THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

CIVIL SUIT NO. 700 OF 2019

(COUNTERCLAIM)

AFRICAN RIVERS FUND ::::::::::::::::::::::::::::::::PLAINTIFF

VERSUS

1. **KARE DISTRIBUTION LIMITED**
2. **GEOFFREY KAREGYEYA::::::::::::::::::::::::::DEFENDANTS**

BEFORE: HON. LADY JUSTICE ANNA B. MUGENYI

JUDGMENT

PLAINTIFF'S CASE

The Plaintiff, upon request from the 1st Defendant through its Managing Director and principal shareholder Geoffrey Karegyeya (2nd defendant) availed the 1st defendant three (3) loans being:

a. A loan of US$ 1,650,000 by loan agreement of 24th April, 2017;

b. A loan of US$ 200,000 by loan agreement of 7th December 2017;

c. A loan of US$ 200,000 by loan agreement of 18th July 2018;

The loans were secured with a Legal mortgage over the property comprised in Block 244 Plot 8096 Vol. 4308 Folio 1 Muyenga Kampala including all the condominium titles for the apartments thereon, as well as the personal guarantee of the 2nd

Defendant. The Loan monies were all disbursed against Disbursement Request Forms executed by the 2nd Defendant on behalf of the 1st Defendant being:

a) Disbursement Request Form dated 28th April 2017 for a disbursement of US$ 1,216,500 of which a sum of US $ 1,200,000 to be remitted to the Account of Canaanze Construction Limited at KCB Bank Uganda Limited and a sum of US$ 16,500 appropriated towards settlement of front end fees (loan arrangement fees).

b) Disbursement Request Form dated 25th May 2017 for a disbursement of US $ 433,500 to be remitted to the 1st Defendant's account with DFCU Bank Limited.

c) Disbursement Request Form dated 7th December 2017 for a disbursement of US$ 200,000 to be remitted to the 1st Defendant's account with DFCU Bank Limited less a sum of US$ 4,000 appropriated toward front end fees.

d. An undated Disbursement Request for a disbursement of US $ 200,000 to be remitted to the 1st Defendant's account with DFCU Bank Limited less a sum of as front end fees (US$ 4,000), legal fees (US $ 5769) and interest for the month of June (US $ 3,000).

The 1st Defendant defaulted in servicing and or payment of the facilities in accordance with the terms on which they were advanced and Plaintiff thereby made demands on the 1st Defendant as principal debtor and on the 2nd Defendant as guarantor for repayment of the monies then owed being a sum of US$ 2,477,433.97 owed as of 23rd May 2019 and on which interest continued to accrue. As of 21st August 2019, the 1st Defendant, as principal debtor, was indebted to the Plaintiff in the sum of US$ 2,577,667.29 for which the 2nd Defendant is liable as guarantor.

DEFENDANTS' CASE

The Defendants' case respectively is that the lending transactions between the parties are illegal as the Plaintiff in the Counterclaim is not a registered entity in

Uganda and that the guarantee executed is illegal, void and of no legal effect and that the purported demands have no legal consequence since the transactions from which they arise are illegal.

REPRESENTATION

The Plaintiff was represented by M/s MMAKS Advocates while the Defendants were represented by the 2nd Defendant himself.

JUDGMENT

During the scheduling conference which the 2nd Defendant rudely and contemptuously abandoned for reasons best known to himself, the two Issues for the Court's determination were stated as follows:

1. **Whether the Defendant is indebted to the Plaintiff and if so in what amount**
2. **Remedies**

The hearing of the case proceeded without the Defendants, the 2nd Defendant having ceded his right to be heard when he voluntarily and unceremoniously left the courtroom during the hearing of the matter.

The Plaintiff presented one witness, Jarl Heijstee (PW 1), a director of the Plaintiff and the Plaintiff's counsel agreed to file written submissions which have been considered in this Judgment.

Issue 1: Whether the Defendant is indebted to the Plaintiff and if so in what amount

PW1, Jarl Heijstee, testified that he is a director of the plaintiff, African Rivers Fund ("ARF") a company registered in Mauritius and engaged in the business of provision of financing to various entities. It is presently engaged in provisions of financing to clients in Uganda and the Democratic Republic of Congo and in Uganda, ARF's local agent is XSML Capital Uganda Limited, a company incorporated in Uganda in which he is also a director.

PW1 testified that Kare Distribution Limited through its Managing Director and principal shareholder Geoffrey Karegyeya approached ARF through its local agent XSML Capital Uganda Limited seeking for a loan in the sum of US $ 1,650,000

(United States Dollars One Million Six Hundred Fifty Thousand only) to finance its (KARE's) purchase of the property comprised in Block 244 Plot 8096 Vol. 4308 Folio 1 Muyenga Kampala from Canaanze Construction Limited. ARF by its letter of 15th March, 2017 agreed to advance KARE the said sum of US $ 1,650,000 at an interest of 11.5% per annum, which KARE, by execution of the said letter acknowledged.

PW1 stated that in the said letter, it was clearly stated that:

"As you may be aware, XSML Capital ("XSML") is an investment fund manager focused on frontier markets in East and Central Africa. ***XSML manages the African Rivers Fund****, investing in private companies in Uganda, Democratic Republic of Congo and Republic of Congo.".*

PW1 further stated that as can be discerned from the letter, it was agreed that the loan would be secured with a legal mortgage over the property comprised in Block 244 Plot 8096 Vol 4308 Folio 1 Muyenga Kampala, condominium titles for the apartments thereon, and the personal guarantee of Mr. Godfrey Karegyeya; that by Loan Agreement dated 24th April 2017 ARF advanced KARE a loan in the sum of US$ 1,650,000 (United Stated Dollars One Million Six Hundred Fifty Thousand only); that it is clear from the Loan Agreement (as well as the loan agreements referred to in his witness statement) that the Lender is African Rivers Fund with Kare Distribution Limited as borrower.

PW1 further testified that it is ARF's practice that upon execution of loan agreements, it clients (in this case KARE) separately sign off loan disbursement request forms prior to actual disbursement of loan monies, and consistent with this practice, KARE by Disbursement Request Form dated 28th April 2017 duly signed by its Managing Director Geoffrey Karegyeya requested for a disbursement of US $

1,216,500 (United States Dollar One Million, Two Hundred Sixteen Thousand, Five Hundred) of which a sum of US $ 1,200,000 (United States Dollars One Million Two Hundred Thousand) was to be remitted to the Account of Canaanze Construction Limited at KCB Bank Uganda Limited and a sum of US $ 16,500 (United States Dollars Sixteen Thousand Five Hundred) appropriated towards settlement of front end fees(loan agreement fees). These monies were in accordance with the KARE's instructions remitted from the RAF's Barclays Bank of Mauritius Limited (Barclays Bank) Account to the said account.

PW1 stated that the funds paid out to Canaanze Construction Limited were to finance the purchase by KARE of properties which were eventually pledged to ARF, and upon this money being remitted, the properties were transferred into KARE's names and the mortgage deed in favor of ARF registered. As agreed in both the letter of 15th March 2017 and the Loan Agreement, KARE executed a mortgage deed pledging the properties to the ARF, and it is Managing Director Geoffrey Karegyeya executed a personal guarantee in favor of the ARF guaranteeing repayment of the loan.

PW1 further testified that **KARE by Disbursement Request Form dated 25th May 2017 duly signed by its Managing Director Geoffrey Karegyeya requested for a disbursement of US $ 433,500 (United States Dollars Four Hundred Thirty Three Thousand Five Hundred) to be remitted to the KARE's Account with DFCU Bank Limited;** that these monies were in accordance with KARE's instructions remitted from ARF's Barlcays Bank of Mauritius Account to the said account; and that as clearly acknowledged by KARE on the request form, a sum of US $ 1,216,000 (United States Dollars One Million Hundred Sixteen Thousand) had as of the date of this request been disbursed to KARE.

Further that by another **Loan Agreement dated 7th December, 2017 ARF advanced KARE a loan in the sum of US $ 200,000 (United States Dollars Two Hundred Thousand only)** and KARE **by Disbursement Request Form dated 7th December 2017 duly signed by its Managing Director Geoffrey Karegyeya requested for a disbursement of the US $ 200,000 (United State Two Hundred Thousand) to be remitted to the KARE's account with DFCU Bank Limited;** that these monies were in accordance with KARE's instructions remitted from ARF's Barclays Bank account to the said account less a sum of US $ 4,000(United States Dollars Four Thousand only) appropriated towards front end fees; and that as clearly acknowledged on the request form, a sum of US $ 1,650,000 (United States Dollars One Million Six Hundred Fifty Thousand) had as of the date of this request been disbursed to KARE.

Further still, that by yet another Loan Agreement of 18th July 2018 ARF advanced KARE a loan in the sum of US $ 200,000 (United States Dollars Two Hundred Thousand only) and KARE by an undated Disbursement Request Form duly signed by its Managing Director Geoffrey Karegyeya requested for a disbursement of US $ 200,000 (United States Two Hundred Thousand) to be remitted to the KARE's Account with DFCU Bank Limited.

PW1 testified that of the US 200,000 (pursuant to the agreement of 18th July, 2018), a sum of US $ 187,231(United States Dollars One Hundred Eighty Seven Thousand, Two Hundred Thirsty One) was in accordance with KARE's instructions remitted from ARF's Barclays Bank of Mauritius Account to the said account and a sum of US $ 12,769 (United States Dollars Twelve Thousand, Seven Hundred Six Nine only) was retained as front end fees (US $ 4,000), legal fees (US $ 5769) and interest for the month of June (US $ 3,000); and that as clearly indicated on the request form, a sum of US$ 1,850,000 (United States Dollars One Million Eight Hundred Fifty

Hundred Fifty Thousand) had as of the date of this request been disbursed to KARE. PW1 further stated that clause 9 (b) of the Loan Agreements provided for penal interest at the rate of 20% per annum, which interest was likewise agreed upon by KARE.

PW1 stated that KARE defaulted in servicing and or repayment of the facilities in accordance with the terms on which they were advanced, ARF through its lawyers thereby making a demand on the it for payment of the US $ 2,477,433.97(United States Dollars Two Million Four Hundred Seventy-Seven Thousand Four Hundred Thirty -Three and Ninety- Seven cents only) which was the sum owed as of 23rd May 2019 and on which interest continued to accrue. ARF additionally made a demand on the guarantor (Geoffrey Karegyeya), and issued a Notice of Default in relation to the security held in accordance with the Mortgage Act.

This Court has had the opportunity to look at the lending agreements all duly signed by the defendants, the Loan Request Disbursement forms all duly signed by the defendants and the acknowledgments by the defendants of all monies advanced set out in the Loan Disbursement Request Forms as well as the last Loan Request Form clearly indicating an amount of US $ 1,850,000 being the amount disbursed as of the date of this request (all seen in PEX 1, PEX2, PEX3, PEX4, PEX5, PEX7, PEX8, PEX9, PEX10, PEX11 and PEX12) and it is evident that KARE, the 1st defendant, did indeed request and obtained the loan facilities in issue (i.e. US $ 1,650,000, US $ 200,000 and US $ 200,000 respectively). No evidence whatsoever was adduced by the defendants to rebut or challenge the coherent and reliable evidence adduced by the Plaintiff in this regard. In any case, the 2nd defendant by his own volition rudely walked out of Court during the hearing of the case and is therefore deemed to have not contested the plaintiff's claims since he gave up his right to cross-examine PW1 and also testify to his own defense, if at all.

PW1 stated that KARE defaulted in servicing and or repayment of the facilities in accordance with the terms on which they were advanced and that ARF through its lawyers thereby made a demand on the it for payment of the US $ 2,477,433.97 which was the sum owed as of 23rd May 2019 and on which interest continued to accrue. ARF additionally made a demand on the guarantor (Geoffrey Karegyeya), and issued a Notice of Default in relation to the security held in accordance with the Mortgage Act.

Not only did the defendants fail to adduce any evidence to dispute the outstanding sums due and owing from them to the plaintiff but also failed to adduce any evidence to prove that the said sum of monies or some of it had been paid. Neither did they adduce any evidence to rebut or dispute the guarantor-ship of the 2nd defendant in the transactions in issue as seen in PEX 4 of the plaintiff's trial bundle.

It is trite law that the duty of this Court is to enforce the terms of an agreement freely entered into by the parties thereto. I am grounded in the said finding by the case of **Stockloser vs Johnson (1954)1 ALL ER 630** where Court held that:

"People who freely negotiate and conclude a contract should be held to their bargain and judges should not intervene by substituting, according to their individual sense of fairness, terms which are contrary to those which the parties have agreed upon themselves."

In the circumstances and from all the fore going, this Court finds that the plaintiff has proved that the 1st defendant is indebted to the plaintiff in the sum of US$ 2,277,433.97 as at 23rd May 2019.

Further, section 71 of the Contracts Act, 2010 provides:

"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."

In the absence of any evidence to rebut the fact that the 2nd defendant executed a personal guarantee for the loan advanced by the plaintiff to the 1st defendant and in light of the above provision of the law, I find that the 2nd defendant is liable for payment of the 1st defendant's debt as guarantor.

Before I take leave of this matter, I find it necessary to point out that although the defendants in their pleadings contended that that the transactions entered between the 1st defendant and the plaintiff are illegal and of no legal impact since the plaintiff has no right to carry on business in Uganda; that the plaintiff has never applied for a credit facility from the defendant and XSML has never been an agent of the defendant and that the sum of monies was unrecoverable, the 2nd defendant discourteously and rudely walked out of Court when the matter came up for hearing thereby rendering their said contentions unproved and unsubstantiated and leaving the plaintiff's claim intact.

Suffice it to note that as testified by PW1 in the letter of 15th March 2017 wherein the plaintiff agreed to advance to the 1st defendant the sum of US $ 1,650,000 at an interest rate of 11.5% per annum and which the 2nd defendant on behalf of the 1st defendant by execution of the said letter acknowledged the same, it was clearly stated that:

"As you may be aware, XSML Capital ("XSML") is an investment fund manager focused on frontier markets in East and Central Africa. ***XSML manages the African Rivers Fund****, investing in private companies in Uganda, Democratic Republic of Congo and Republic of Congo.".*

Further, the loan agreement dated 24th April 2017 was clearly made between the plaintiff (Africa Rivers Fund) and the 1st defendant (KARE) and duly executed by

the 2nd defendant himself on behalf of the 1st defendant on page 15 of the said agreement where he also signed on each page thereby acknowledging and endorsing the entire transaction. No agreement between XSML Capital and the defendants was adduced in Court by the defendants to prove the transactions were done with the said XSML Capital as claimed.

Further still, the 1st defendant not only pledged to the plaintiff properties purchased from Canaanze Construction Limited through finances obtained from the plaintiff, but also the said properties were transferred into its names upon the said monies being remitted to it by the plaintiff and a mortgage deed between the parties executed in that regard. Clearly the defendants benefitted from the transaction in issue by obtaining and utilizing the monies in issue as well as obtaining ownership of the properties that were purchased and transferred into their names.

From the above, the 1st defendant cannot, therefore, turn around and claim that it did not receive any monies from the plaintiff and that the same is unrecoverable yet it clearly obtained the monies in issue and utilized the same for its benefit as agreed between the parties on the understanding that the same would be repaid in the manner agreed upon in the lending agreements. To find otherwise would be to condone theft and outright flouting of terms of an agreement freely entered into by the parties thereby causing a gross miscarriage of justice.

Further, I agree entirely with the submissions of counsel for the plaintiff in respect of the purported illegality alleged by the defendants regarding the laws the defendants mistakenly believe were contravened during the lending transactions in issue as well as the clarification handed down by the Supreme Court regarding lending to a Ugandan borrower by a foreign lender in the case of **Ham Enterprises Ltd & 2 others v Diamond Trust Bank (U) Ltd & another SCCA No. 13 of 2021.**

I am further buttressed in finding as above by the case of **Ham Enterprises Ltd & 2 others v Diamond Trust Bank (U) Ltd & another (supra)** where the Supreme Court pointed out that:

"...no law was brought to this Court's attention that forbids foreign financial institutions from extending credit facilities to any financial institution or person in Uganda. If anything, in furtherance of international trade and investment, financial institutions the world over are known to engage in global financial business transactions by dealing with, or through, financial institutions based in other jurisdiction. In the case of Uganda, such international financial business transactions are certainly neither governed by the Financial Institutions Act,2004, as amended, nor the Financial Institutions (Agent Banking) Regulations,2017, made pursuant thereto...."

In the present case and as seen above, the defendants not only failed to adduce any evidence to prove that the lending transactions in issue were illegal, but they also failed to demonstrate that the said transactions were governed by any of the laws they referred to as explained by counsel for the plaintiff in their submissions. In any case, the defendants did not bother to prove their contentions as they abandoned defending their case by contemptuously walking out of Court during the hearing and in the absence of any evidence to the contrary, I find that the lending agreements and the guarantee deed were legal and unenforceable.

Issue 2: Remedies

The plaintiff in the counterclaim, in their pleadings, sought judgment in its favor for the payment of a sum of US $ 2,577,167.29, interest on the said amount at the rate of 11.5% from August 2019 until payment in full and costs of the counterclaim.

PW1 in his witness statement stated that the plaintiff prayed for judgment in the sum of US $ 2,577,167.29 and interest on the same at a rate of 20% per annum from August 2019 until payment in full and costs of the counterclaim

All in all, having held as I have above and in accordance with the pleadings and agreements between the parties in this matter, judgement is entered in favor of the plaintiff herein jointly and severally against the defendants in the following terms:

1. **Payment of a sum of US $ 2,577,167.29(United States Dollars two million five hundred seventy- seven thousand one hundred sixty-seven and twenty- nine cents)**
2. **Interest on the amount in (1) above at the rate of 11.5% from August 2019 until payment in full**
3. **Costs of the Counterclaim**

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HON. LADY JUSTICE ANNA B. MUGENYI

DATED.....25/3/2024.....