THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CV-CA-0060-2022

(Arising out of IBD-00-CS-CS-0089-2020)

CENTENARY RURAL DEVELOPMENT BANK LTD :::::::::::::::::::::::::::::::: APPELLANT

VERSUS

BAGAMBE VINCENT :: RESPONDENT

(Being an Appeal from the Judgment and Orders of Her Worship Kainza Beatrice, Chief Magistrate sitting at Ibanda Chief Magistrate's Court dated 11th January 2022)

BEFORE: HON LADY JUSTICE JOYCE KAVUMA

JUDGMENT

Introduction.

[1] This appeal arises as a result of a loan facility of UGX 30,000,000/= advanced to the Respondent by the Appellant evidenced by an agreement concluded between them on **24th June 2018**.

Background.

[2] The pleadings before me from the trial court indicate that on **27th June 2018** the Appellant and the Respondent entered into a loan agreement for a sum of UGX 30,000,000/=. At trial, the Respondent contended that the agreed interest rate on the loan was 0.5% per month on all amounts in arrears.

To obtain the loan facility, the Respondent claimed to have mortgaged his land comprised in **Plot 14 and 15, Block (Road) 93, Volume HQ7129,**

Folio 21 land at Kyakalenzi, Kantozi Parish, Kitagwenda County, Kamwenge District.

From the evidence, the Respondent delayed to pay one instalment. It was contended by the Respondent that the Appellant instead of applying the agreed upon interest per month, they levied it per day. That pursuant to this, the Appellant wrote to the Respondent demanding that he pays the remaining instalments amounting to UGX 4,738,968 together with interest and late payment charges.

The suit was brought because the Appellant was threatening to sell the Respondent's mortgaged property yet according to him, he had fully paid all amounts due to him from the Appellant.

[3] The Appellant denied all the above allegations. They contended that they did not breach any contract with the Respondent. Further, that the penal interest was 0.5% per day as indicated in their loan fact sheet and the discrepancy in the loan agreement was an error. That the Respondent was still indebted to them to a tune of UGX 5,139,601 as of 2nd November 2020 and the intended sale of the mortgaged property was an exercise of their rights as mortgagee.

The Appellant counterclaimed for the payment of the outstanding UGX 5,139,601/= against the Respondent.

[4] After trial, the learned trial Chief Magistrate decided in favour of the Respondent declaring that the ambiguity between 0.5% per day in the key facts document and 0.5% per month in the offer letter and 0.5% per month in the loan facility agreement should be resolved in favour of the Respondent and unfavourably against the Appellant who

drafted the documents on the doctrine of the *contra proferentem rule*. The counterclaim filed by the Appellant was also dismissed due to contradictions the learned trial Chief Magistrate observed in the evidence of the Appellant and their pleadings.

[5] Feeling dissatisfied with the above findings of the learned trial Chief Magistrate, the Appellant, in a Memorandum of Appeal dated **19th July 2022** preferred the instant appeal on the following grounds;

1. **The learned trial Chief Magistrate erred in law and fact when she failed to properly evaluate the evidence and held that the Appellant had failed to prove the Respondent's indebtedness to the tune of UGX 5,139,601/= claimed in the counterclaim.**
2. **The learned trial Chief Magistrate erred in law and fact when she awarded the Respondent unjustified general damages of UGX 10,000,000/=.**

It was prayed that this court allows the appeal and sets aside the decision of the trial Chief Magistrate with costs.

Representation.

[6] The Appellant was represented by Mr. Arinaitwe Bright Bujara while the Respondent was represented by Mr. Nuwagaba Collins. Counsel proceeded by written submissions which I have considered.

The duty of this court.

[7] As the first appellate court, this court is duty bound to re-evaluate all the evidence that was available to the trial Chief Magistrate and make its own inferences on all issues of law and fact complained of in the Appellant's memorandum of appeal. (**See Fr. Narcensio Begumisa & Others vs Eric Tibebaaga SCCA no. 17 of 2002; Kifamunte Henry vs Uganda, Supreme Court Criminal Appeal No. 10/97; Bogere Moses and Another vs Uganda, Supreme Court Criminal Appeal No. 1/97; Ruwala vs R (1957) EA 570; Pandya vs R (1957) EA 336 and Coglan vs Cumberland (1898) 1 Ch. 704**).

Analysis and decision of court.

Ground one: The learned trial Chief Magistrate erred in law and fact when she failed to properly evaluate the evidence and held that the Appellant had failed to prove the Respondent's indebtedness to the tune of UGX 5,139,601/= claimed in the counterclaim.

[8] According to counsel for the Appellant, the evidence before the trial court showed that there was no need for the application of the contra proferentem rule because the documents on a whole showed that the whole transaction was one to be subjected to a penal interest of 0.5% per day. On authority of **Direct travel Insurance vs Mc Geown [2004]1 ALLER (Comm) 609**, it was submitted further that a court should not create an ambiguity where there is none. That the discrepancies in the loan agreement were corrected by the key facts document.

That the learned trial Magistrate having concluded that the 0.5% interest per day could not be enforced by the Appellant did not consider the 0.5% per month in evaluating whether it distinguished the Respondent's loan in the counterclaim thus deciding that the Respondent was not indebted to the Appellant.

[9] In reply, according to counsel for the Respondent, the learned trial Chief Magistrate properly evaluated the evidence before her and rightly found that the ambiguity of 0.5% per day in the Key Facts Documents should be favourably resolved in favour of the Respondent and unfavourably against the Appellant which drafted the said documents on the basis of the contra proferentem rule.
That the Appellants were bound by their pleadings which sought for a declaration that the interest of 0.5% per day valid and for an order to recover UGX 5,139,601/= as the amount outstanding on the loan in their counterclaim which was rejected by the trial court.

[10] The undisputed facts upon which the instant appeal is based are that the Appellant and the Respondent entered into a loan agreement on **24th June 2018** for a loan sum of UGX 30,000,000/=. The facts further show that both parties to the said agreement also agreed that among the terms of the agreement was a penal interest rate of 0.5%.

The contention in my view concerned the said basis on which the said penal interest would be imposed. This the subject of the instant appeal. The Appellant on one hand contended that the penal interest was supposed to be at **0.5% per day** as stated in the Key Facts Document

which the Respondent signed while the Respondent averred that it was **0.5% per month** and that since he did not default for a month, then the said penal interest was not chargeable on him.

[11] At trial, **PW1 Bagambe Vincent** the Respondent testified in chief that the Appellant wrote an offer letter to him specifying the terms of the loan. That he signed the offer letter accepting the terms of the loan and under **clause 10** of the offer letter the penal or default interest was 0.5% p.m on all amounts in arrears after which he signed a formal agreement. That when he went to the Appellant after he had paid UGX 39,042,345/=, he was told that he was owed UGX 4,738,968/= more as a result of a penal interest of 0.5% imposed per day instead of 0.5% per month which he did not agree with.

In **cross-examination**, it was his testimony that he was disputing the 0.5% per day. That he signed the key facts document after reading it. That in that document the default interest was stated as 0.5% per month. That if he exceeded 30 days without making payment, he would pay 0.5% per day but he never exceeded 30 days.

DW1 Mpumwire Stephen who testified on behalf of the Appellant testified in chief that when the Respondent approached the Appellant seeking for a loan, he made a choice of a loan product and was given a Key Facts Document summarizing the loan product, risks of late repayment including a penal interest of 0.5% per day. That the Respondent accepted the loan product and signed onto it. That an official offer was extended to the Respondent which he also signed after which he was given a Banking Facility Agreement containing the terms

and conditions of the facility which he also signed. That when the Respondent failed to pay as agreed, the said loan accrued penal interest of 0.5% per day on overdue days leading to the total sum of UGX 4,738,968/=.

In **cross-examination** he testified that according to the offer letter signed by the Respondent, clause 10 thereof indicated penal/default interest as 0.5% p.m on all amounts in arrears. That he could not tell was 'p.m' stood for. Further that the Key Facts Document was a summary of all the terms and conditions. That the Respondent had defaulted for a total of 25 days when he paid on **16th November 2019**. That the agreement was the last document that binds the parties.

[12] On the above evidence, the learned trial Chief Magistrate at **page 8** of her judgment concluded as follows;

> *"In my view the fact that this relationship is contractual it naturally requires that just like all other contracts both parties to the contract must be accorded ample opportunity to scrutinize the terms and conditions before the start of relationship.*
>
> *In the instant case the key facts document relied on by the defendant to fault the plaintiff has other two supplementary documents. It is my considered opinion that as a prudent Banker the defendant ought to have examined its documents to clearly highlight the crucial paragraphs, mistakes and inconsistences in these documents. The*

mistakes in the defendant's document cannot be attributed to the customer (plaintiff).

Had the said error been found in one document as claimed by the defendant that would be understandable. In the instant case two documents override one.

In the circumstances, I agree with Defence Counsel that the ambiguity between 0.5% per day in the key facts document and 0.5% p.m. in the offer letter and 0.5% per month in the loan facility agreement should be resolved in favour of the Plaintiff and unfavourably against the defendant who drafted these documents on the doctrine of contra proferentem rule.

I therefore find that the interest rate of 0.5% per cannot be enforced by the defendant."

[13] The provision of penal interest in the parties' evidence during trial was in **DE1, DE2 and DE3**.

According to **DE1** the Key Facts Document, it provides under clause 4 as follows;

"Clause 4:

(a) Late repayments: if you delay by more than 30 days you will be charged 0.5% per day"

In **DE2** the Offer letter provides under clause 10 as follows;

"Clause 10 – Penal/Default Interest.

0.5% p.m on all amounts in arrears"

In **DE3** the Banking Facility Agreement states under clause 10 as follows;

> *"Clause 10 – Default interest.*
>
> *A default interest currently at 0.5% per month or such other rate as the Bank may stipulate from time to time (in addition to interest charge mentioned above) will be charged on all overdue instalments of principal and interest on loan and all other charges not paid when due"*

[14] Terms of a written contract are construed by a court with an aim to discover therefrom the intention of the parties to the contract. (**See Wood vs Capita Insurance Services Limited [2017] UKSC 24**).
There is a general presumption that parties intend what they have said so that their words must be construed as they stand. (**See I.R.C vs Raphael [1935] A.C. 96, 142 and British Movietonews vs London and District Cinemas [1952] A.C. 166**). It therefore follows that the meaning of the contract or particular parts of it is to be sought in the document itself. The court therefore, in construing the meaning of terms in a contract it need not guess their meaning but consider them as they are used in the contract itself.

It is also an accepted rule of construction of contracts that *"verba cartarum fortius accipiuntur contra proferentem"*, that is, words in a document or contract shall be construed more strongly against the party at whose instigation they were included in the contract and who now seeks to rely on them. This however is done where there exists an

ambiguity in the contract. This is a general principle of application in contract law. (**See Tan Wing Chuen vs Bank of Credit and Commerce Hong Kong Ltd [1996] 2 BCLC 69, 77**).

[15] In the case before me, I am of the considered opinion that the clause they called onto the learned trial Chief Magistrate to construe was free from obscurity and not ambiguous. This made the application of the rule of *"verba cartarum fortius accipiuntur contra proferentem"* unnecessary on the evidence that was before the trial court.

I note from annexures **DE1, DE2 and DE3** as extracted hereinabove that the Key Facts Document contains varying information in relation to the penal interest rate than the offer letter and facility agreement.

Key Facts Documents derive their basis from the **Bank of Uganda Financial Consumer Protection Guidelines, 2011. Guideline 6(2)** thereof provides as follows;

> *"(2) Provision of information and Advise to a Consumer.*
> *(a) Prior to a consumer choosing a product or service, a financial services provider shall:*
> *(i)...*
> *(ii)...*
> *(b) Where a consumer has chosen a product or service, a financial services provider shall before the consumer buys the product or service:*

(i) *Provide the consumer with a key facts document for the product or service;*

(ii) *Give the consumer a copy of the terms and conditions for the consumer's agreement or consent; and*

(iii) *Inform the consumer of the applicable charges, fees or additional interest the consumer will bear should the consumer decide on an early termination of any contract."*

The above **Guidelines** under **Guideline 3** go further. They interpret "Key facts document" to mean a document that highlights the key characteristics of a financial product or service.

[16] From the foregoing, I am of the stern view that the main purpose served by the key facts document in such a transaction as the instant one was to highlight information on the products the Respondent sought from the Appellant by giving him characteristics of the same to guide him in coming to a decision on whether or not to take the loan.

A contract is considered complete where one party makes an offer to another which is acted upon by the other notwithstanding the absence of consideration. (**See generally Section 10 of the Contracts Act, No. 7 of 2010 and Central London Property Trust vs High Trees House Ltd [1947] KB 130 per Denning LJ at page 135**).

[17] In **Protea Chemicals East African Limited vs KAC Chemicals and Paints (U) Limited HCCS no. 470 of 2016** this court while commenting

on the effect of **Section 10(5)** of the Contracts Act, 2010 observed at **page 5** of its decision as follows;

> *"...The requirement is satisfied by any signed writing that; (i) reasonably identified the subject matter of the contract; (ii) is sufficient to indicate that a contract exists; and (iii) states with reasonable certainty the material terms of the contract."*

Whereas the key facts document may have reasonably identified the subject matter of the contract in the instant case, it was not in my view sufficient to indicate that a loan agreement between the Appellant and Respondent had been concluded.

It would therefore follow that the documents that showed, with reasonable certainty, that a loan agreement existed between the Appellant and Respondent were for the purpose of the instant case **DE2 and DE3** (the offer letter and Banking Facility Agreement respectively) and not **DE1** the Key Facts Document.

Any inconsistences in the terms in **DE1** with those in **DE2 and DE3** was in my view of no consequence as the agreed terms were reduced into the offer (**DE2**) which were accepted and formed the agreement (**DE3**).

[18] As it stands, **DE2** and **DE3** provided for an unambiguous penal interest of **0.5% per month** and not that postulated by the Appellant at trial of **0.5% per day**.

For the above reasons, I therefore agree with the conclusion of the learned trial Chief Magistrate that the interest rate of **0.5% per day** was not applicable to the Respondent.

[19] This was however not the end, as I understand the submissions of both parties to the instant appeal, there remained the issue of whether the Respondent was indebted to the Appellant per the counterclaim filed by the Appellant in the trial court.

It is an elementary principle of law that the counterclaimant has the duty to prove their claim in the counterclaim. (**See Charles Lwanga vs Centenary Rural Development Bank (Court of Appeal Civil Appeal No. 30 of 1999)**.

The Appellant's claim in the counterclaim was for the following orders;

1. *A declaration that the interest rate of 0.5% per day on monthly instalments in default is valid and should be upheld.*
2. *An order that the certificate of title for land comprised in Plot 14 and 15, Block (Road) 93, Volume HQ7129, Folio 21 land at Kyakalenzi, Kantozi Parish, Kitagwenda County, Kamwenge District be retained by the counterclaimant since the same is still burdened by an ongoing loan to the Counter Defendant's spouse.*
3. *An order to the Counter defendant to pay the outstanding amount of Ugx 5,139,601/= that remains owing and unpaid against the Counter defendant.*
4. *The Costs of the counterclaim.*

[20] As per my analysis hereinabove, the first order sought in the counterclaim above was settled in the main conclusion of the trial court.

In relation to the second order above, relating to the land comprised in **Plot 14 and 15, Block (Road) 93, Volume HQ7129, Folio 21 land at Kyakalenzi, Kantozi Parish, Kitagwenda County, Kamwenge District**, it was the evidence in chief of **DW1** that;

> *"On the 28th day of August 2019 the plaintiff gave his wife Mrs. Karungi Edinah powers of attorney to use the same land as security to get a loan from the Defendant which is still outstanding too."*

The above evidence of **DW1** remained unchallenged in his cross-examination.

It is now the law that an omission or neglect to challenge the evidence-in-chief of an adversary during trial, on a material or essential points by cross-examination would lead to the inference that the evidence is accepted subject to its being assailed as inherently incredible or probably untrue. (**See Habre International Co. Ltd vs Ebrahim Alarakhia & Others Civil Appeal No. 4 of 1999 (SC) and Uganda Revenue Authority vs. Mabosi (Civil Appeal 26 of 1995) [1996] UGSC 16 per Karokora JSC (RIP)**).

As long as the land comprised in **Plot 14 and 15, Block (Road) 93, Volume HQ7129, Folio 21 land at Kyakalenzi, Kantozi Parish, Kitagwenda County, Kamwenge District** continued being encumbered

by an ongoing mortgage from a loan taken out by the Respondent's spouse as **DW1** testified, it would in my considered view be in the interest of justice that the same not to be released to the Respondent by the Appellant.

[21] In regard to the third order sought in the counterclaim, the learned trial Chief Magistrate found as follows at **pages 9 and 10** of her judgment;

> *"Whereas the defendant set up a counter claim of five million one hundred thirty-nine thousand six hundred and one (5,139,601) as the outstanding balance DW1 in cross examination told court that the plaintiff was indebted in the sum of seven million and gave a break down as follows;*
> *.... The total of the above figures is seven million seven hundred thousand (7,700,000/=) and not seven million.*
> *In further cross examination DW1 could not produce the plaintiff's Bank Statement to show whether or not he had any unpaid loan.*
> *While he told court that the penal interest was 1.4mUgx, the notice of intention to sue, (P.E.4) indicated that the loan attracted a penal interest of 0.5% per day which had accumulated to Ugx 4,950,717/=.*
> *Dw1 failed to explain the plaintiff's repayment schedule, he explained a few components like the 5th instalment having delayed for 59 days, and that the 14th instalment was delayed for more than 30 days.*

He told court in further cross examination, I quote "the plaintiff still owes the bank, I do not know how much he is indebted"

Perusal of the repayment schedule (simulation) attached to the banking facility agreement indicated that the 5th instalment was paid on the 27th November 2018 while the 6th instalment was paid on the 27th November 2018 after one month and not 59 days while the 14th instalment was paid on 27th August 2019, after paying the 13th instalment on 27th July 2019. The total monthly instalment paid was 38,427,494.77, the principal was 30,000,000/=, and the interest was 8,427,494.76.

The above contradictions indicate that DW1 did not know what he was talking about. No wonder he told court in cross examination that he was not present when the key facts document was being negotiated."

Courts of law are moved by evidence. The Appellant in the instant case claimed that the Respondent owed them UGX 5,139,601/= a sum that remained unpaid on the loan they obtained from them.

[22] It is the law that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts, must prove those facts exist. **(See Section 101 of the Evidence Act)**. It is said that this person has the burden of proof. This is the person whose suit or proceeding would fail if no evidence at all were given on either side. **(See Section 102 of the Evidence Act)**.

The initial burden to prove that the Respondent owed the Appellant UGX 5,139,601/= lay on the Appellant. This burden could only be satisfied if the Appellant led evidence that was more than a probably true of their claim.

At trial, **DW1 Mpumwire Stephen** led evidence on behalf of the Appellant to prove the claim of the UGX 5,139,601/=. In his evidence in chief he testified that the Respondent was still indebted to the Appellant and had not paid his loan instalment for the last 259 days and more. He referred the court to annexure **DE5** the Respondent's repayment schedule. That on 1st September 2020 the Appellant wrote to the Respondent notifying him of the default which stood at UGX 4,738,968/= at the time. Reference was made to annexure **DE6**.

In his **cross-examination** he testified that it was not him that compiled annexure **DE5** the Respondent's repayment schedule. That he did not possess the records that showed the number of days that the Respondent took without paying the loan. That he could not show how the figures of days came up. That the Respondent had last paid his instalment in June 2020 and not paid successive instalments. That he was supposed to pay on 27/10/2019 but he paid on 16/11/2019. That in total he defaulted for 25 days. That the Plaintiff still owed the Appellant but he did not know how much. That the last time he checked it was seven million.

When **re-examined**, he testified that the first time the Respondent delayed to pay was on the 5th instalment which was for more than 59 days and the next was for more than 30 days on the 14th instalment.

[23] The evidence as brought by the Appellant's witness in chief at trial as shown above was so much discredited as a result of cross examination that it could not be believed on a balance of probabilities. It was not enough to put the Respondent to his defence.

In the upshot, I would equally come to a similar conclusion with the learned trial Magistrate that the Appellant failed to prove the claim in the counterclaim.

Therefore, I do no not find merit in this ground of appeal.

Ground two: The learned trial Chief Magistrate erred in law and fact when she awarded the Respondent unjustified general damages of UGX 10,000,000/=.

[24] On this ground of appeal, it was submitted on behalf of the Appellant that the Respondent did not suffer any loss and neither did he labour to justify the quantum of damages awarded to him by the learned trial Chief Magistrate.

In response, counsel for the Respondent submitted that the Respondent had been greatly inconvenienced and put to heavy unnecessary disturbance, disturbance and embarrassment and that the learned trial Chief Magistrate rightly exercised her discretion when she awarded UGX 10,000,000/= to him as general damages.

It is the law that an appellate court will not interfere with an award of damages by a trial court unless the trial court has acted upon a wrong principle of law or that the amount is so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is

entitled. (**See Crown Beverages Ltd vs Sendu Edward (Supreme Court Civil Appeal No. 01 of 2005 per Order JSC**).

It is also the position of the law that general damages are at the discretion of court and their award is not meant to punish the wrong party, but to restore the innocent party to the position he or she would have been had damage not occurred. (**See Uganda Commercial Bank vs Kigozi [2002] 1 EA 305, Charles Acire vs M. Engonda HCCS No. 143 of 1993 and Kibimba Rice vs Umar Salim Supreme Court Civil Appeal no. 17 of 1992**).

It is also now settled that in reaching a quantum of general damages, the court considers the nature of harm, the value of the subject matter and the economic inconvenience that the injured party might have been put through.

[25] In the instant appeal, the nature of harm that the Respondent could have suffered could in my view relate to the fact that his land remained encumbered by a mortgage in favour of the Appellant. However, from the evidence on the record, this court was able to find that the same land was taken by the Appellant as security for another loan facility in favour of the Respondent's spouse.

In relation to the value of the subject matter, this could be drawn from the pleadings to have been an unpaid loan sum of UGX 4,738,968/=.

I was unable to ascertain any economic inconvenience that could have been suffered by the Respondent from the evidence before me.

In the upshot therefore, considering the nature of harm, the value of the subject matter and the economic inconvenience that the Respondent suffered, this court finds a compelling reason to interfere with the discretion of the learned trial Chief Magistrate in awarding general damages of UGX 10,000,000/= in the matter.

In all fairness, I found the sum above to be so high given the damage occasioned. In the premises, I reduce the sum to UGX 1,000,000/=.

I therefore make the following final orders;

1. **This appeal partially succeeds and the orders of the learned trial Chief Magistrate in relation to the penal interest and counterclaim.**
2. **The quantum of general damages awarded by the learned trial Chief Magistrate is reduced to UGX 1,000,000/=.**
3. **I make no orders as to the costs of the appeal.**

I so order.

Dated, delivered and signed at Mbarara this **15th** day of **March 2024**.

Joyce Kavuma
Judge