

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

CIVIL APPEAL NO. 11 OF 2016

(ARISING FROM WAKISO CHIEF MAGISTRATE'S COURT CIVIL SUIT NO. 57 OF 2011)

MARIAM SEBIRUMBI MAYANJA.....APPELLANT

V

FAROUK SEBUGUZIRESPONDENT

BEFORE HON. LADY JUSTICE H. WOLAYO

JUDGMENT

The appellant appealed the judgment of HW Karungi Doreen Olga Magistrate grade one dated 19.1.2016 on six grounds of appeal that I will revert to later in the judgment.

At the hearing of the appeal, Mr. Musisi appeared for the appellant while Mr. Kajeke appeared for the respondent . Only Mr. Musisi for the appellant filed written submissions . Counsel for the respondent was to file his submissions by 9.3.2017 but they are not on record as I write this judgment.

The duty of the first appellate court is to re-evaluate the evidence and arrive at its own conclusions on issues of fact and law.

Brief facts

The respondent, Mr. Farouk Sebuguzi together with Ruth Nakku Musoke sued the appellant Mariam for breach of a contract . it was averred in the plaint that some time back, Farouk and Nakku separately gave Mariam money and by an agreement dated 21.2.2009, Mariam undertook to pay on 30.4.2009 which she did not hence the suit.

The defendant denied the claim by the two claimants.

After hearing both sides, the trial magistrate entered judgment for Farouk in the sum of 13,000,000/ being money borrowed and 3,000,000/ as general damages. The claim by Nakku was dismissed.

The evidence

For the sake of clarity, I will refer to the parties by their names. It was Farouk's case that he entered into an agreement with Mariam on 21.2.2009 but that he had given her money through Nakku and that the agreement had been voluntarily made. According to Farouk, he granted Nakku permission to first give Mariam 13,000,000/ and she was added 2,000,000/ as interest.

The evidence reveals two agreement. The first one annexure C dated 11.3.2008 shows that the appellant was given 15m through Nakku Ruth and 3,000,000/ was charged as interest , the total sum of 18m was to be paid by 11.4.2008 . Annexure C is attached to Nakku's witness statement.

The second agreement was made on 21.2.2009 in which the parties then agreed that Mariam would pay 20,000,000/ which includes interest, by 30.4.2009. the parties in this agreement marked annex. B to the witness statement of Farouk makes reference to the 11.3.2008 agreement (annex. C)There were no witnesses to this agreement.

From the foregoing account , it is evident that Mariam is said to have borrowed money from 13m from Farouk as principal sum but the money was handed by Nakku to Mariam. The fact that it is Nakku who paid out the money is confirmed by testimony. The other sums like 2,000,000/ and 3,000,000/ mentioned in the two agreements was interest. these sums will be discounted because no evidence was led to show that the respondents were licenced money lenders.

In defence, Mariam admitted to borrowing 13m from Nakku on 11.3.2008 and that she had paid back 8m. Her testimony is supported by Annex. C to Nakku's witness statement that shows 13m was received by the appellant on 11.3.2008 . The witness to this transaction was

one late Haji Ali Sebirumbi , husband to the appellant. this fact was corroborated by Nakku in her witness statement.

Mariam further testified that the agreement of 21.2.2009 annex. B was obtained by duress and coercion as Farouk came with several other people.

An examination of the agreement of 21.2.2009 reveals that it was not witnessed therefore the claims that it was procured by coercion cannot be ruled out. The menacing tone of the language makes matters worse. For instance interest is applied as a penalty and that '*there will be no other excuse except looking for the money.*' I will therefore not rely on it.

The respondent had a duty to prove his case on a balance of probabilities. As the agreement has been discounted, what is left of the respondents' evidence is oral testimony and the agreement of 11.3.2008 annex. C.

After considering Annex. C, which supports the appellant's claim that she borrowed 13m of which 8m has been paid back, I am inclined to believe the appellant's version of events. I reject the respondents' claim that the appellant has never paid back any money.

While the trial magistrate rightly concluded that the appellant borrowed 13m, he erred when he concluded that none of the 13m has been paid back. The trial magistrate also erred in relying on an agreement that was obviously procured by duress.

There was also no basis for general damages of 3,000,000/ as the respondent had not pleaded mental anguish or suffering.

I now turn to the grounds of appeal.

Ground one

The learned magistrate erred and misdirected himself when on the evidence when he held that the appellant admitted a debt of 20m to the 1st respondent as per the agreement dated 21.2.2009 yet the basis of that agreement arose from the money the appellant had received from 2nd respondent whose claim the magistrate had dismissed.

Counsel for the appellant submitted that as the trial magistrate had dismissed the claim by Nakku , it meant that the claim by Farouk the current respondent could not stand. I disagree with this analysis. It is evident that Nakku was an agent of Farouk which explains the

decision by the trial magistrate to dismiss her claim . Both Farouk and Nakku presented the same evidence and put the debt at 15m.

I find no merit in this ground because the trial magistrate did not find that the appellant was indebted in the sum of 20m.

Ground two

The learned trial magistrate failed to find that although the appellant and the 1st respondent entered into a memorandum of understanding dated 21.2.2009, the appellant had never received any money from the respondent Farouk.

I have found that Nakku from whom the appellant received money was Farouk's agent.

There is no merit in this ground.

Ground three

The learned trial magistrate erred in law when she failed to consider the unchallenged testimony of the appellant that she cleared all the money.

I have re-appraised the evidence and found that the appellant paid only eight million/ out of the 13m she borrowed. This ground partly fails.

Ground four

The learned trial magistrate erred in law when he found that the appellant was indebted to the respondent when the agreement of 21.2.2009 was procured by duress and coercion.

I have re-appraised the evidence and found that the 21.2.2009 was procured by duress which means the trial magistrate erred when he relied on it as proof of a debt.

Ground five

The trial magistrate erred when he dismissed the 2nd plaintiff's claim without costs.

The decision to award costs is in the discretion of the trial court. Although no reasons were given, no injustice was occasioned as the 2nd respondent was an agent of the 1st plaintiff.

Ground six

The learned trial magistrate erred in law and in fact when she granted reliefs to the 1st respondent based on an illegal contract.

I have found that the trial magistrate erred in relying on an agreement that was procured by duress but I have found that there was oral evidence and other documentary evidence produced by the 2nd respondent showing that the appellant borrowed 13m on 11.3.2008.

In the result I allow the appeal in part and make the following orders.

1. The appellant shall pay the respondent 5,000,000/ (five million) with interest at 3% p.a from date of judgment in the lower court, i.e. 18.12.2015 until payment in full.
2. The award of 3,000,000/ general damages is set aside.
3. Half the taxed costs of the appeal and the lower court to the 1st respondent.

DATED AT KAMPALA THIS 14TH DAY OF JULY 2017.

HON. LADY JUSTICE H. WOLAYO