UGX 120,000,000 at an interest of 10% per month. The 2nd Defendant guaranteed the loan, and granted 1st Defendant powers of attorney to mortgage his land comprised in Busiro Block 444, Plot 1808 Nkumba as security for the loan. The loan was repayable within one month. The 1st Defendant made part payment and remained with a balance of UGX. 89,040,000.

2. On 29th March 2018, the 1st Defendant signed a memorandum of understanding in which she undertook to pay UGX. 89,040,000 within 2 months. However, the 1st Defendant did not honor her commitment.

3. On 20th August 2018 the parties entered into another Memorandum of Understanding in which the 1st Defendant undertook to give the Plaintiff 2 Acres of her land in Mawokota Block 39, Plot 91 as consideration in full and final settlement of

her loan obligations. Each acre cost UGX 40,000,000. The 1st Defendant was supposed to provide the Plaintiff with the necessary documents to enable it to transfer the Land into its name. However, the 1st Defendant did not honour the Memorandum of Understanding.

4. On 26th November 2019, the Plaintiff then instituted a summary suit seeking to recover UGX 89,040,000, interest as of 20th August 2018 interest at a rate of 25% per annum, accrued interest, and costs of the suit.

5. The Defendants applied for leave to appear and defend. The parties consented to the Application and the Defendants were allowed to file their Written Statements of Defence.

6. In the 1st Defendant's Written Statement of Defence she stated that:
    a) the Plaintiff's claim of UGX 89,040,00 with an interest of 25% per annum is unreasonable and the interest is harsh and unconscionable.
    b) the actual outstanding debt was not put to the Defendant for payment.
    c) The Plaintiff's interest rate of 25% per annum is harsh and unconscionable.
    d) The Plaintiff has no cause of action against the 1st Defendant and the suit is vexatious and frivolous.

7. The 2nd Defendant in his Written Statement of Defence stated that:
    a) the Plaintiff has no cause of action against him since his responsibility as a guarantor has not yet crystallized.
    b) the Plaintiff has a duty to first recover from the Principal Debtor before it can demand from the 2nd Defendant.

c) the Plaintiff and 1st Defendant have yet to harmonize the actual amount owed.
d) the 1st Defendant is willing to pay the Plaintiffs a sum of UGX 40,000,000 as full and final statement.

8. The Defendants were served with hearing notices but they did not make an appearance in Court when the matter was called for hearing. Court under Order 9 Rule 20(1)(a) of the Civil Procedure Rules SI 71-1, directed that the matter proceeds exparte.

Representation

9. The Plaintiff was represented by M/S Tamale & Co Advocates Prime Plaza, 5th Floor Jinja Road, Kampala and the 1st and 2nd Defendant were represented by Prudens Law Advocates, 2nd Floor, Mateeka House, Kampala.

Issues

10. The parties filed a Joint Scheduling Memorandum in which three issues were raised as follows:
    i. Whether the Defendants defaulted on their undertakings under the Loan Agreement
    ii. Whether the 1st Defendant defaulted on her undertakings under the Memoranda of Understanding
    iii. Whether the Plaintiff is entitled to the remedies sought

Evidence:

11. The Plaintiff called one witness, Frank Kiiza, the general manager of the Plaintiff who testified that the Plaintiff loaned the 1st Defendant UGX. 120,000,000 at an interest rate of 10% per month making the amount payable 132,00,000. The 2nd Defendant guaranteed the 1st Defendant's loan facility and granted the 1st Defendant powers of attorney to mortgage land comprised in Busiro Block 444 plot 1808 to secure the loan

facility from the plaintiff company. The 1st Defendant made partial payments of UGX. 25,500,000 on the principal sum and has an outstanding balance of UGX.89, 040,000.

12. In a bid to help the 1st Defendant pay up the loan amount and to have the matter amicably settled, on 29th March 2018 the Plaintiff entered a Memorandum of Understanding. The Defendant still defaulted on her understanding. The Plaintiff company was still lenient with the 1st Defendant and on 20th August 2018, the Plaintiff entered into a 2nd Memorandum of Understanding with the 1st Defendant. Under Clause 2 of the 2nd Memorandum of Understanding, the Plaintiff undertook to give (two) 2 acres of land comprised in Mawokota Block 39 plot 91 at Jumba in final and full payment of the outstanding loan obligations. Under clause 3 of the 2nd memorandum of understanding, the 1st Defendant was supposed to avail to the Plaintiff with all the necessary documents to enable the Plaintiff curve off the said portion of land but the Defendants defaulted on the said undertaking.

Submissions:

13. The Plaintiff filed their submissions on the three issues as follows:

Issue 1: whether the Defendants defaulted on their undertakings under the Loan Agreement

14. Counsel for the Plaintiff cited *Black's Law Dictionary 8th Edition page 1262* where the term default was defined as the omission or failure to perform legal or contractual duty especially the failure to pay a debt when due. Counsel submitted that none of the Defendants denied that the 1st Defendant owes UGX 89,040,000. The 1st Defendant authored the Memorandum of Understanding dated 29th March 2018 in which she clearly stated the balance is UGX 89,040,000, however in her Written

Statement of Defence she stated that the actual outstanding balance was not put across to the Defendant for payment.

15. Counsel for the Plaintiff submitted that once the principal debtor is in default and the creditor demands for payment which is not honored, the lender is not precluded from proceeding against both the principal debtor and guarantor. To fortify this position Counsel for the Plaintiff submitted that under Section 71 of the Contracts Act, 2010 the liability of a guarantor takes effect upon default by the principal debtor. Counsel further cited the case of **Uganda Finance Trust Ltd V. Alloys Muhumuza & Anor HCT -01-CV-CA-03-2015** in which Court stated that *"under the guarantee the guarantor promises or undertakes that he will be personally liable for the debt, default or miscarriage of the principal. The guarantor's liability is ancillary or secondary to that of the principal who remains primarily liable to the creditor. There is no liability on the guarantor unless and until the principal has failed to perform his obligations."*

16. Counsel for the Plaintiff submitted that the loan was repayable in 1 month, in one installment. Therefore, the 1st Defendant's failure to repay the loan in one installment within the agreed one month period amounted to breach of her undertakings under the Loan Agreement and she is in default. It follows therefore that the 2nd Defendant is also in default of his undertakings in the Guarantee deed.

Issue 2 whether the 1st Defendant defaulted on her undertakings under the Memoranda of Understanding

17. Counsel for the Plaintiff submitted that on 29th March 2018, the 1st Defendant in a Memorandum of Understanding undertook

to pay the outstanding loan monies within 2 months but she failed to honor this undertaking. On 20th August 2018 the 1st Defendant in Memorandum of Understanding undertook to give the Plaintiff 2 acres of land comprised in Mawokota Block 29 Plot 91 at Jumba each valued at UGX 40,000,000 which was not honoured.

Issue 3: Whether the Plaintiff is entitled to the remedies sought

18. The Plaintiff submitted that PW1 testified that at the time of filing the suit, the 1st Defendant owed UGX 89,040,000. The Plaintiff prayed that the money be repaid.

19. The Plaintiff submitted that the Loan Agreement provided for interest on the principal sum at the rate of 10% per month. Since 20th August 2018, the 1st Defendant's loan obligations stood at UGX 89,040,000. The 10% of outstanding balance would give a monthly interest which is UGX 8,904,000. The total accrued interest is UGX 489,720,000. The Plaintiff prayed that Court orders the Defendants to pay the Accrued interest to the Plaintiff.

20. Counsel also prayed for Interest on the principal sum at a rate of 25% from the date due till payment. Counsel argued that a Microfinance Institute has been inequitably denied the use of its monies and capital by the Defendants through their willful default.

Resolution:

Preliminary issue:

21. The Defendants in their Written Statements of defence raised a Preliminary Point of law that the Plaintiff has no cause of action against them.

22. In the case of **Motor Garage and others Vs. Motorkov East Africa Law Reports 1971 E.A pg. 514**, court held that for a cause of action to be disclosed the plaint must show that the plaintiff has a right, which right has been violated and the Defendant is liable.

23. In the case of **Kapeka Coffee Works Ltd Vs. NPART CACA No. 3 of 2000**, court held that in determining whether there is a cause of action the court must look only at the plaint and its annextures if any, and nowhere else. (see **Praful Chandra R. Patel Vs. Abbas Manafwa HCT-04-CV-CA-0013/2015)**

24. In the instant case, on 12th April 2017, the Plaintiff granted a loan facility to the 1st Defendant repayable in a period of one month. The 2nd Defendant guaranteed the payment of the loan. The loan agreement and the guarantee were attached as Annexture A to the Plaint.

25. On 29th May 2018, the 1st Defendant signed a memorandum of understanding in which she undertook to pay UGX. 89,040,000 to the Plaintiff within 2 months. On 20th August 2018, the parties entered into another Memorandum of Understanding under which the 1st Defendant undertook to transfer 2 acres of land to the Plaintiff to settle the outstanding loan obligation. The two memoranda were attached to the Plaint as Annextures C and D respectively.

26. The two memoranda clearly indicate that the 1st Defendant defaulted on the loan agreement and thus the Plaintiff's right to recover the loan has been violated. The 1st Defendant having defaulted is liable and consequently, the 2nd Defendant as guarantor is also liable since the 1st Defendant defaulted. I, therefore, find that the Plaintiff has a cause of action against the Defendants.

I will handle the 1st and 2nd issues together which I have rephrased as follows:

Issue 1: Whether the 1st Defendant defaulted on their undertakings under the Loan Agreement and the memoranda of understanding and whether the 2nd Defendant is liable

27. According to the loan agreement PE2, the 1st Defendant borrowed UGX 120,000,000, at an interest of 10% per month, payable within a month. The total amount payable was UGX 132,000,000. The Plaintiff adduced in evidence 2 memoranda of understanding signed by 1st Defendant (PE 5 & PE 6 respectively). As already discussed under paragraph 25 above, both memoranda indicate that the 1st Defendant did not honour the terms of the loan agreement.

28. In her written statement of defence, under paragraph one it is stated as follows:

> *Except as specifically admitted, the 1st Defendant ...denies each and every allegation contained in the Plaint as if the same were set forth and traversed therein.*

The 1st Defendant went ahead to admit the contents of the first 3 paragraphs of the Plaint which describe the three parties to the suit.

29. Under *Order 8 Rule 3 of the Civil Procedure Rules* it is provided as follows:

> *Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against a person under disability; but the court may*

in its discretion require any facts so admitted to be proved otherwise than by that admission.

30. In the Indian case of **Uttam Chand Kothari vs Gauri Shankar Jalan and Ors. AIR 2007 Gau 20, 2007 (1) GLT 37**, cited with approval by Justice Wangtusi in the case of **VAMBECO V. Attorney General MA – 0265 of 2014**, it was held as follows:

> *From a careful reading of Order VIII, Rules 3, 4 and 5, [Rule 3 is similar to Order 8 Rule 3) it clearly emerges that when an allegation of a fact, made in the plaint, is not denied, in a written statement, specifically or by necessary implication or is not stated to have not been admitted, such a pleading will constitute an implied admission. In short, evasive denial or non-specific denial constitutes an implied admission in a judicial proceeding of civil nature.*

31. The learned Justice Wangtusi while discussing the above case (in the case of **VAMBECO V. Attorney General supra)** held that "What this means is that the Written Statement of Defence, must deal specifically with each allegation of fact in the plaint and when a Defendant denies any fact, he must not do so evasively but answer the point of substance."

32. The Plaintiff in the Plaint alleges that the 1st Defendant borrowed the money, made partial payment, and under 2 separate memoranda undertook to pay the outstanding balance. The 1st Defendant did not make specific denials of the above allegations.

33. Under paragraph 3 of the Written Statement of Defence, the 1st Defendant stated in her defence that the interest of 25% against

the principal is unreasonable and unconscionable and that the outstanding debt was not put across to her.

34. My reading of paragraph 3 is that the Defendant implies that she borrowed the money, however, the interest is unreasonable and unconscionable and the outstanding debt was not put across to her.

35. In the absence of evidence to the contrary I find that the1st Defendant defaulted in her undertakings under the loan agreement and the memoranda of understanding.

36. The case of the Plaintiff against the 2nd Defendant is that he guaranteed the loan granted to the 1st Defendant. The 2nd Defendant's defence is that the Plaintiff has a duty to recover the money from the principal before it demands from the 2nd Defendant.

37. According to **The Black's Law Dictionary, 8th Edition** at page 286, "a guarantor answers for another person's debt." In this case, the 2nd Defendant under clause 1 of the guarantee agreement undertook to pay the Plaintiff on demand money due to the Plaintiff.

38. Under *section 68 of the Contracts Act* a "**guarantor**" means a person who gives a guarantee and a "**contract of guarantee**" means a contract to perform a promise or to discharge the liability of a third party in case of default of that third party, which may be oral or written.

39. Under Section 71 of the Contracts Act, it is provided as follows:

71. Liability of guarantor

(1) The liability of a guarantor shall be to the extent to which a principal debtor is liable, unless otherwise provided by a contract.
(2) For the purpose of this section the liability of a guarantor takes effect upon default by the principal debtor.

40. In the case of **Bank of Uganda V Banco Arabe Espanol (Court of Appeal Civil Appeal No. 23 of 2000** cited by the Plaintiff, the Court of Appeal held that the duty of guarantor or surety to repay a loan is that once the principal borrower defaults the guarantor has a duty to repay the loan.

41. In the present case, I have already found that the 1st Defendant defaulted on the loan. It therefore follows that the 2nd Defendant as guarantor has a duty to pay the loan.

Issue 2: Whether the Plaintiff is entitled to the remedies sought

42. The Plaintiff prayed for judgement for the principal sum of UGX 89,040,000, accrued interest from the date of default, interest at the rate of 25%, and costs of the suit.

Principal sum of UGX 89,040,000

43. PW testified that the 1st Defendant made a partial payment of UGX 25,500,000 on the principal sum and has an outstanding balance of UGX 89,040,000 being an amount due to the Plaintiff.

44. In the Memorandum of understanding dated 29th March 2018 the 1st Defendant acknowledged the outstanding balance as UGX 89,040,000 being principal, interest, and collection fees. In the Memorandum of Understanding dated 20th August 2018, the 1st Defendant agreed to give the Plaintiff 2 acres of land each

valued at UGX. 40,000,000. The Defendants are therefore liable to the Plaintiff for the sum of UGX 89,040,000.

Accrued interest

45. The Loan Agreement PE1 provided for interest on the principal sum at a rate of 10% per month. Counsel for the Plaintiff submitted that the total amount due including interest is UGX 489,720,000. Both Defendants in their Written Statements of Defence stated that the interest of 25% per annum is unreasonable. The 1st Defendant stated that the interest is harsh and unconscionable. I note that the interest rate is actually above 25% per annum. The question is whether the interest is unreasonable, harsh, and unconscionable.

46. The **Black's Law Dictionary 8th Edition** at page 4737 defines unconscionable to mean a transaction showing no regard for conscience; affronting the sense of justice, decency, or reasonableness the contract is void as unconscionable.

47. The parties agreed to an interest rate of 10% per month which amounts to 120% per annum. In the case of **Alice Okiror V. Global Capital Save 2004 Ltd Civil Suit No. 149 of 2010** it was held that the rate of 12% per month amounting to 144% per annum was harsh and unfair.

48. In the case of **Alpha International Investments Ltd Vs. Nathan Kizito HCCS No. 131 of 2001** while dealing with a similar situation observed that people often resort to loans in desperate situations and do not find out the legal implications of their actions. The learned judge then compared the interest rate of 240% per annum and the commercial rate at the time and held that the interest rate was unconscionable.

49. I note that the above 2 cases were decided before the Money Lenders Act, Cap 273 was repealed. However, the said cases are relevant as they bring the point that interest rates that are way above the commercial rate are unconscionable.

50. Under **Section 26(1) of the Civil Procedure Act**, where an agreement for payment of interest is sought to be enforced, and the court is of the opinion that the rate agreed to be paid is harsh and unconscionable and ought not to be enforced by legal process, the Court may give judgment for the payment of interest at such a rate as it may think just.

51. In the case of **Samuel V. Newbold (1906) A.C. 461**, cited in the Indian case of **Avathani Muthukrishnier vs Sankaralingam Pillai, (1913) 24 MLJ 135,** the House of Lords while addressing a provision of the UK's Money Lenders Act of 1900 which is similar to *section 26 (1) of the Civil Procedure Act* held as follows:

> *...that if there is evidence which satisfies the court that the transaction is harsh and unconscionable, using those words in a plain and not in any way technical sense, the court may reopen it...*
>
> *... excessive interest of itself is sufficient to render a contract, harsh and unconscionable.*

52. Commercial bank lending rates range from 18% to 25% per annum. I find that a commercial rate of 120% per annum is excessive compared to the commercial rates and is therefore harsh and unconscionable.

53. In the circumstances, I, therefore, reopen the transaction and award interest at the rate of 25% per annum until payment in full.

54. In conclusion, therefore the Judgment is entered for the Plaintiff against the Defendants jointly and severally in the following terms:

a) Payment of UGX 89,040,000;
b) Interest on a) above of 25% per annum until payment in full
c) Costs of the suit.

Dated this 28th day of July 2023

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Patricia Kahigi Asiimwe

Judge

Delivered on ECCMIS