THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
HCT – 01 – CV – CA – 0019 OF 2016
(Appeal from the judgment and Decree OF THE Chief Magistrate's Court of Kasese at Kasese, Civil Suit No. 111 of 2010 of 2010 by His Worship Mfitundinda George (Magistrate Grad one) delivered on the 27th June, 2016)

EQUITY BANK UGANDA LTD……..……APPELLANT
VERSUS
ALI AMIN SATURDAY MUSOLO…….……RESPONDENT

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE.

Judgment

This is an Appeal arising from the Judgment and Orders of the Magistrate Grade I of Kasese dated the 27th/06/2016 in which judgment was delivered against the Appellant.

Background:

The Respondent was a customer of the Appellant and took out a loan of UGX 5,000,000/= on the 06th/06/2008 from the former Uganda Microfinance Ltd bank which was taken over by the Appellant in 2008. The loan was payable within 14 months at 4% interest rate. The Respondent claimed not to be indebted to the Appellant and filed the suit seeking recovery of his agreements which he had pledged to the Appellant as security. He also sought orders restraining the Appellant from selling his house which was never part of the security of the loan agreement, general damages, interest and costs.

The appellant on the other hand lodged a counterclaim seeking recovery of a sum of UGX 3,159,613/= as the outstanding loan balance.

Issues for determination were;

1. Whether the Plaintiff paid off the loan from the Defendant?
2. Whether the advertisement of the Plaintiff's house at Kaserengethe II by the Defendant was lawful
3. Whether the Defendant is entitled to prayers in the Counter Claim.
4. What remedies are available to the parties?

The trial Magistrate held in favor of the Respondent and dismissed the Appellant's counterclaim, hence this appeal.

The Memorandum of Appeal was filed before this Court on the 22nd July, 2016 and contains grounds which are stated as follows:-

1. That the learned Magistrate Grade I erred in fact when he held that the appellant Bank did not have information relating to the Respondent's account statement for the Period between June 2008 to September 2008, thereby reaching a wrong decision.
2. That the learned Magistrate Grade I erred in law and in fact when he failed to adequately evaluate the evidence on record as a whole thereby reaching a wrong decision.

3. That the learned Magistrate Grade I erred in law and in fact when he awarded general damages of UGX10, 000,000/= without proper legal and factual assessment of the same.
4. That the learned Magistrate Grade I erred in law and in fact when he dismissed the Counterclaim.

Representation:

Counsel Mpata Kulid appeared for the Appellant and Counsel Ruth Ongom for the Respondent. Counsel for both parties filed written submissions by consent.

Duty of the first Appellate Court:

This being a first Appellate Court, it has the duty to rehear the case on appeal by reconsidering all the materials which were before the trial Court and make up its own conclusion bearing in mind that it neither saw nor heard the witnesses in the trial Court. **(See: Father Nasensio Begumisa & 3 Others versus Eric Tibebaga, SCCA No. 17 of 2002).**

The grounds are discussed separately.

Ground 1: The learned Magistrate Grade I erred in fact when he held that the appellant Bank did not have information relating to the Respondent's account statement for the Period between June 2008 to September 2008, thereby reaching a wrong decision.

The trial Magistrate Grade I on page 25 line 7 of the record of appeal found that the Appellant had not provided details of the respondent's account statement for the Period between June, 2008 to September, 2008. He held that since Equity bank took over Uganda Microfinance Limited it ought to have reconciled the information between June, 2008 and September, 2008 in the pinnacle system.

DW1 testified on page 52, line6-12 of the record of Appeal that;

> *"When Uganda Microfinance Limited was bought by equity bank its customers and loans transferred to Equity. The only change was in account codes and their numbers..... Previously the plaintiff held account No.2010000335 with Uganda Microfinance Limited bank. It was a savings account. With Equity Bank the savings account turned into account no.1021140322964 in the name of Ali Amin Satade Musolo. The loan account No.UML was 8020000403. When it came to Equity Bank it became 1021540328679 in the name of Ali Amin Satade Musolo."*

The Appellant through their sole witness DW1 corroborated the oral evidence with account statements that were tendered and admitted in the trial court as **DE3 the statement on the savings account no.2010000335 Uganda Microfinance Limited with transactions from 06/06/2008 to 29/09/2008. DE5 Loan statement account number 802000403 Uganda Microfinance Limited dated 06/06/2008 to 10/10/2008. DE4 statement for savings account No.102114032964 Equity Bank 30/11/2005 to 06/01/2010 and DE6 Loan account statement Equity Bank NO. 102140328679 dated 01/02/2008 to 16/11/2013.**

DW1 explained as to why the Respondent had two account statements of the 2 accounts he had with the Respondent. On page 54 lines 22 – 24 of the Record of Appeal while identifying DE4 the DW1 noted that the statement contained some information from Uganda Microfinance

Limited. The Respondent also admitted on Page 49 lines 4-5 to have been given new accounts by Equity Bank.

I have been able to critically examine the account statements adduced by the Appellant bank. DE3 UML was incorporated in DE4 Equity account and the same applied for DE5 UML account with DE6 Equity Bank. Although the dates of entry of the transactions in DE3 & DE5 are different from those entered in the new Equity bank account statements DE4 & DE6, when critically examining the figures, they are reflected on both statements.

It is also my observation that although the statements were produced, they have many inconsistencies and ambiguities. It is settled law that in case of inconsistencies and ambiguities in the evidence of the Appellant, it may be interpretive to the benefit of the Respondent. In the case of **Constantino Okwel Alias Magendo versus Uganda, SCCA No. 12 of 1990** the Supreme Court laid down the law as to contradictions and inconsistencies. Court stated that;

"In assessing the evidence of a witness his consistency or inconsistency, unless satisfactorily explained, will usually, but not necessarily, result in the evidence of a witness being rejected, minor inconsistencies will not usually have the same effect, unless the trial judge thinks they point to deliberate untruthfulness. Moreover, it is open to a trial judge to find out that a witness has been substantially truthful even though he lied in some particular respect."

This ground therefore fails.

Ground 2:

The learned Magistrate Grade I erred in law and in fact when he failed to adequately evaluate the evidence on record as a whole thereby reaching a wrong decision.

In reaching a decision for the Plaintiff/Respondent the trial magistrate evaluated evidence as to the following circumstances;-

Transfer of the loan security of UShs.750, 000/=

The trial magistrate on page 25 line 25 of the record of proceedings held that although the DW1 claimed that the transfer of UGX 750,000/- to the Plaintiff's loan account was intended to clear the loan in arrears, there is no corresponding transaction of the Plaintiff savings account DE4 in support of her testimony and as a result found the testimony to be untrue. I entirely agree with his worship's findings.

The Respondent at the trial relied on refund of the loan security of UGX 750, 000/= as part of proof that he had completed his loan obligation while the Appellant claimed that the said money was transferred to the savings account to service the loan.

It is reflected on DW4, savings account Equity bank No. 1021140322964 that on the 17th/07/2009 a sum of UGX 750,000/= was transferred on the said account to service a loan. However, it is surprising why the money is neither reflected on DE6 Loan account statement

Equity Bank No. 102140328679 nor was it reflected on DE5 Loan statement account number 802000403 UML.

Counsel for the Appellant submitted that the money was transferred to service a loan yet on the other hand the respondent claims to have received the money having completed the loan. The question is why the bank did not automatically recover the money to the respondent's account if he was in default to ensure that the UGX.750, 000/= was used for its real purpose, to service the loan.

On Page 63, lines 7-9 while DW1 was being cross examined on DE5 she stated that that;

> *"It is electronically transferred to loan account. It is the role of customer to deposit money on the savings account for loan payment and the role of the bank is to transfer it. "*

There was no proof adduced to prove that between this period the *finacle system* which was in use by Equity bank had broken down. If the money cannot be reflected in the loan account which was meant to pay off the loan of the Respondent then it would mean the Appellant deliberately left the money for the Respondent to withdraw and use.

I therefore agree with the trial magistrate that the Appellant had the duty to be vigilant and withdraw all the money it believed under its system that they demanded from the Respondent but they did not.

Transactions of 12/12/2008 and 22/12/2008 and the Motor vehicle

The trial magistrate on page 25 lines 21-24 found that since the Respondent had made cash deposit on the saving account on the 12/12/2008 and it was never transferred to the loan account and 10 days later on the 22/12/2008, the Respondent was able to withdraw the money mean that he was not indebted to the Appellant or else the bank would have recovered the money. I agree with this finding.

Upon carefully perusing the record, I find that it is true that the Respondent made a deposit of UGX 2,270,000/= on the 12th/12/2008 and the money was never deducted by the Appellant. Furthermore, DW1 testified on page 60 lines 23 &24 that the Respondent had last made payment on the 18/08/2008. However, the statements adduced by the Appellant show that the Respondent made cash deposits on the 12th/12/2008. In fact on the same page of the record of Appeal DW1 further acknowledges that the Respondent had made a deposit of UGX999, 000/=. The respondent withdrew a sum of UGX 3,200,000/= from his account 10 days after deposit of the last known transaction.

According to DW1, if the last payment had been made by the respondent on the 18/08/2008 then the period until the next transaction was on the 12th/12/2008. A debtor in 4 months of default is easy to detect and the bank could have held the money before the Respondent was able to withdraw it10 days later.

I agree with the trial magistrate that the bank did not provide any proof to show that the system was faulty. The only evidence is the word of DW1 on page 61 lines 5 – 8 where she states that in 2008 (but could not recall the month) the system was under migration from banker's realm to finacle they could not deduct automatic loan payments. She further stated that they verbally communicated to their customers not to withdraw money on their accounts.

At the time DW1 was the field agent of the Respondent but no proof was adduced to prove that the Respondent was verbally informed or even in writing not to withdraw the money from his savings account.

It should also be noted that the statements adduced by the Respondent have unexplained contradictions. The transaction on DE6 on the 07th/04/2010 shows that the Respondent deposited all the outstanding loan amount at the time of UGX 2,659,637.94 but the system continued to show the respondent as indebted. Although, the respondent justified it to be an electronic transfer due to the change in the system from banker's realm to finacle system. This was a loophole that cannot be under looked. The bank has a duty to reflect the true transactions of their clients without any grave mistakes or else it can lead to loss and inconvenience on the part of their clients.

Release of the Motor vehicle

The trial magistrate on page 26 lines 1- 8 of the Record of proceedings found that the actions of the bank in releasing the log book or securities implied discharge of the Plaintiff/Respondent. The trial magistrate also dismissed the claim by the defendant/Appellant that the motor vehicle was sold to pay off the loan since they adduced no proof of the same. I find that the trial magistrate properly evaluated evidence on this point.

The memorandum of Deposit which was admitted as **DEII** shows Motor Vehicle registration No. UAF 828Y as part of the security provided by the respondent to secure the loan.

PW1 on page 50 line 3 testified that the bank returned his car log book having paid the loan in full. However on the other hand DW1 testified that the log book was returned having agreed to let the respondent sell off the car to be able to pay up the outstanding balance. No proof of application by the respondent to the bank to sell the motor vehicle sufficed.

Counsel for the Appellant stated that the bank reserves the right to discharge a mortgage. However, there was no proof as to whether it was done in agreement for sale of the security by the respondent in payment of the land. The deposit that followed the sale of UGX 2,270,000/= was not sufficient enough to prove that the parties had agreed to sale the motor vehicle. No sale agreement was produced to show that the said sum was derived from the sale of a motor vehicle.

I agree with the trial magistrate's resolve on this ground.

The house at Kaserenge

The trial magistrate on page 26 lines 13-15 of the record of proceedings found that the Plaintiff/Respondent did not pledge the house as security and that there was no Order of court allowing the bank to sell the house; he therefore found the advertisement to be illegal. I am in total agreement with this finding.

PW1 testified that he pledged a motor vehicle and 2 plots of land at Kambumbi and Kyaduriand, the same was reflected on DEII the memorandum of deposit. On page 46, lines 15-21 the respondent testified that when he completed his loan, he applied to have his 2 sale agreements returned and he was informed that the same were in Kampala. Before he could apply, a one Harima wrote on his house at Kaserenge that "house for sale". He further testified that the house was not part of the security agreed upon. On the other hand DW1 on page 62, lines 1-4 testified

that the advertised plot of land was in respect of the Respondent's mother's loan who had pledged it as security having given the bank a sale agreement.

There was no proof of the agreement produced by the respondent to show what belonged to the said debtor, no proof of customer banker relationship to prove existence of the land. The bank had no court order adduced in court authorizing the sale of the house.

I agree therefore with the findings of the trial magistrate on this ground. The bank appears to have been taking advantage of the takeover by Equity bank to defraud the respondent. It is my considered opinion that the trial magistrate properly evaluated the evidence and arrived at the proper orders he made against the respondent.

Ground 3:

The learned Magistrate Grade I erred in law and in fact when he awarded general damages of Ushs.10, 000,000/= without proper legal and factual assessment of the same.

The trial magistrate on page 26 lines 15 – 17 awarded general damages of UGX10, 000,000/= to the respondent relying on the illegal advertisement that was made by the bank. He noted that the Plaintiff/Respondent told court that he was disturbed by the advert and for that inconvenience; he awarded the said general damages. I agree with the decision of the learned magistrate.

In the case of **Adonia Tumisiime & 318 others versus Bushenyi District Local Government& another High court Civil Appeal No.32/2012,** Court noted that the position of the law is that the award of general damages is at the discretion of court and always the law will presume to be the natural consequence of the defendant's act or omission. In assessment of the quantum of damages, courts are mainly guided *inter alia* by the value of the subject matter, the economic inconvenience that the party may have been put through and the nature and extent of the breach.

It was therefore the role of the court to place the person who has suffered damage due to the wrongful act of the defendant in the position he/she would have been had he not suffered the wrong.

In this case as resolved above, it is clear that the respondent suffered inconvenience as a result of the Appellant bank's failure to conduct due diligence to ascertain the true owner of the house. He testified on page 47 lines 3-5 that

> *"The 2 pieces of land I mortgaged were not advertised for sale. I lost peace when my house was written on for sale by the bank. I wondered what was happening. I realized they wanted to cheat me. I remained in the house. That is where I stay. People used to ask me whether it was on sale and I used to tell them that it was not on sale."*

The fact that the Appellant attempted to attach a residential home of the respondent in respect of a loan taken out by someone else was totally unfair and illegal especially because the appellant sought to do the same without any court order. Had the appellant gone through the right procedure of recovery in court, the respondent could have objected to the sale and no inconvenience or mental anguish would have been caused.

The respondent lost peace had to answer questions from people who wondered what the words "house for sale" meant. This embarrassed the respondent. I respectfully agree with the trial magistrate.

This ground fails.

Ground 4:

The learned Magistrate Grade I erred in law and in fact when he dismissed the Counterclaim.

The trial Magistrate on page 26 lines 18 to 20 found that the defendant failed to show that the Respondent owed her money claimed in the counterclaim and as a result dismissed the same with costs. I agree with this finding.

The Appellant lodged a counterclaim against the respondent seeking a sum of UGX 3,339,000/= He relied on evidence of DE6 to prove that the respondent was indebted to the bank.

As discussed above in ground 2, the Appellant relied on DE6 which I pointed out to be unreliable as it had a lot of inconsistencies. The same statement clears the loan debt on 07/04/2010 and later continues counting the loan balance. I must also point out that the Appellant's saving account DE4 which would have helped understand where the mysterious money came from was only extracted from the 30th/11/2005 to the 06th/01/2010. The transaction in issue on the 07th/04/2010 which would have shown whether or not the said money was from the respondent savings account was not reflected in his savings account statement.

Furthermore, the conduct of the Appellant was one where he represented that the loan had been cleared. The bank transferred the loan security to the respondent's account DE4 but the same was not reflected in DE6 as a paid off loan. The respondent had a sum of UGX 999,000/= on the savings account but it was never withdrawn to the loan account. The respondent further deposited UGX 2,270,000/= which DW1 testified to have been a deposit after the sale of the motor vehicle to clear the loan. If this was so, why didn't the bank remove the money? The respondent was able to withdraw it 10 days later. The sum withdrawn was enough to cover the outstanding balance alleged by the Appellant then.

The bank had a right to claim the debt in full upon default by issuing a notice of demand/ commencing legal proceedings against the respondent. None of these steps were taken by the bank. This conduct can be taken to mean that the bank's debt had already been concluded.

I am in agreement with the decision of the trial magistrate.

This ground also fails.

In a nutshell this appeal lacks merit, fails on all grounds and is dismissed with costs to the Respondent. Decision of the lower Court is upheld. I so order.

Right of appeal explained.

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OYUKO. ANTHONY OJOK

JUDGE

31/10/2017

Judgment read and delivered in open Court in the presence of;

1. Counsel Mpata Kulid for the Appellant.
2. Counsel Richard Bwiruka for the Respondent.
3. Court Clerk – James
4. Court Clerk – Beatrice Katusabe
5. In the absence of the parties.

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OYUKO. ANTHONY OJOK

JUDGE

31/10/2017