

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT
KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO. 640 OF 2013
KCB BANK UGANDA LIMITED:..... PLAINTIFF

VERSUS

1. SENDAGIRE JOSEPH
2. EDDIE NSAMBA GAYIYA:.....
DEFENDANT

AND

1. UAP INSURANCE UGANDA LIMITED
2. KINTU PAUL T/A TERRAIN CONSULT:.....THIRD
PARTIES

BEFORE JUSTICE WANGUTUSI DAVID

JUDGMENT:

KCB Bank Uganda Limited the Plaintiff herein sued Sendagire Joseph the 1st Defendant and Eddie Nsamba Gayiia herein the 2nd Defendant jointly for breach of contract, recovery of UGX. 398,201,669/= and its accumulated interest, general damages, interest on any pecuniary award and costs of the suit.

The 2nd Defendant is also sued for general damages and interest with costs arising from professional negligence while carrying out his business of surveying and valuation.

The background of this suit as discerned from the pleadings is that the Plaintiff advanced a loan to the 1st Defendant of UGX. 300,000,000/= whose purpose was to buy off the 1st Defendants' outstanding loan with FICNA bank, provide working capital and purchase a heavy duty truck from Japan. This loan was repayable in 48 months and would attract interest of 32% per annum, **ExhP4**.

For security the 1st Defendant provided his certificate of title and all developments on Plot No 8956 Block 185 land at Najera Kira Town Council in the names of Sendagire Joseph, **ExhP1**.

Before the Plaintiff credited the 1st Defendants' account she instructed the 2nd Defendant to go and open boundaries, conduct evaluation of the property and make a report thereof.

The 2nd Defendant also appointed a surveyor one Paul Kintu trading as T/A Terrain Consult to do a survey. After the survey and valuation, the 2nd Defendant submitted a report giving the current market value of the property at 650,000,000/= and the forced sale value of 455,000,000/=.

On the strength of this report the Plaintiff then executed a mortgage with the 1st Defendant to a tune of 300,000,000/= with property aforementioned as security, **ExhP5**.

As fate would have it the 1st Defendant defaulted in payment and did not positively respond to the statutory notices and demands.

The Plaintiff therefore commenced proceedings of realising the mortgage.

To do so the Plaintiff had to first find out the current value of the mortgaged property. She therefore hired Knight Frank Uganda Limited to survey and value the said property a year after the mortgage agreement.

Knight Frank Uganda Limited did as instructed and on the 27th Feb 2013 made a valuation report on plot 8956 Kyandondo Block 185 defining the market value, restricted sale and gross current replacement cost.

Knight and Frank found that the land that had originally been described as developed was in fact undeveloped and had a restricted sale of only UGX 14,400,000/= and an open market value of UGX 24,000,000/=**ExhP7**.

It was therefore clear that the report of the 2nd Defendant was riddled with falsehoods and inaccuracies whose explanation

the Plaintiff contended was gross negligence and overvaluation of the security by the 2nd Defendant.

The plaintiff contended that the 2nd Defendant had been negligent and yet he owed a duty of care to give a proper valuation of the property which duty he had breached and was therefore equally responsible for the loss of the money advanced to the 1st Defendant.

She filed this suit against both the 1st and 2nd Defendant.

The 1st Defendant having failed to file a response within the required time judgment was entered against him.

On her part the 2nd Defendant denied liability.

He also filed a third party notice

He contended that his firm on receiving instructions from the plaintiff had also sub contracted an experienced surveyor, one Paul Kintu trading as Terrain consult to open boundaries and carry out physical survey of the land and that since he relied on the findings of the surveyor who was an independent contractor that he was therefore not liable of the results of the mishap.

By way of counter claim the 2nd Defendant contended that the suit be dismissed with costs against him and liability be visited on the 1st Defendant and 3rd Defendants', that the 1st

Defendant be declared fraudulent, the Plaintiff be held liable for contributory negligence, the 1st Defendant be held solely liable to the Plaintiff for the decretal sum, general damages against the 1st and 3rd Defendants, interest on the decretal sum and costs.

The 2nd Defendant further averred that he would claim indemnity against Kintu Paul and indeed sought and obtained a third party notice against him.

The 2nd Defendant also filed 3rd party notices against UAP insurance hereinafter referred to as the 1st third party wherein he also claimed indemnity based on an insurance policy to wit professional indemnity insurance policy that he had taken out, **ExhP2.**

In her defence the 1st third party denied liability and contended that the claim did not fall under the policy in so far as the documents and information examined revealed that the circumstances of loss to the Plaintiff were not as a result of professional error and or negligence but a result of intentional fraud, a claim not capable of being made under the indemnity policy.

In this she relied on clause 6 of the professional indemnity policy which excluded cover of claims brought about by dishonest, fraud, criminal or malicious acts or omissions of the firm or her predecessors in business or any person at any time employed by the firm or their predecessors in business, **ExhD2.**

At scheduling the parties agreed on the following issues;

- a) Whether the 1st Defendant is liable for breach of contract entered into between the Plaintiff and the 1st Defendant
- b) Whether the 2nd Defendant was negligent while carrying out the valuation and survey on behalf of the Plaintiff and whether such negligence resulted into loss
- c) Whether the Plaintiff is liable for contributory negligence
- d) What remedies are available to the parties?

As for the 3rd parties the issues for resolution are;

- a) Whether the 2nd Defendant was professionally negligent while carrying out the valuation and survey on behalf of the Plaintiff if so
- b) Whether the Plaintiff is liable for contributory negligence, if so to what extent
- c) Whether the 2nd Defendant is entitled to any indemnification from the 1st third party arising from the Plaintiffs claim against him (the Defendant).
- d) What remedies are available to the parties?

Resolution

As to whether the Defendant is liable for breach of contract entered into between him and the Plaintiff.

The Plaintiff claimed that he had loaned the 1st Defendant money which he was to repay in 48 months. The 1st Defendant provided security of land comprised in **Block 185 Plot 8956**.

The opening of boundaries and valuation was done by the 2nd Defendant. It is clear from the evidence on record that the

Plaintiff relied on the valuation report to give the 1st Defendant the facility.

It is also clear that the 1st Defendant defaulted in payments and the Plaintiff sued for recovery.

It is also clear from record that the 1st Defendant did not defend the suit and judgment was entered against him.

On whether the 2nd Defendant was negligent while carrying out the valuation and survey on behalf of the Plaintiff and whether such negligence resulted into loss.

The resolution to the foregoing is found in the relationship between the Plaintiff and the 2nd Defendant, the 2nd Defendant is a valuer with 35 years of experience who had served the plaintiff for 8 years.

As earlier pointed out, the Plaintiff offered a loan to the 1st Defendant who secured it with land comprised in Block 185 Plot 8956.

In the instant case the Plaintiff not being competent to open boundaries and do a valuation relied on the 2nd Defendant.

PW1 Stella Nabbale told Court that the 1st Defendant who was in need of a loan facility from the Plaintiff offered his property comprised in **Kyandondo Plot 8956 Block 185** at Najjera Town Council as security.

The Plaintiff then sought the services of the 2nd Defendant a re-known valuer to open boundaries and do valuation of the same before she could advance the money to the 1st Defendant.

The 2nd Defendant carried out the survey and valuation of the property and on 29th November 2011 submitted a report.

His report showed that the property was developed with a three storied residential apartment block enclosed in a perimeter wall fence giving it an open market value of UGX 650,000,000/= and a forced sale of UGX 455,000,000/=.

It is PW1's evidence that basing reliance on the report, the Plaintiff executed a mortgage of UGX. 300,000,000/= with the property as security.

As we now know the 1st Defendant defaulted in payment and the Plaintiff commenced the process of realisation of the money. Before she proceeded with sale of property she sought expert assistance from Knight Frank. Knight Frank opened up boundaries and found that actually the land did not have any developments and that the report of the 2nd Defendant was riddled with inaccuracies.

The inaccuracy of the report is not disputed by the 2nd Defendant. In fact the 2nd Defendant in his evidence told Court that the valuation given was of a different plot and not the one the Plaintiff had sent him to establish and value.

He however added that the Plaintiff had contributed in the negligence because she did not carry out independent due diligence and verification of the 1st Defendants' property.

The 2nd Defendant also denied liability and stated that he sub contracted a surveyor Kintu Paul to carry out the physical survey of the land. He further stated that he relied on the findings he got from Kintu Paul to report to the Plaintiff.

With due respect I do not think that the Plaintiff contributed in negligence. The due diligence that was expected of him was exhibited in his appointment and reliance on the expertise of the 2nd Defendant. The 2nd Defendant stated that he had worked for 35 years with banks in similar situations.

He further stated that he rendered similar services to the Plaintiff for 8 years and the 2nd Defendant also told court that he was at the locus with Paul Kintu the surveyor he had retained when the boundaries of the plot were being opened. He said;

"Kintu opened boundaries of the wrong property. I valued the property I was shown by the surveyors."

With all that experience as stated by the 2nd Defendant what other due diligence was expected of the Plaintiff.

The 2nd Defendant who was the expert held himself out as such. He expected the plaintiff to take his advice which she did.

The plaintiff therefore cannot be held to have contributed to the negligence.

The 2nd Defendant also claimed that this was a mere error which would not be held against him.

While an error in figures may not be held against the 2nd Defendant this case is different in that with all the experience the 2nd Defendant valued a different plot. This was not a light error.

In *Baxter vs Gapp & co ltd* [1938]4 ALLER 457

"A valuation which falls outside the permissible margin of error brings into question the valuers competence and care with which he carried out his task."

In *Bangue Braxelles Lambert S.A vs Eagle Stay Insurance Co Ltd* [1995]2 ALLER 769 Their Lordships were of the view at page 789 that;

"A valuer is not negligent merely because he adopts a method of valuation which is not the best provided it is one which is acceptable by a reasonable body of opinion among valuers. A valuer will however, be negligent if he gives an open market valuation without considering implications of a recent sale of property, unless he has been specifically instructed to disregard it."

From the foregoing, it is clear that mere "variance of opinion as to the value of a property does not mean that the valuer has been in breach of his duty." **Halsbury Laws of England, 4th Edition Vol 49.**

It should however be noted that the relationship between the valuer and the person who appoints him is that of a professional and a layman.

For one to determine whether a duty of care exists, the issue of foreseeability of the danger, reasonableness and proximity come into play; **Caparo Industries PLC vs Dickman [1990] AC 605.**

In the instant case the 2nd Defendant was providing professional care to the Plaintiff as a valuer of experience. The fact of professional care was reiterated in the English case of **Hedley Byrne & Co Ltd vs Heller & Partners Ltd [1964] AC 465** in the following words;

"I consider that it follows and that it should now be regarded as settled that if someone possessing special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference.

Furthermore, if in a sphere in which a person is so placed that others could rely upon his judgment or his skill or upon his ability to make careful inquiry, a person

takes it upon himself to give information or advise to, or allows his information or advise to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise.”

For the 2nd Defendant to value a different property from that shown on the title and going ahead to submit a report in respect of a fully developed property when the one in issue was not developed is an error that falls outside the permissible margins of errors and therefore brought into question the valuers competence and the care with which he carried out his task.

The 2nd Defendant might have done a lot of good work before but on this he gave little attention which resulted in valuing property which was not subject to the intended loan.

Following the reasons above the 2nd Defendant falls out of the protection of “*mere error*” and slides into the arena of negligence. Even if the 2nd Defendant used a different surveyor, the risk was foreseeable and he should have been more diligent than he was.

In reaching that conclusion I am fortified by the holding in ***Uganda Commercial Bank vs Deo Kigozi CACA 21 OF 1999*** where Court observed that;

“Where however a person delegates a task or duty to another, it employs another, not a servant, to do something for his benefit

of himself or other, whether the other person be called agent or independent contractor, the employer will be liable for the negligence of that other person on the performance of the task, duty to act as the case may be."

That being the case the 2nd Defendant cannot shield himself from liability by the excuse that Kintu Paul of Terrain Consult was a private contractor. While the 2nd Defendant can recover from Paul Kintu he cannot exonerate himself from the Plaintiffs' claims.

For the above reasons I find that the 2nd Defendant failed in his duty he owed to the Plaintiff who had entrusted him with the opening of boundaries and valuation.

Loss incurred as a result therefore be paid by the 2nd Defendant jointly with the 1st Defendant.

For the reasons given above the counter claim to hold the Plaintiff in contributory negligence and the 1st Defendant solely liable fails and is dismissed with costs to the Plaintiff.

Resolution of 1st third party issues.

As to whether the 2nd Defendant was professionally negligent while carrying out the valuation and survey on behalf of the Plaintiff. This issue has been earlier handled in this judgment with a finding that the 2nd Defendant was negligent.

On whether the Plaintiff is liable for contributory negligence has also been resolved above where this Court found that the Plaintiff did not contribute to the negligence.

As to whether the 2nd Defendant is entitled to any indemnity from the 1st third party.

The 2nd Defendant contended that he had a professional negligence insurance cover with the 1st third party and that in event of him being found liable to the Plaintiff the 1st third party would indemnify him.

For those reasons he issued third party notices against the 1st third party.

The 1st third party denied indemnity to the 2nd Defendant relying on clause 6 of the Professional Indemnity Policy.

Clause 6 of the Professional Indemnity Policy the 1st third party would not indemnify the firm in respect of claims brought about or contributed to by the dishonest, fraudulent, criminal, or malicious act or omission of the firm or their predecessors in business or any person at any time employed by the firm or their predecessors in business.

As to whether there was fraud on the part of the 2nd Defendant, there is evidence from all corners including the 2nd Defendant who in his testimony clearly stated that there was

fraud and dishonesty during the survey of the mortgaged property.

When asked during cross examination whether there were elements of fraud during the survey, the 2nd Defendant said;

"In so far as Sendagire Joseph took the surveyor to a property which was not his, yes that constitutes fraud."

This clearly imputes that what contributed to the loss of the Plaintiff was by means of an element of fraud. This falls outside what the Professional Indemnity Policy covers.

I therefore do not find the 1st third party liable to indemnify the 2nd Defendant.

The 2nd third party filed no reply to the third party notice. There's no evidence on record to show that Kintu Paul was served with either the third party notices or the defence personally as required under *Order 5 Rule 1 of the Civil Procedure Rules*.

In the circumstances I make no finding against the 2nd third party.

Remedies

The Plaintiff sought general damages.

These are damages that a Court awards in its discretion and will be presumed to be the natural and probable consequence

of the Defendants' act or omission, ***James Fredrick Nsubuga vs Attorney General HCCS No 13 of 1993.***

It follows that a Plaintiff who has suffered damage due to the wrongful act of the Defendant must be put in a position as near as he or she should have been in had he or she not suffered the wrong. In assessing the quantum of damages, Courts are mainly guided by the value of the subject matter, and the economic inconvenience that a party may have been put through, ***Kibimba Rice Limited vs Umar Salim SCCA No 17 1992***

In the instant case it has been established that the 2nd Defendant was negligent in carrying out the assignment given to him by the Plaintiff when he opened and made valuation of a different land other than land in **Block 185 Plot 8956** to which he gave a current market value of UGX 650,000,000/= and forced sale value at UGX 455,000,000/=.

The Plaintiff stated in her evidence that she relied on the valuation of the 2nd Defendant to grant the 1st Defendant a loan which in the end the 1st Defendant defaulted to pay despite several demands as shown in **ExhP6**. That in any case if it were not for the false amounts reported, the Plaintiff would have never extended a loan of that much to the 1st Defendant.

To recover her money the Bank hired Knight Frank to value the land. On submission of the report she realised that the

land at Block 185 was worth 24,000,000/= way lower than what the 2nd Defendant had reported.

The 1st Defendant has to date not repaid the loan he got from the Plaintiff in 2011. Owing to the fact that this is a commercial bank whose business depends on lending and making profits, they missed out on re-lending the same.

The foregoing implies that the 2nd Defendant fully contributed to the loss of the Plaintiff when he submitted valuations of a developed land not what the Plaintiff had instructed him to value. The Plaintiff relied on his report to extend the loan; he is therefore accountable for the loss as well.

While the Plaintiff is entitled to general damages she did not guide court on the quantum.

The only guidance that this court has is the sum in the mortgage contract.

Taking into account all the circumstances surrounding this case I find an award of UGX. 50,000,000/= WHICH SHOULD BE PAID BY THE 1ST AND 2ND Defendant appropriate.

The Plaintiff also sought interest.

Interest is at the discretion of court; ***Uganda revenue Authority vs Stephen Mabosi SCCA 16 OF 1995***. Like all other discretion it must be exercised judiciously taking into account all the circumstances of the case; ***Superior Construction Ltd vs Notay Engineering Ltd HCCS 24 OF 1992***.

The Plaintiff was kept out of the money from which she would have earned interest. She is therefore entitled to interest.

This being a commercial bank, it is only just that she be awarded a commercial rate. Considering all the circumstances surrounding this case I find interest of 20% per annum appropriate.

As for general damages the 1st and 2nd Defendant shall jointly pay 6% per annum from date of judgment till payment in full.

Costs of the suit to the Plaintiff and 1st third party be paid jointly by the 1st and 2nd Defendant.

In conclusion judgment is entered in the following terms;

- a) The 1st and 2nd Defendant to jointly pay the loan sum to the Plaintiff of UGX 398,201,669.
- b) The 1st and 2nd Defendant jointly pay general damages of UGX 50,000,000/=
- c) Interest on (a) at a rate of 20% per annum from 25th May 2012 and (b) at 6% per annum from date of judgment till payment in full.
- d) The counterclaim is dismissed with costs.
- e) The 1st and 2nd Defendant shall be liable to pay costs of the suit.

Dated at Kampala this 30th Day of June 2021


HON. JUSTICE WANGUTUSI DAVID

JUDGE.