

The issues for determination were;

1. Whether the Plaintiff and the Defendant engaged in a joint business.
2. Whether the items received by the Defendant were contributions to joint business or gifts of love relationship between parties.
3. Whether the Defendant received Shs 432,000/- as cost for loan repayment from the Plaintiff.
4. What remedies are available to the parties.

The Plaintiff's case opened with Kawesa Daniel, PW1 the Respondent giving his evidence. He sued the Defendant for fraud of shop items, cash, paint and for running a business he helped her establish without involving him as a partner. The joint name of the business was Kaweesa and Tina, however she named it Nalumu Tina and runs it solely. He contributed cash amounting to 3,946,500/- and items worth 570,000/-. He gave the Defendant 432,000/- to clear loan payment however she did not pay the money to clear the loan. Receipts, copies of phone messages, a letter to the Defendants father and a copy of the agreement between the parties were identified at the trial. The Plaintiff denied ever being in a love relationship with the Defendant.

PW2, Lubega Joseph testified that in May 2018, he received two Kaki envelopes and 20,000/- from Shaban to pass on to a person who would collect the said items from him. Kaweesa Daniel had given those items to Shaban to take them to PW2. PW2, Lubega Joseph did not know what was in the envelopes. The Defendant collected the said items from him. PW3, Nganda Shaban confirmed PW2's testimony and stated that PW1, Kaweesa gave him an envelope to deliver to Lubega. Kaweesa told him that the envelope contained money worth 1,500,000/-. The envelope was sealed. He gave the money to Lubega Joseph, PW2.

PW4, Mugisha Richard testified that the Plaintiff Kaweesa Daniel obtained a loan of 1,440,000/- from an Association called, "Suubi Mubulamu Star Group"

PW5, Nganda Issa testified that he loaned the plaintiff 1,200,000/- to ran a business. In July 2018, the Plaintiff gave him an envelope with 200,000 in it and instructed him to give it to Lubega Joseph to pass on to Nalumu Justine the Defendant. The evidence of PW6 is that the Plaintiff is an employee of Radio Ssesse. In June, Daniel instructed a cyclist to pick shop items including crates of beer and soda and take them to Mweena to Nalumu Justine. The cyclist

ferried the items for two days and the Defendant went to Radio Ssesse at 6:00p.m. The Plaintiff's father, PW7, testified that he loaned the Plaintiff 1,000,000/- in June 2018.

Twehweyo Richard was PW8. He knows both parties as people who have a joint business in Mweena Trading Centre dealing in Mobile money.

That was the Plaintiff's case.

The Defendant's case opened with the evidence of the Defendant Nalumu Justine who testified that the Plaintiff is her boyfriend since June 2018. She denied the Plaintiff's allegations and stated that theirs was a love affair between a man and a woman. They met at Kyakuwa's home at least three times and four times at her business premises. She received cash amounting to Ugx 3,840,000/- from the Plaintiff and assorted goods all valued at 570.000/-. She got the said items from Radio Ssesse where the Plaintiff works. He told her to sell the items and use the proceeds for her purposes. She did not know that he was servicing a loan. All the shop items were given to her as a girlfriend or mistress to use them for her personal benefit. She had a sexual affair with the Plaintiff and he sent her messages on her cell phone. Photos of the plaintiff's messages on the defendant's phone were admitted for identification purposes at the trial.

The relationship ended because the Defendant realized that the plaintiff was still with his wife.

DW2, Kyakuwa Olivia testified that she is the Plaintiff's workmate and acted as go between in the affair between the Plaintiff and Defendant. She took money from Kaweesa to the Defendant and also provided her home as a meeting place for them. The love affair lasted two months.

That was the close of the Defendants case.

The court visited locus and established the existence of a shop owned by the Defendant with various shops items. None of the items constituted items originally given to the Defendant by the Plaintiff. The Defendant confirmed that she received 3,700,000/- as a mistress.

In his judgment, the trial Judge considered the manner in which the Plaintiff mobilized money and found that the parties engaged in a joint business and that the money received by the Defendant was a contribution to the business and not love gifts. He entered judgment for the Plaintiff and awarded him general damages and costs.

The Appellant being dissatisfied with the trial Magistrate's decision, appealed the decision to this court on the following grounds;

1. The Learned Trial Magistrate Grade One erred in law and fact when he held that the relationship between the Appellant and the Respondent was one of joint business partners.
2. The Learned Trial Magistrate erred in law when he failed to properly evaluate the evidence on record hence arriving at a wrong decision.
3. The Learned Trial Magistrate erred in Law when he failed to apply the relevant laws to the evidence before reaching a decision.

Both Parties filed written submissions.

Regarding the first ground of appeal, Appellants Counsel submitted that the Judge in his judgment did not reveal the nature of joint business that was established by the parties and its legal status. He proffered that the Pleadings and the Judgment made no reference to the relevant legislation that should have bound the two parties to the alleged business relationship and that the whole alleged relationship operated outside the provisions of the law.

That the Judgment merely stated that "Kaweesa Daniel adduced evidence that the Defendant did not register the intended business into the joint names of "Kaweesa & Tina" but in the sole name "Nalumu Tina."

He submitted that the Appellant never entered into any business dealing with the Respondent and that whatever they did was personal and not intended to be protected by the law. The Appellant and Respondent were lovers and whatever the Respondent gave to the Appellant was out of love. The learned trial Judge neglected to evaluate evidence on the alleged fraud and did not apply any law in reaching the decision he did.

In response, Respondent's Counsel submitted that the learned trial Magistrate was right in finding that the Respondent made contributions to the intended business and not love gifts. The Appellant submitted that she operated a sole Proprietorship business. It was upon failure to realize the intended business that the Respondent sued the Appellant for money had and received from him. In introducing breach of contract, Counsel for the Appellant is trying to distract the

Court because the suit is for money had and received, fraud, general damages and costs. The Appellant's submissions do not object to receipt of money from the Respondent but they invite the Honourable Court to hold that the received money and items from the Respondent were love gifts to the Appellant whereas not. The Appellant admitted receipt of money and various commercial items stated from the respondent by her own admission. That her failure to establish the intended business having admitted receipt of money by the Appellant amounts to fraud.

Counsel invited this Court to dismiss the Appeal with costs to the Respondent.

Determination of the Appeal

It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (*see Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17 of 2000; [2004] KALR 236*). In a case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (*see Lovinsa Nankya v. Nsibambi [1980] HCB 81*).

I will resolve all the grounds of appeal concurrently the basis of the appeal being determining the basis for the monies and stock given to the Appellant by the Respondent.

The Plaintiff's evidence is that he entered into an oral agreement with the Defendant/Appellant to set up a soft drinks and mobile money business at Mweena Trading Centre, Kalangala District. He contributed money amounting to Ugx 3,946,500 in cash, one jerrycan of Sadolin paint, ten empty crates of soda, ten empty crates of beer, eight Airtel and MTN mobile money transaction books, general merchandise including soap, steel wire, books, pens, pencils, diapers and other miscellaneous items. That the total cost of the merchandise purchased was Ugx 570,000/=. He also gave the Defendant Shs. 432,000/= to clear loan repayment however she did not pay the said money to clear loan. The principal loan was 1,440,000/=. He stated that instead of the appellant registering the business as Kaweesa & Tina, she registered it solely in her name, Nalumu Tina.

At scheduling and at trial, the Defendant/Appellant admitted to receiving the amounts stated by the Plaintiff/Appellant and contends that they were in a love relationship that lasted two months

in which they even had sexual encounters. Her argument is that the money and the stock she received were love gifts and when she found out that the Respondent was still with his wife, she terminated the relationship.

The witnesses called by the Plaintiff confirmed that he borrowed money from the Savings Scheme as well as from his father to set up a business. One of the witnesses, PW4, Mugisha Richard testified that the Plaintiff Kaweeesa Daniel obtained a loan of 1,440,000/- from an Association called, “Suubi Mubulamu Star Group”

PW5, Nganda Issa testified that he loaned the plaintiff 1,200,000/- to ran a business. In July 2018, the Plaintiff gave him an envelope with 200,000 in it and instructed him to give it to Lubega Joseph to pass on to Nalumu Justine the Defendant. The evidence of PW6 is that the Plaintiff is an employee of Radio Ssesse. In June, Daniel instructed a cyclist to pick shop items including crates of beer and soda and take them to Mweena to Nalumu Justine. The cyclist ferried the items for two days and the Defendant went to Radio Ssesse at 6:00p.m. The Plaintiff's father, PW7, testified that he loaned the Plaintiff 1,000,000/- in June 2018.

In his judgment, the learned trial Magistrate considered the manner in which the Plaintiff mobilized money and the amount he contributed to the business to arrive at his decision that these were not love gifts and that the Plaintiff and Defendant engaged in a joint business.

Appellant's Counsel's argument is that the Magistrate should have defined the nature and legal status of the business. Respectfully, I disagree. The nature and style of businesses are not what is in issue. The issue is that contributions were made by one party to another on the pretext that a joint business would be established and it was not.

From the evidence adduced, even if this court were to hold that there was indeed an affair between the Plaintiff/Respondent and the Defendant/Appellant, it must still consider the intention for which the Plaintiff advanced money to the Defendant. It is clear from the evidence especially of PW1, PW4, PW5 and PW7 that The Plaintiff indeed mobilized money at different times in the middle of the year 2018 to set a business.

DW2 Kyakuwa Olivia testified that when the Respondent gave her money to give to the Appellant, he told her to take it to the Appellant and tell her to work.

In her evidence, the Appellant confirmed that she indeed received money and business items from the Respondent but contended that the money and items were received as gifts since she was engaged in a love affair with the Respondent. It was also the Appellant's evidence that their love affair was between June 2018 to September 2018. PW6 Daudi Ssempiira stated that when the Respondent sent shop items to the Appellant, he informed him that they had a business meeting. The Respondent adduced a letter into evidence which he wrote to the Appellant's father demanding for the money and items, to which the appellant testified that she returned crates, shop items and not cash. This raises a question as to why the Appellant returned some items and crates, and not the cash yet she claims that she received the items and money for personal use.

The Appellant faults the trial Magistrate for holding that the Parties were in a relationship as joint partners. *Section 2(1) of the Partnership Act* defines a partnership as the relation which subsists between persons carrying on business in common with a view point of profit and can be formed informally or by conduct of the parties as per the case of *Dr. Okello N. David versus Komakech Stephen, H.C.C.S No. 30 of 2004*. In the instant case, it is not in dispute that the respondent extended money to the Appellant as well as business items which were used to start a business that is currently being run by the Appellant. I find that from the conduct of the Parties, an intention to form a business was created and the business was later formed. The Appellant received money from the Respondent which she used to start and run the said business.

This is a suit for recovery of money, the Appellant confirmed that she indeed received money from the Respondent. Suits for recovery of money had and received like this one, seek to avoid unjust enrichment. (*Moses v Macfarlane (1760)2 Burr at page 10 cited in Cloth link (U) Ltd Vs Africa Traders Investments Fund Ltd & Anor HCCS 234 of 2010*)

It was further stated in *Moses v Macfarlane (supra)* that

“The principle of unjust enrichment requires; first that the Defendant has been enriched by the receipt of a benefit; secondly that this enrichment is at the expense of the Plaintiff and thirdly, that the retention of the enrichment is unjust. This qualifies restitution.”

In the instant case, the Appellant received money meant for a joint business, she used the money to start and run the said business solely and denied the respondent from benefitting from the business. It therefore goes without saying that she is unjustly benefitting from the receipt and use of the money she received from the Respondent, and to continue benefitting from the same at the Respondent's expense would be unjust.

Counsel for the Appellant referred to Section 10 of the Contract Act which requires contracts whose subject matter exceeds twenty-five currency points to be in writing. He submitted that none compliance with the provisions rendered the contract illegal.

Much as the section uses the word "shall" it has been decided that the same does not mean that its mandatory. In the case of *Sitenda Sebalu vs Sam K. Njuba and the Electoral Commission (Election Appeal No 26 of 2007) (unreported)* the Supreme Court of Uganda discussed Section 62 of the Parliamentary Elections Act where the word "shall" is used and held as follows:-

"It is common ground that although prima facie the use of the word "shall" in a statutory provision gives the provision a mandatory character, in some circumstances the word is used in a directory sense. Much as we agree with learned Counsel for the appellant to the extent that where a statutory requirement is augmented by a sanction for non-compliance it is clearly mandatory that cannot be the litmus test because all too often, particularly in procedural legislation, mandatory provisions are enacted without stipulation of sanctions to be applied in case of non-compliance. We also find that the proposal by Counsel for the 2nd respondent to restrict the directory interpretation of the word "shall" to only where it is shown that interpreting it as a mandatory command would lead to absurdity or to inconsistency with the Constitution or statute or would cause injustice, to be an unreliable formula, which is supported by precedent or any other authority"

The Supreme Court cited with approval the observation of *Lord Steyner in Regina Vs Soveji and other [2005] UKHL 49 (HL)* Publications and internet where he stated as follows:-

“A recurrent theme in drafting of statutes is that Parliament casts its Commands in imperative form without expressly spelling out the consequences of failure to comply. It has been the source of a great deal of Litigation. In the course of the last 130 years a distinction evolved between mandatory and directory requirements. The view was taken that where the requirement was mandatory, a failure to comply invalidates the act in question. Where it is merely directory a failure to comply does not invalidate the act in question. There were refinements. For example, a distinction was made between two types of directory requirements, namely (1) requirements of purely regulatory character where a failure to comply would never invalidate an act provided there was substantial compliance.”

Lord Steyner after reviewing decisions from the English Court of Appeal, the privy Council and Courts in New Zealand, Australia and Canada made the following conclusion:-

“Having reviewed the issue in some detail I am in respectful agreement with the Australian High Court that the rigid mandatory and directory distinction, and its many artificial refinements have out lived their usefulness. Instead, as held in Attorney General’s Reference (No. 3 of 1999) the emphasis ought to be on the consequences of non- compliance, and posing the question whether parliament can be fairly taken to have intended total invalidity”.

In this case I do not think that the Parliament of Uganda intended to invalidate such contracts. I am alive to the fact that the biggest population of Ugandan is illiterate and semi illiterate hence requiring that every contract above 500,000/= must be in writing becomes unreasonable especially in such *friendly* contracts entered into between persons who are most likely semi-illiterates. I find that non-compliance with the above provision did not invalidate the contract between the Respondent and Appellant nor did it invalidate their intention to create a joint business.

I find that the trial Magistrate properly evaluated the evidence on record to find that there existed a joint business relationship between the Parties and that the Respondent proved on a balance of probabilities that indeed he gave money to the Appellant with the intention of creating a business which business was started but at the expense of the Respondent who was denied access to or

benefit from the same. The Appellant should therefore not be allowed to unjustly benefit from the money she received from the Respondent at his expense.

On the whole, this appeal fails and is hereby dismissed with costs to the Respondent. The Judgment and Orders of the trial magistrate are wholly upheld.

I so order.

Dated at Masaka this 10th day of May, 2021

Victoria Nakintu Nkwanga Katamba

Judge