

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBARARA
HCT-05-CV-CS-0002-2019
EBIRUNGI BIRUGO'MUTUTU
SACCO LTD ::::::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

- 1. NSASIRWE CHARLES**
- 2. TUKUNDANE ROBERT**
- 3. MUJUNI TINAKO MOSES**
- 4. NSASIRWE ALLEN ::::::::::::::::::::::::::::::: DEFENDANTS**

BEFORE: HON LADY JUSTICE JOYCE KAVUMA

JUDGMENT

Introduction.

[1] The agreed facts in this matter were that on the **14th day of February 2018**, the 1st Defendant borrowed UGX 40,000,000/= from the Plaintiff. That on the same date, a loan agreement was executed by the Plaintiff and 1st Defendant. The 2nd, 3rd and 4th Defendant's guaranteed the said loan.

Background.

[2] From the Plaintiff's plaint, they claim against the Defendants, jointly and severally for the recovery of UGX 54,890,674/= at a commercial interest rate which they claim the 1st Defendant defaulted on according to an agreed repayment schedule and costs of the suit. It was further claimed that the guarantors have also not fulfilled their respective guarantee agreements.

[3] The Defendants however contended that the 1st and 2nd Defendants had been depositing the instalments monthly in a bid to clear the aforementioned loan sum.

Representation.

[4] The Plaintiff was represented by Mr. Arinaitwe Emmanuel while the Defendants were represented by Mr. Bakwatanisa Godfrey. When the Defence closed its case, this court gave both counsel schedules within which to file written submissions in the matter. Both counsel filed written submissions in the matter which I have ably considered.

The issues raised;

- [5] The following issues were raised for resolution by this court;
1. **Whether the Plaintiff discloses a cause of action.**
 2. **Whether the Defendants are indebted to the Plaintiff in the sum of UGX 54,890,674/= claimed by the Plaintiff.**
 3. **What remedies are available to the parties?**

Issue 1: Whether the Plaintiff discloses a cause of action.

[6] This issue was raised by way of preliminary point of law before the trial commenced and this court in its ruling dated **16th August 2021** overruled the objection finding that the Plaintiff filed by the Plaintiff disclosed a cause of action against the Defendants.

Issue 2: Whether the Defendants are indebted to the Plaintiff in the sum of UGX 54,890,674/= claimed by the Plaintiff.

[7] The Plaintiff claimed that the 1st Defendant was indebted to them a sum of UGX 54,890,674/= a sum that that he failed to clear despite multiple reminders.

It is now settled 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 instant matter, being civil in nature, the standard of proof is on a balance of probabilities. (**See Miller vs Minister of Pensions [1972] 2 All ER 372**).

It therefore follows that the Plaintiff, being desirous of getting judgment in their favour against the Defendants for the claimed sum of UGX 54,890,674/= had the initial evidential burden of proving their case on a balance of probabilities.

This burden is probabilistic in nature and can only shift onto the Defendant when the Plaintiff has led evidence that was more than probable to be true. Failure to do so would lead to the dismissal of their case.

[8] To prove their case on a balance of probabilities, the Plaintiff called one witness.

PW1 Byaruhanga Erias testified in chief that the Defendants failed to pay the loan according to the loan repayment schedule. The loan repayment schedule was admitted by this court as **PEXh 2**.

That though the Defendants paid part of their debt, they still owed the Plaintiff a sum of UGX 54,890,674/=. An account statement of the 1st Defendant was admitted by this court as **PEXh 3**. That all efforts to recover the said sum were futile and therefore prayed for judgment against the Defendants.

In **cross-examination** he testified that the 1st Defendant obtained UGX 40,000,000/= from the Plaintiff. That the sum was a business loan. That the 1st Defendant attempted to service the loan of which he paid about UGX 12,900,000/= but stopped paying in the 7th month. That the 1st Defendant was given various chances to clear but he failed. That the 1st Defendant had by way of mortgage pledged his property a commercial house in Kazo town. That the said house was valued at UGX 100,000,000/= but was not titled at the time he was advanced the loan. That the Plaintiff only took the agreements in relation to the property and the place was to be titled. That the Plaintiff did not agree on deduction of loan money to process a title for the 1st Defendant. That title processing was different from the loan acquisition and that the UGX 12,000,000/= deduction was not an arrangement in the loan given to the 1st Defendant. That he had ever entered into a mutual understanding with the Defendants to assist them to process a certificate of title for the property. That the Plaintiff assisted in this process and that the money or facilitation used in the process was never deducted from the loan sum of UGX 12,000,000/=. That the sum was

not part of the terms and conditions as per the loan. That he did not know who was in charge of the processing the title. That two land titles were processed, one was given to the 1st Defendant and the second was retained by the Plaintiff as collateral for the loan. That the agreement was that the Plaintiff was to process the two land titles at a cost of UGX 3,600,000/= and not UGX 12,000,000/= as the 1st Defendant alleged. That after the suit was commenced, he had been receiving money from the Defendants. That he was not certain of how much the 1st Defendant had paid since he was sued.

[9] The Defendants on the other hand called one witness the 1st Defendant.

DWI Nsahirwe Charles testified in chief that on **14th February 2018** he borrowed UGX 40,000,000/= from the Plaintiff, entered into a loan agreement which loan was guaranteed by the 2nd, 3rd and 4th Defendants. That in the same year, the Plaintiff undertook to follow up the process to enable the 1st and 4th Defendants obtain certificates of title for their land at Rwabwonyo Cell Gabarungi Ward Kazo Town Council. That the Plaintiff deducted UGX 12,000,000/= from the UGX 40,000,000/= he had obtained and the said money was meant for the facilitation and registration fees for processing the certificates of title. That he and the 4th Defendant have been depositing the monthly instalments in a bid to clear the loan. Deposit slips totalling to UGX 13,950,000/= were admitted by this court collectively as **DEXh 1**. In **cross-examination** he maintained that he obtained a loan from the Plaintiff in the sum of UGX 40,000,000/= and that he paid according

to the loan schedule. That he paid UGX 12,000,000/= and stopped because his wife was sick. That he did not pay the loan in time. That he hadn't finished paying the loan. That from the time he was sued up to the time he testified in court he had so far paid UGX 25,950,000/=. He maintained that UGX 12,000,000/= was deducted from his loan to process two land titles. When he was shown his statement and item 11 he stated that it said UGX 3,600,050/= was to process two land titles. That the land titles were made and one was given to him while another retained by the Plaintiff.

In **re-examination** he testified that he owed the Plaintiff UGX 15,000,000/=.

[10] From the evidence of both parties to the instant suit as I have had it summarized above, it is not in dispute that a sum of UGX 40,000,000/= was advanced to the 1st Defendant as a loan on **14th February 2018**. Further, the 1st Defendant in his evidence did not dispute failing to clear the above loan in time.

PW1 for the Plaintiff acknowledged that the 1st Defendant made attempts to clear the loan advanced to him and placed the sum so far paid by the 1st Defendant at UGX 12,900,000/= and that he owed the Plaintiff a sum of UGX 54,890,641/=.

Throughout the cross-examination of **PW1**, the said sum was never challenged save for when he testified that even as the instant suit was ongoing, the 1st Defendant continued making deposits. He conceded that as at the time he was testifying, he was not certain how much the 1st Defendant had paid since the time the suit was commenced.

[11] The instant suit was commenced on **24th January 2019**.

According to **PEXh 3** the 1st Defendant's account statement, as at the above date, which translated to **31st December 2018** the 1st Defendant had so far paid UGX 11,598,000/= to the Plaintiff.

DW1 the 1st Defendant alleged that he had so far paid UGX 25,950,000/=. The evidence he relied upon were deposit slips marked **A1** to **A6** which he told this court had a total amount of UGX 13,950,000/=. This court admitted the said slips collectively as **DEXh 1**. **A1** indicates that on **18th February 2021** he made a deposit of UGX 500,000/=.

A2 indicates that on **21st October 2020** he made a deposit of UGX 500,000/=.

A3 indicates that on **14th December 2020** he made a deposit of UGX 500,000/=.

A4 indicates that on **6th January 2021** he made a deposit of UGX 500,000/=.

A5 indicates that on **11th November 2020** he made a deposit of UGX 500,000/=.

A6 indicates that on **12th October 2020** he made a deposit of UGX 500,000/=.

The sum total of all the above deposit slips led to an amount of UGX 3,000,000/=. A sum less by UGX 22,950,000/= which **DW1** claimed he had so far paid to the Plaintiff. This was all the evidence that the 1st Defendant relied upon to prove the alleged UGX 25,950,000/= he claimed to have paid to the Plaintiff.

[12] I note that all the above sums in **A1** to **A6** were paid while the instant suit was pending determination by this court.

The sums were not captured in the 1st Defendant's account statement that **PWI** presented to this court as admitted as **PEXh 3**. The statement however captured further deposits on **29th March 2019** of UGX 50,000/=, **10th April 2019** of UGX 200,000/=, **7th June 2019** of UGX 100,000/=, **27th May 2020** of UGX 500,000/=, **26th June 2020** of UGX 500,000/=. The total of which is UGX 1,350,000/=.

The above sum when added to the sum in annexures **A1** to **A6** of UGX 3,000,000/= amounted to UGX 4,350,000/=.

The sum of UGX 4,350,000/= above when added to what the account statement read as at the time the instant suit was initiated, which was UGX 11,598,000/=, leads to a total of **UGX 15,948,000/=**.

When the sum of **UGX 15,948,000/=** is deducted from the UGX 54,890,974/= which the Plaintiff claimed in their plaint against the 1st Defendant, it places the total sum owed by the 1st Defendant to the Plaintiff as UGX 38,942,674/=.

It therefore follows, from the evidence before this this court, that the 1st Defendant is indebted to the Plaintiff a sum of UGX 38,842,674/=.

[13] Before I leave this issue, I note that during the trial, the parties, in their evidence capitalized on the issue of another transaction which involved the 1st and 4th Defendants agreeing with the Plaintiff to process for them land titles for their land at Kazo.

I must point out that this evidence was in complete departure from the parties' pleadings filed in this court.

It is now the law that a departure by a party's evidence from his or her pleadings is a good ground for rejecting the evidence. (See AW Biteremo vs Damascus Muyanda CA no. 15 of 1991 (SCU) and interfreight Forwarders (U) Ltd vs East African Development Bank Civil Appeal no. 33 [1992] SCU).

I therefore did not consider the said evidence. As a matter of fact, it did not have any effect on the case before me which was based on failure by the 1st Defendant to clear their loan obligations.

The 1st Defendant would have in my considered opinion raised the said issues by way of a counterclaim against the Plaintiff should they have wished to rely upon it.

Issue 3: What remedies are available to the parties?

[14] The Plaintiff claimed for a commercial interest against the Defendants and costs of the suit.

The law is on award of interest is now settled; the award of interest is at the discretion of the court. The determination of the rate of interest is also at the discretion of the court. (See Omunyokol Akol Johnson vs Attorney General [2012] UGSC 4).

According to **Section 26 (2)** of the Civil Procedure Act, this court has powers to award interest where non is agreed upon. (See also Crescent Transportation Co. Ltd.; vs Bin Technical Services Ltd Court of Appeal Civil Appeal no. 25 of 2000).

Interest rates on special damages should be with effect from the date of loss till payment in full while on general damages it should be from the

date of judgment as it is only ascertained in the judgment. (**See Hope Mukankusi vs Uganda Revenue Authority (Court of Appeal Civil Appeal no. 6 of 2011)**).

No special damages or general damages were sought by the Plaintiff in the instant suit. However, they sought for interest on the sum owed by the 1st Defendant to them.

I find an interest rate of 3% per annum from the date of making this judgment till payment in full as appropriate.

[15] In relation to the costs of the instant suit, it is the law that a successful party is entitled to those costs unless for good cause court orders otherwise. (**See Section 27 (2) of the Civil Procedure Act and also James Mbabazi & Another vs Matco Stores Ltd. & Another (Court of Appeal Civil Reference No. 15 of 2004)**).

The Plaintiff being the successful party in the instant suit, I found no reason to deny him the costs of the suit. The costs of the suit are accordingly awarded to the Plaintiff.

I so order.

Dated, delivered and signed at Mbarara this 29th day of May 2024.



Joyce Kavuma
Judge