

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL SUIT NO. 1228 OF 1998

JACKSON BBALE:::PLANTIFF

VERSUS

MS CAPITAL FINANCE CORPORATION LTD :::::::::::::: DEFENDANT

BEFORE: THE HON. LADY JUSTICE M.S. ARACH - AMOKO

JUDGMENT:

The Plaintiff filed this suit against the Defendant for:

- a. Return of his certificate of Title to land comprised in Mailo Register Block 244 Plot 5203.
- b. Cancellation of incumbrance in favour of the Defendant noted on the said land.
- c. General damages for breach of the loan agreement and for holding into the said certificate of Title.
- d. Costs of the suit.
- e. Any other relief the Court may deem fit.

The Plaintiff's case is that on the 24/4/95, he requested the Defendant bank for a loan of Shs.20m. He executed a Mortgage Agreement for the said amount in respect of his land comprised in Mailo Register Block 244 plot 5203, Mengo Ssabagabo, land at Kisugu, to secure loan. The plaintiff did not have a bank account with the defendant. The defendant never gave him the money under the loan agreement and has refused to return his certificate of Title claiming that it advanced the loan to one Sophia Masimbi and Sophilia Pharmacy ltd.

The plaintiff avers and contends that he never entered into any contract with the defendant so that the money be advanced to them, nor did he enter any guarantee agreement with the defendant guaranteeing any loan to them, or grant any powers of attorney to them to use his land title to get a loan from the defendant. That the defendant's failure and/ or refusal to advance the money under the loan agreement and its continued holding into his certificate of title is a breach of contract and has caused him financial loss, since he could not use the

certificate of Title to obtain a loan from another financial institution. There is also an encumbrance which was noted on the title. Hence this suit.

The defendant's response to the claim is that the plaintiff lent the said title to one Haji Eriyasi Masimbi, the proprietor of Sophilina Pharmacy. Sophilina Pharmacy who filled the loan form. Then the defendant sanctioned the loan of shs 20m and the money was received by the plaintiff, who duly acknowledged receipt thereof.

In the alternative, and strictly without prejudice to the foregoing, the defendant averred and contended that the suit property was legally and properly mortgaged to the defendant and the defendant is justified the foreclosure on the said property, since the plaintiff has failed to pay the loan.

The Defendant averred further that the Plaintiff was at all material times aware of his indebtedness to the Defendant and did on several occasions correspond to the Defendant his willingness to pay the said loan in order to redeem the suit property. The Plaintiff is therefore not entitled to the reliefs claimed, and the suit should be dismissed with costs.

The following issues were agreed upon for determination by the Court:

1. Whether the Defendant breached the Mortgage Agreement entered with the Plaintiff.
2. Whether the Plaintiff received the loan under the Mortgage Agreement.
3. Whether the Plaintiff lent his land title to Block 244 Plot 5203 to Haji Eriyasi Masimbi, and if so,
4. Whether the Defendant is entitled to foreclose
5. Whether the Plaintiff is entitled to the relief sought.

The Plaintiff was the sole witness in his case, and the Defendant called two witnesses: Apollo Ntarima, a handwriting expert (DW1) and Julius Twinomujuni, the Defendant's loan officer; at the material time.

Regarding issues No. 1, 2 and 3, the real underlying question is whether the Defendant disbursed Shs.20m to the Plaintiff or to Sophilina Pharmacy on the Plaintiff's order. This so because the Defendant does not deny the mortgage agreement. What is in contention is that

the monies under the mortgage were not disbursed either to the plaintiff or to Sophilia Pharmacy on his order.

The plaintiff testified that on the 24/4/95, he went to the defendant bank and requested for a loan. He was not a customer of the defendant. The defendant agreed to lend him money if he deposited a land title as security. They executed a mortgage agreement in respect of his land in respect of Block 246 plot 5203 at Kisugu (Exh.P1). It was to secure a loan of 20m. He was not given the money because the Manager was absent. He was told to go back. He has never been given any money. He does not know Sophilia pharmacy or Sophia Masimbi. He has never had any dealings with Sophilia Pharmacy. He never gave Sophia Pharmacy or Sophia Masimbi a power of attorney, or sign a guarantee with the defendant to give money that was due to him under the mortgage agreement to Sophilia Pharmacy.

DW2, Julius Twinomujuni, testified that the plaintiff did indeed go to the defendant for a loan as stated. The plaintiff had security but he did not qualify to get a loan from the bank because he did not have an account. DW2 advised the plaintiff to open an account, but he did not. He instead informed DW2 that he had reached an understanding with Eriyasi and Sophilia Masimbi who operated A/C No.10013 in the name Sophilia Pharmacy, to use the said account for disbursement of the loan. The plaintiff then went out and returned with Eriyasi Masimbi and they brought to him a memorandum of understanding (Exhibit D1) under which the plaintiff agreed to give his title to Block 5203 Block 244 to Masimbi to secure the loan of 20m/=. When he took the land title, the basic information report and Mr. Masimbi's ledger to Mr. Ali the Executive Director and his boss, for approval of the loan, Mr. Au insisted on a written consent from the Plaintiff that the money would be withdrawn by Mr. Masimbi on his behalf. The Plaintiff could not write properly, so Mr. Au wrote for him and then read it to him and then the Plaintiff signed. The note written in capital letters was tendered as Exhibit D2; and it reads:

“To Capital Finance
Plot 10 Entebbe Road

KAM PALA.

I, Jackson Bbale owner of property at Block 244 plot 5203, Mengo Kyadondo have executed a registered mortgage over the said property in your favour for facilities extended to Sophilia Pharmacy Ltd for due consideration received by me and have received proceeds of the loan

on behalf of Sophilia Pharmacy Ltd to whose account all sums may be credited.

Signed:

JACKSON BBALE”

Thereafter, Mr Ali approved the loan; and DW2 prepared the sanction and the documents sent to their lawyers Mulenga and Kalemera who prepared and registered the Mortgage (Exhibit D3 same as D1). After the Plaintiff signed the Mortgage, the Defendant credited Sophilia Pharmacy Account No. 10013 with Shs.20m. The money was withdrawn from the account. They defaulted. The Defendant wrote several letters to Sophilia Pharmacy and tried to sell the property .The plaintiff used to tell DW2 that he was following up the matter with Mr.Masimbi. He even wrote a letter that he would sell off one acre of the land to pay (Exhibit D4).The bank rejected the proposal and instructed auctioneers to sell.

The evidence on record is clear. The plaintiff wanted to borrow money from the defendant.

The requirements according to DW2 were:

a.An account

b. A basic information duly filled by the account holder.

c. Security

The plaintiff did not have an account, so he could not fill No.(b). He however had security.DW2 advised him to open an account first. He decided instead to enter what I find a complicated and risky arrangement with Haji Masimbi who operated A/C No.10013 in the name of Sophilia Pharmacy for the purpose of disbursement of the loan. In order to ensure that Haji Masimbi did not cheat him, they went to a lawyer called Charles Odere of Shonubi Musoke & co. who drew for them a memorandum of Guarantee (Exhibit D1) in the following terms:

“RE: AGREEMENT OF UNDERSTANDING”

I Haji Eriyasi of Gaba of P.O.Box 3620 Kampala has today borrowed Mr. Bbale’s land title plot 5203 Block 244 Kisugu . The land title comprises a residential house on it amongothers, to use it in procuring a loan of shillings twenty million Uganda shillings (20,000,000) from Capital Finance.

In case of failure to repay the loan, my land and properties will be used to settle the debt by surrendering them to Bbale:

The land includes the following:

1. Land on Block 418 plot at Nabugabo 32.
2. House at Kyatebe Masaka.

I have written this agreement in my own free will in the presence of the following:

Signed: Haji Masimbi Eriyasi

In the presence of Charles Odere.

Signed: Jackson Bbale

In the presence of:..... Charles Odere.”

These documents were then used to support the application.

The Plaintiff denied signing the note of acknowledgement Exhibit D2 and the memorandum of Agreement, in his reply to the written statement of Defence, where he averred in paragraph 2 that:

“2. In reply to paragraphs 3 (b) and 3 (d) of the written statement of Defence, the Plaintiff further contends that he never executed documents attached to the written executed documents attached to the written statement of defence and marked as annexures X2 AND X3 respectively.

In the alternative, and strictly without prejudice from the foregoing the plaintiff avers and contends that, if ever he executed the document attached to the written statement of defence and marked Annexure X2(the acknowledgement note Exhibit D2), then it never took effect.”

Firstly, I find this kind of pleading not only contradictory but false. One cannot deny and admit signing a document at the same time. This points to a deliberate falsehood. In his testimony however, the plaintiff does not deny that he signed Exhibit D2. He said during cross examination on page 17 of the record:

“Ali never told me that it was a requirement to have an account with the bank in order to obtain a loan. I signed the mortgage and another plain paper. The Manager told me to come back.”

And on page 19 when he was shown Exhibit D2 he said:

“This is the paper I signed and they told me to come and pick the money.”

This is corroborated by the evidence of DW1 who compared the signature on the mortgage deed (Exhibit P1) and the note (Exhibit D2) and stated as follows:

“I examined the questioned signatures on the documents and I interposed them among themselves with the following findings:

- a. There are 3 signatures on Annexure X1 (“the mortgage”) and Annexure X3 (“the letter of instruction from the Plaintiff for disbursement of the loan monies to Sophilia Pharmacy”) and they match closely in letter joins, proportions, areas of reduced or stressed pen pressure, fluency, start and other writing characteristics. In my opinion there is evidence consistent with these signatures having been written by the same writer.”

In relation to the memorandum (D1) DW1 stated this:

“There is inconclusive evidence regarding the signature on Annexure X2 because of it being a photocopy, however, it also matches in many characteristics including letter terminations, joint, start and fluency with the signatures on the legal mortgage X1 (Exhibit P1) and X3 (the letter instructing the Defendant to pay Sophilia Pharmacy Limited Exhibit D2). This was also written by the above writer.”

I agree with the Defence counsel that this expert evidence establishes that the memorandum of Guarantee was indeed signed by the Plaintiff and supports the contention that the Plaintiff indeed asked the Defendant to pay the loan monies to Sophilia Pharmacy Ltd.

I have also taken note of the chronology of events in the suit.

The mortgage deed was executed on 24/4/95 and so was the memorandum of Guarantee. This was, as counsel for the defendant rightly pointed out, to secure the plaintiff’s position incase Sophilia pharmacy defaulted in repayment, and the security was sold Two days

later, on 26/4/95 the plaintiff issued the acknowledgement note (Exhibit D2) and he actually acknowledged receipt of the money where he says:

“ I have received proceeds of the loan on behalf of Sophilia Pharmacy Ltd to whose account all sums must be credited.”

Although the plaintiff claim that he never got the money and he made several visits to the bank, no letter has been produced in this court to show that he ever complained to the bank. He filed this suit on 20/11/98-three and a half years later when the bank had by then instructed auctioneers to sell the said property .It is instructive to note that the suit seeks to stop the bank from selling the property and does not seek the shs.20m under the loan, which lends credence to the defendant’s position that the suit is merely intended to salvage the property. Counsel for the defendant has submitted that it is unbelievable that the plaintiff who had mortgaged his certificate of title to the defendant that it is unbelievable that the plaintiff who had mortgaged his certificate of title to the defendant in 1995 and who had not received the loan monies could let three (3) years pass by without taking any steps to retrieve his certificate of title. That the only way the defendant could have registered a mortgage on the plaintiff’s land and then disbursed the proceeds to someone else completely unconnected with the plaintiff would have been if the defendant was involved in a fraudulent design with Sophilia Pharmacy ltd, the entity to whose account the loan was disbursed. The plaintiff does not however allege fraud ,and short of fraud, on the part of the defendant , the plaintiff’s position that the loan was not disbursed to the account of Sophilia Pharmacy at his request does not stand. I respectfully agree with Defence counsel. Most importantly, there is on record, a letter dated 17/9/97, from the Plaintiff to the Defendants Managing Director. The letter says:

“Dear Sir,

RE: PAYMENT OF OUTSTANDING DEBT/LOAN

I acknowledge receipt of your advocates letter regarding the above matter.

Since my last communication to you, I have been trying my utmost to raise finances to pay the loan amount. As you are well aware, the Administrator General’s Office, as Administrators of the estate of the deceased, had undertaken to raise finances to pay off the loan (attached hereto is a copy of the relevant letter). Unfortunately, this has never been done. It is in this regard that I, as owner of the mortgaged property, would like to make an arrangement with you by which I pay off the debt and redeem my property. My

proposal to sell of 1 acre of the relevant property to somebody in exchange for a commercial tipper lorry. I propose to pay you an average of Ug. Shs.lm per month from the income generated by the vehicle.

In this regard, I would request you to release the certificate of title to me, or any other party of your choice, to permit the mutation of the land. I shall hand over the original log book of the vehicle to you as security for the outstanding loan

Kindly consider my proposal which I trust shall benefit both parties.
Eagerly anticipating your positive response.

Yrs faithfully

Jackson Bbale

C.C.Shonubi Musoke & co. advocates”

This letter was annexed to W.S.D as 4X. The plaintiff did not deny it in his reply to W.S.D. He denied it in cross examination. The report of the handwriting expert DW2-however established that he signed the same.DW2 stated in paragraph 13 of his report that:

“Although the signature on Annexure X4 (Exhibit P4) shows different strokes following the final flourish for “alle” of “Bbale”, I have also found the rest of the signature to have significant similarities with the rest of the earlier mentioned signatures. It is in my opinion highly probable that this was written by the same writer”

The earlier mentioned signature is on Exhibit P1-the mortgage deed. The letter P4 is clear evidence that the plaintiff knew, and he indeed knows that he is indebted to the defendant bank.

In conclusion and in answer to issues 1, 2,and 3,I agree with defence counsel that the suit is not merely an attempt but a desperate attempt to fraudulently avoid liability under the mortgage. It is clear that the loan was disbursed to the plaintiff through the account of Sophilia Pharmacy. The Plaintiff acknowledged receipt thereof (D2). The Plaintiff defaulted and the bank is threatening to foreclose. He presented a payment proposal (D4) which the bank rejected; hence this suit. The loan transaction is not a loan between the

Defendant and Sophilia Pharmacy. If it were so, Sophilia Pharmacy would definitely require a Power of Attorney to use the Plaintiff's title; or a Guarantee by the Plaintiff to pay the loan on behalf of Sophilia Pharmacy. There was therefore no breach of contract on the part of the Defendant. The Plaintiff received the loan through the account of Sophilia Pharmacy, as per his instructions. The Plaintiff lent his title to Block 244 plot 5203 to Haji Masimbi to secure a loan of Shs.20m; but then it is the same title that had been mortgaged at security to the bank in respect of the same loan. As far as the Defendant is concerned, however, I hold the view that, the Memorandum of Guarantee had no legal consequence on its rights under the Mortgage Deed. As I have said earlier, the loan transaction was between the Defendant and the Plaintiff. The Plaintiff had no account with the bank, so he instructed the bank to disburse the loan through Sophilia Pharmacy account, and the bank carried out the Plaintiff's instructions as evidenced by the bank statement - Exhibit P8.

The fourth issue is whether the Defendant is entitled to foreclose. The Defence counsel has rightly pointed out that the Defendant did not file a counterclaim for an order of foreclosure. It cannot therefore seek this order from this Court. It is however free to exercise its rights under section 9 of the Mortgage Decree, since it is a Mortgage and clause 4 of the Mortgage Deed permits it to realise the security without recourse to the Court in case of default.

The fifth issue is whether the plaintiff is entitled to the reliefs claimed. It follows from my findings on the other issues that he is not. He got the loan, he has not paid it. He is therefore not entitled to the return of the title or cancellation of the encumbrances thereon in favour of the defendant.

All in all, I find no merit in this suit and I dismiss it with costs to the defendant.

M.S.Arach-Amoko

JUDGE

Judgment delivered in the presence of

1.Bitamisi Batuuka for the plaintiff

2. Mrs Musoke legal assistant to the defence counsel

3. Plaintiff.

4. Mr.Okuni –court clerk.

M.S Arach-Amoko

JUDGE

30.4.03