

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBARARA
HCT-05-CV-CA-0024 OF 2002

(Arising from RUK. Civil Suit No. 0009 of 2002)

BAKUTWIRE JAMES :::::::::::::::::::::::::::::::::::::: **APPELLANT**

VERSUS

KAMANZI IRENE & 7 O’RS :::::::::::::::::::::::::::::: **RESPONDENTS**

BEFORE : **HON. MR.JUSTICE BASHAIJA K. ANDREW**

JUDGMENT

This is an Appeal from the judgment of Ag. Chief Magistrate of Rukungiri (*hereinafter referred to as the “trial court”*) dated 25/09/2002. The brief facts are that on 23/02/2002, the Respondents entered on the suit land and cut down several banana stems and leaves without the consent or authority or knowledge of the Appellant. At the trial the Plaintiff, now the Appellant, averred that due to the actions of the Respondents, he suffered loss and damage. The Respondents denied the claim, and the trial court decided the case in favour of the Respondents, hence this appeal.

At the trial the Appellant testified that he had mortgaged the plantation to a money lending group called *Kabajungu Twetungye Group*, of which some of the Respondents were members, while others were not. The Appellant claimed to have paid all the money owing. It emerged during the trial that the *Kabajungu Twetungye Group* was not registered as a money lender under the ***Money Lenders Act***, and was thus illegally charging a 10% interest on the monies lent out.

The Appellant pledged as security the banana plantation in question (*hereinafter referred to as the “suit property”*) to obtain a second loan of Shs. 566,500=. It was part of the terms of the agreement that in the event of default in repayment the suit property would be entered by the *Kabajungu Twetungye Group*.

The trial court (at page 3 of its judgment, line 3 from the bottom) found that:

“What is now in issue is the 566,500= for which the Plaintiff mortgaged his banana plantation.”

The trial court then proceeded to make the following findings:

1. That the Plaintiff claims to have paid the 566,500= which the Defendants denied.
2. The Plaintiff’s own witness, one Mr. Wilber, in fact denied that the Plaintiff ever paid back that money. That the agreement to the effect that the Plaintiff paid back Shs. 340,000 and later paid back Shs. 225,457 was a forgery because he (Mr. Wilber) is the Treasurer of the *Kabajungu Twetungye Group*, who should have been the one to receive that money and no one else.
3. That the said Mr. Wilbur was also the witness and surety for the Plaintiff and he should have witnessed the payment back.

At page 4 of the said judgment the trial court also stated that:

“I have also looked at the loan and repayment book, I agree with Wilber that Shs. 566,500= was never repaid. This is because any payment is always shown on the original document of a loan by cancelling the written document and not written at the back.

I therefore believe that the purported payment by the Plaintiff shown at the back is a forgery.”

Dissatisfied with the decision of the trial court the Appellant filed this appeal and advanced four grounds as follows:

- 1. *Having found as a fact that the Respondents' contract, which was the basis of their suit, was illegal, the learned trial Magistrate erred by entering judgment against the appellant basing on the same contract; and as a result occasioned both a miscarriage of justice and the law.***
- 2. *The learned trial Magistrate misdirected himself on the law by ordering that the group was entitled to retain the suit land and further that the defendants were free to dispose of the same, when the group was clearly a non-existence entity in law and as a result reached a judgment which was bad in law.***
- 3. *The learned trial Magistrate erred on the law and on the evidence when he held that the records of payments made by the Plaintiff and acknowledged at the back of the agreement were a forgery when there was no evidence on record in support thereof.***
- 4. *The learned trial Magistrate erred on the evidence by failing to find that the respondents were liable in trespass, when the evidence on record sufficiently proved the trespass by the Respondent/Defendants.***

Ground 1.

M/s Kwizera& Co Advocates Counsel for the Appellant submitted that trial court having found that the Respondent *Kabajungu Twetungye Group* was illegally charging interest of 10% when it was not a registered money lender (page 3 paragraph 1, line 3-5 of the judgment), the court should not have gone ahead and

entered judgment for the Respondents basing on the same contract, which was an illegality. Further, that the evidence on record clearly indicated that the group was unregistered, and hence the group had no capacity to enter into a contract, and that the trial court erred in law when it entered judgment in for the Respondents whose claim was based on an illegal contract.

In reply, M/s Katembeko & Co Advocates, Counsel for the Respondents, argued that it is not true that the trial court held that the contract was illegal, but that only the claim for interest at 10% per month was held to be illegal. Further, that the trial court clearly held that the main contract for the loan of Shs. 566,500= was good, and that it is for this amount that the Appellant had given the suit property as security for the loan, and the trial court found as a fact that the Appellant had never paid back the amount of money.

From the fact on the trial court's record, I am inclined to agree with Counsel for the Respondents that there existed a lawful and binding contract between the Appellant and the Respondents' group, but only the charging of interest of 10% when the Respondent group was not a registered money lender as provided for by the **Money Lenders Act** was illegal. It follows that the illegal clause of 10% interest rate could be severed from the contract without defeating its primary purpose of having lent out the money to the Appellant. This ground of appeal lacks merit and accordingly fails.

Ground 2.

The Appellant faults the trial court for holding that *Kabajungu Twetungye Group* retains ownership of the disputed banana plantation when the unregistered group was a non-existent person in law and had no capacity to contract. Counsel for the respondent responded arguing that the Appellant who was the Plaintiff in the

original suit had sued the defendants now Respondents in their individual capacity and alleged that each of them had trespassed on his land and took the banana plantation, and that the trial court dismissed the plaintiff's claim.

There should be no difficulty in appreciating the trial court's view in this regard. Holding that the Respondent group was not registered meant that it was not registered for the purpose of lending money under the *Money Lenders Act*. This is evident from the trial court's judgment, at page 3 (line 3 to 8) where it was observed, and correctly so in my view, that:

“The group used to charge interest of 10% on refund. At this juncture, I must say that the charging of 10% interest is illegal since the group had not been registered as a money lending institution. This however does not mean that the group could not loan, (sic) rather it would mean that the amount refunded would be the amount loaned out without interest thereon.”

The trial court's observations above do not in the least suggest that the Respondent group lacked the capacity to contract. Certainly the group needed not to be registered to lend out money, provided it did not charge interest. In addition, the Respondent group could be taken as a partnership, which does not, in law, necessarily need to be registered. As was held in the case of *Kafeero v. Turyagyenda [1980] HCB 122*, there is no need for registration of a partnership; but for evidential value it is imperative upon the members to register the partnership deed with the Registrar of Documents. Given this position, ground 2 of the appeal is disallowed.

Ground 3 was abandoned, and instead only **Ground 4** was argued. It was contended by the Appellant that the trial court erred by failing to find that the Respondents

were liable in trespass, and that some of the Respondents were not members of *Kabajungu Twetungye Group*. Further, that the mortgage between the Respondent group and the Appellant was illegal, and that the Respondents did not lodge a counterclaim in which they would have put across their claim of advancing of a loan to the plaintiff. Counsel for the Respondents countered that the evidence on record did not establish trespass having been committed by the Respondents on the banana plantation but rather that it emphasised the respondents' legal right to take over possession and ownership of the banana plantation after the Appellant failed to pay back the loan.

The issue of relating to the legality of the agreement has been settled, and it is not necessary to repeat it. I will deal only with the point that the Respondent group never lodged a counter-claim in which they would have put across their claim of advancing a loan to the Appellant. It came out in the testimony of PW II, one Twesigye Wilber, who stated (at page 7 in line 6 of the proceedings) that:

“The Plaintiff had borrowed money from the group. It was a total of Shs.98,759. 50.cts.

The Plaintiff did not pay back the money. He never paid any single money on that amount.”

It would appear that it was on the basis of the above evidence that the trial court held (on page 4 of its judgment) that:

“In the circumstances therefore, I find that the Plaintiff on a balance of probabilities has not proved his case. He has established no cause of action with any remedy in law.”

It was proved before the trial court to the required standard that the Appellant had given as security for a loan the suit property, and he has never cleared the monies advanced to him. If the Respondent group entered the said suit property pursuant to the terms of the contract, it cannot be said that the group trespassed on the Appellant's land. Ground 4 of appeal also fails. The net effect is that the judgment of the trial court stands, and the appeal fails in its entirety and it is dismissed with costs to the Respondents in this court and in the court below.

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BASHAIJA K. ANDREW

JUDGE

08/02/2013.