

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
CIVIL APPEAL NO. 001 OF 2021
(Arising from KMG-06-CV-CS-23 OF 2019)

HOFOKAM LIMITEDAPPELLANT

VERSUS

TWEYAMBE WILSON.....RESPONDENT

BEFORE: HON. MR. JUSTICE MUGABO VINCENT EMMY

JUDGMENT

Background

This is a first appeal against the judgment and orders of His Worship Kirya Martins, Magistrate Grade 1 of Kamwenge delivered on the 12th January 2021. The suit arises out of loan transactions between the parties entered into between 2014 and 2016.

The case for the respondent at the trial in the lower court was that in the year 2014, he obtained a loan of UGX 7,000,000/= from the appellant and pledged the logbook for motor vehicle registration no. UAQ 025D and two land sale agreements as security for the loan. This loan was repaid and he requested for the return of his documents pledged as security which were not returned to him. He was instead advised by the appellant to obtain another loan. He obtained another loan of UGX 5,000,000/= on 29th March 2016 to be repaid in 12 equal monthly instalments and asked to pledge another land sale agreement which he ably did.

Before the expiry of the loan period, the appellant instituted Civil Suit No. 49 of 2017 against the respondent to recover UGX 4,257,956/=. This suit was concluded by consent whereby the respondent agreed to clear this sum

in monthly instalments of UGX 600,000/= effective 20/7/2017 and to pay costs of UGX 400,000/=. The respondent avers that he cleared all the sums due under the consent judgment albeit not in line with the timelines. He then requested for the return of his logbook and the three land sale agreements from the appellant but in vain. He then filed Civil Suit No. 23 of 2019 from which this appeal arises.

The appellant on the other hand claimed in the court below that the respondent was still indebted to the appellant and that the respondent was not entitled to the return of the security documents.

The trial magistrate heard the parties and their evidence and found that the present respondent had actually repaid the loan and paid UGX 152,044/= in excess of what he ought to have paid under the consent. He ordered for the return of the 3 land sale agreements and the logbook for motor vehicle registration no. UAQ 025D to the respondent. He also ordered the appellant to pay UGX 2,000,000/- in general damages. Costs in the lower court were granted to the respondent.

The appellant is dissatisfied with the judgment and orders of the trial magistrate, hence this appeal.

Grounds of appeal

The appellant presented the following grounds of appeal for court's consideration.

1. The learned trial magistrate erred in law and in fact when he failed to properly evaluate the evidence which showed that the plaintiff wrongly instituted Civil Suit No. 23 of 2019 before completing the loan payment in full as agreed in the consent decree.

2. The learned trial magistrate erred in law and in fact when he held that the respondent had satisfactorily proved that he had paid the money demanded in full and in excess.
3. The learned trial magistrate erred in law and in fact when he held that one Kaahwa who allegedly received money from the respondent was an agent of the appellant and his actions bind the appellant.
4. The learned trial magistrate erred in law and in fact when he awarded the respondent general damages of Shs. 2,000,000/= which were unjustified and excessive.

I will deal with the grounds of appeal in the order presented.

Representation and hearing

In this appeal, the appellant is represented by Mr. Bwiruka Richard of Kaahwa, Kafuuzi, Bwiruka & Co. Advocates and the respondent by Ahabwe James & Co. Advocates. Both counsel filed written submissions that have been considered in this judgment.

The law

The duty of this court with respect to first appeals is to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion. This duty is well explained in ***Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17 of 2000***; [2004] KALR 236 as thus;

“It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the

appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.”

The parties are entitled to obtain from the first appeal court its own decision on issues of fact as well as of law. See **Pandya v. R [1957] EA. 336**. It is incumbent on this court therefore to weigh the conflicting evidence and draw its own inferences and conclusions in order to come to its own decision on issues of fact as well as of law and remembering to make due allowance for the fact that it has neither seen nor heard the witnesses.

The appellate Court is confined to the evidence on record. Accordingly, the view of the trial court as to where credibility lies is entitled to great weight. However, the appellate court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court.

Ground 1

The learned trial magistrate erred in law and in fact when he failed to properly evaluate the evidence which showed that the plaintiff wrongly instituted Civil Suit No. 23 of 2019 before completing the loan payment in full as agreed in the consent decree.

In support of this ground, counsel for the appellant submitted that from **PW1**'s own testimony, there is UGX 400,000/- that still remains unpaid by the respondent to date. Counsel relied on **Section 34(1) of the Civil Procedure Act** and the case of **Francis Micah Vs Nuwa Walakira SCCA No. 24 of 1994** to argue that Civil Suit no. 23 of 2019 from which this

appeal arises was barred by law, incompetent and an abuse of court process. Further that all questions arising between parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge, or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit. The respondent could not legally file a separate suit after the consent decree had been entered in Civil Suit No. 49 of 2017. The separate suit would be barred by **Section 34(1) of the Civil Procedure Act.**

Counsel for the respondent submitted that the trial magistrate properly found that the respondent had completed the payment of all the decretal sums of UGX 4,257,956/-, paid UGX 152,044/- in excess and the UGX 400,000/= in costs as agreed in the consent decree before filing of the suit. Counsel relied on the evidence of **DW1** in cross examination at the trial to show that the respondent had actually extinguished his loan obligations to the appellant by the time of the suit in the lower court. Counsel argued that the respondent's suit in the lower court was properly instituted after paying all that he owed to the appellant and the appellant had neglected to hand over the security documents back to the respondent.

I have perused the submissions made by counsel for either party and the evidence of the parties at the trial. The last receipt issued by the appellant indicating the respondent's repayment of the loan is receipt no. 265 dated 19th June 2019. The plaint in the lower court was received by court on 20th June 2019. The respondent by that time had also been notified of the loss of the logbook he had pledged to the appellant in the Daily Monitor newspaper of 31st August 2016.

To say that that suit was premature would be to stretch it too far. I have taken note of counsel for the appellant's submission that the suit in the lower court was barred by **Section 34(1) of the Civil Procedure Act**. But I note that the suit from which this appeal arises dealt majorly with the failure of the appellant to perform its obligations under the original loan arrangement and not those that accrued from the consent decree in the earlier suit. Am unable to agree with the submission of counsel for the appellant. The obligation to handover the documents of title existed as a term under the original loan agreement upon completion of repayment of the loan monies by the respondent. The consent decree dealt with the respondent's obligation to pay, which no doubt also existed under the original loan agreement but the consent was not a substitute of the loan agreement between the parties.

Civil Suit no. 23 of 2019 from which this appeal arises was properly filed and this ground of appeal fails.

Ground 2

The learned trial magistrate erred in law and in fact when he held that the respondent had satisfactorily proved that he had paid the money demanded in full and in excess.

The evidence given by the parties in the court below was quite clear. While the appellant maintained that the respondent was still indebted to it, no evidence whatsoever was presented in this regard. Besides, it is the appellant that issued the respondent with various receipts indicating the repayment of the loan by the respondent.

There was an attempt by **DW1** to state the amounts which the appellant claims from the respondent as still owing. **DW1** stated that he was informed by the bailiff that UGX 250,000/= was still owing from the respondent. In the first place, this would squarely fall into the realm of hearsay evidence which I would take trouble to admit, but also it would be threatening to the customers of the appellant to know that their financial information is not properly handled. To know that the appellant is not even in position to produce a customer's loan statement to ascertain the true financial or loan position of the customer would at the very least be improper of a financial institution.

The trial magistrate rightly addressed the issue of evasive denials under **Order 6 rule 8 of the Civil Procedure Rules**. While the burden is on the plaintiff to prove his case to the required standard, in the circumstances of this case, it was not enough for the appellant to just allege that the respondent was still indebted to it without stating the amount that was still claimed. This could have been extinguished by simply producing the respondent's loan statement which was in the appellant's absolute power to do.

I find that the trial magistrate at page 6 of his judgment properly calculated the monies paid by the respondent from the time the consent decree was passed as against the receipts issued by the appellant to the respondent. He rightly found that the respondent had paid UGX 152,044/= in excess of what he ought to have paid under the consent.

The challenge I find with the parties' loan transaction is that from the evidence of **PW1**, the loan was not repaid within the agreed timelines. This in my view would have easily formed the basis of the appellant's case but

they chose to omit it in the pleadings and insisted that the respondent was still indebted. The time within which to repay a loan forms an important part of a loan contract. Financial institutions take various considerations into account before they agree on the timelines within which a loan should be repaid. This may include the cost of funds, inflation, Bank of Uganda lending rate at the time and so on. Failure to repay a loan within the agreed time would in my view amount to a breach of that arrangement and the financial institution would be entitled to exercise one or more of the many remedies available to it at law. They could include allowing the loan to run in their system, accumulate penalty interest up to the time of being written off in accordance with the **The Financial Institutions (Credit Classification and Provisioning) Regulations, 2005** or to commence recovery proceedings.

In the present circumstances, the appellant allowed the respondent to repay the loan in the way he did, he completed the payment and the appellant cannot now turn around and allege that the respondent was still indebted to it.

This ground of appeal also fails.

Ground 3

The learned trial magistrate erred in law and in fact when he held that one Kaahwa who allegedly received money from the respondent was an agent of the appellant and his actions bind the appellant.

Counsel for the appellant defined an agent according to Section **118 of the Contracts Act** and the case of **Goldstar Insurance Co. Ltd Vs Attorney General & 2 Ors HCCS No. 132 of 2010** to mean a person employed by

a principal do any act for that principal or to represent the principal in any dealing with a third party. Counsel argued that while PW1 testified that he paid UGX 400,000/- to one Kaahwa who purportedly received the same on behalf of Akugizibwe Isaiah the appellant's bailiff, it was wrong for the trial magistrate to impute sub-agency against the appellant where one never existed which offends **Section 125(1) of the Contracts Act**.

In response, counsel for the respondent argues that the appellant did not deny that Akugizibwe Isaiah was the appellant's bailiff tasked to recover money on behalf of the appellant. That the said Isaiah received UGX 400,000/- from the respondent as the costs that were agreed upon in the consent. I however don't see how this argument connects Kaahwa who received the money to the appellant.

From the evidence of **DW1** at the trial, he stated that he knew Kaahwa, as an advocate and that it was the appellant that had sent him to handle its case with the respondent. He was receiving money on behalf of the appellant. **DW1** further stated in cross examination that he had seen the document made by Kaahwa wherein he stated that there was nil balance due from the respondent. **DW1** could not agree with the document because it did not have a stamp. During re-examination, **DW1** stated that he was not certain about Kaahwa but that Kaahwa was working hand in hand with Akugizibwe Isaiah, the appellant's authorised recovery officer.

PW1 testified that he handed over UGX 400,000/- to Kaahwa, who received the same on behalf of Akugizibwe Isaiah, the appellant's debt collector and Kaahwa wrote for him an acknowledgement of receipt for the said amounts which were exhibited in court.

From the evidence of **DW1**, direct agency arrangement can be inferred between Kaahwa and the appellant. **DW1** stated that Kaahwa was working

hand in hand with the appellant's authorised bailiff, Akugizibwe. I suppose working hand in hand to collect debts for the appellant. **DW1** also stated that the appellant had sent Kaahwa, an advocate to handle the appellant's case with the respondent. This would with ease imply that Kaahwa was a co-agent with Akugizibwe in the debt collection business on behalf of the appellant. It would be very unfair to hold that the said Kaahwa was a complete stranger to the appellant and that his actions do not bind the appellant.

The acknowledgements of receipt of funds signed by the said Kaahwa indicate that he would receive the money on behalf of Akugizibwe Isaiah. The said Isaiah was never produced to substantiate whether he received the money or not. I agree with the findings of the trial magistrate that failure to bring a material witness without any explanation attracts a negative inference on the party that ought to have brought the witness.

Section 125(1) of the Contracts Act as cited by counsel for the appellant to argue that the actions of Kaahwa as a sub-agent don't bind the appellant is misplaced. This provision relates to agency contracts where an agent undertakes to perform an act personally. The nature of such a contract would be one that requires a special skill that the agent may not easily transfer to a sub agent, or any other reason that would bar the agent's obligations from being delegable. I don't view the obligation to collect debts in this regard.

I don't find any merit in this ground of appeal and it therefore fails.

Ground 4

The appellant's complaint in this ground of appeal is that the trial magistrate was wrong to award general damages of UGX 2,000,000/- to

the respondent yet the damages were unwarranted, unjustified and excessive.

Counsel for the appellant referred court to the case of **Stanbic Bank Uganda Limited Vs Hajji Yahaya Sekalega T/A Sekalega Enterprises HCCS No. 185 of 2009** to argue that while it is in the discretion of the judicial officer to award damages, such discretion must be exercised judiciously taking into consideration the value of the subject matter, the economic inconvenience and the extent of the damage caused. Further that it was actually the respondent who inconvenienced the appellant by breaching the terms of the consent decree and it was completely unjustified for the court to award the respondent damages.

Counsel for the respondent argued that damages are awarded at the discretion of court to compensate the aggrieved party for the inconveniences suffered. Further that the respondent sold his car without a logbook which had been unreasonably withheld by the appellant. Counsel noted that the trial magistrate was correct to award damages. Counsel further suggested that the damages awarded by the lower court were less considering the inconvenience the respondent suffered and suggested that the same be enhanced in the discretion of this court to UGX 15,000,000/-

General damages are usually awarded at the discretion of the court.

In the case of **Uganda Commercial Bank Vs Kigozi [2002] 1 EA 305** court held that;

“In assessment of the quantum of damages, courts are mainly guided by the value of the subject matter, the economic inconvenience that a party

may have been put through and the nature and extent of the breach or injury suffered”.

The award of general damages is normally in respect of what the law presumes to be the natural and probable consequence of the defendant’s act or omission see **James Fredrick Nsubuga v. Attorney General, H.C. Civil Suit No. 13 of 1993**

A plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been if she or he had not suffered the wrong See **Hadley v. Baxendale (1894) 9 Exch 341; Charles Acire v. M. Engola, H. C. Civil Suit No. 143 of 1993** and **Kibimba Rice Ltd v. Umar Salim, S. C. Civil Appeal No. 17 of 1992.**

At the trial, the respondent testified that he was notified that his logbook had gotten lost while in the custody of the appellant by the Daily Monitor newspaper of 31st August 2016 (**PEX1**). He later sold the car in the hope that the appellant would produce the logbook. He was later arrested on charges of obtaining money by false pretenses suspecting him of having sold a stolen vehicle. He relied on **PEX2** to prove this.

In his judgment, the trial magistrate found that the respondent had been greatly inconvenienced by the actions of the appellant. He found that the respondent was made to pay more money than he ought to have paid under the consent decree without explanation. He also found that the arrest of the respondent which had its genesis from the failure of the appellant to hand over the respondent’s logbook and loss of the same caused the respondent great physical and mental discomfort. The trial magistrate then awarded the respondent general damages of UGX 2,000,000/=.

As earlier stated, general damages are awarded at the discretion of court, which discretion must be exercised judiciously. In my considered view and in the circumstances of this case, I don't think general damages of UGX 2,000,000/- were excessive. It is my opinion that the damages were properly awarded in the discretion of court and I find no reason to interfere with the decision of the trial magistrate in this regard.

This ground of appeal also fails

In the final result, considering my resolution of all the grounds of appeal as above, this appeal wholly fails and it is hereby dismissed with costs to the respondent. The judgment and orders of the trial court are upheld.

I so order.

Dated at Fort Portal this 17th day of August 2022. .



Vincent Emmy Mugabo

Judge

The Assistant Registrar will deliver the judgment to the parties



Vincent Emmy Mugabo

Judge

17th August 2022.