THE REPUBLIC OF UGANDA

THE HIGH COURT OF UGANDA AT MUKONO

CIVIL APPEAL NO. 001 OF 2021

(ARISING FROM MISC. APPLICATION NO. 63 OF 2020)

(ARISING FROM CIVIL SUIT NO. 92 OF 2020)

KATAMBA FRED::APPELLANT

VERSUS

KATENDE CHARLES::RESPONDENT

BEFORE HON. LADY JUSTICE CHRISTINE KAAHWA

JUDGMENT

Background to the Appeal

Summary Suit

The Respondent/Plaintiff filed Civil Suit No. 92 of 2020 against the Appellant/Defendant by way of summary suit to recover Ug. Shs.14,000,000/= [Uganda Shillings Fourteen Million] being an outstanding balance of money arising from a purchase agreement dated 29th August 2019, interest and costs of the suit. The Respondent/Plaintiff contended that on the 29th August 2019, he bought land from the Defendant/Appellant at an agreed consideration of Ug. Shs.20,000,000/= [Uganda Shillings Twenty Million only]. That at the time of executing the purchase agreement, the Plaintiff paid the agreed price in full and was given the authority to use the land by the defendant who purported to be the owner. When the Plaintiff decided to take possession of the land, he discovered that the defendant/Appellant was not the owner of the land

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and therefore the plaintiff could not take possession of the land nor use it. When he demanded for repayment of his purchase price the defendant agreed to repay the money he had received. The defendant paid back Ug. Shs. 6,000,000/= [Uganda Shillings Six Million] only and remained with a balance of Ug. Shs.14,000,000/= [Uganda Shillings Fourteen Million]. That the defendant agreed to pay back the remaining balance by cheque and subsequently issued a cheque of DFCU Bank No.000012 for Ug. Shs. 14,000,000/= [Uganda Shillings Fourteen Million]. However, when the Plaintiff wanted to cash the cheque, the Defendant pleaded with him not to as he had no money on the Account. That the Defendant having failed to pay, the Plaintiff filed a specially endorsed plaint accompanied by an affidavit as required by Order 36 rule 2 of the Civil Procedure Rules (CPR) to recover the balance.

The Application for leave to appear and defend

The Defendant/Appellant filed a Miscellaneous Application No. 63 of 2020 for leave to appear and defend. He contended that he had a plausible defence to the whole claim. He stated that he had borrowed money amounting to Ug. Shs.12,000,000/= [Uganda Shillings Twelve Million] from the Respondent and he was supposed to pay back the said sum with an interest of Shs.25% within a period of one month from the date thereof. He further contended that the Respondent executed a Sale Agreement instead of a friendly loan and he paid Ug. Shs. 16,000,000/= [Uganda Shillings Sixteen Million] and that he did not owe the Respondent/Plaintiff any money. He prayed that leave be granted for him to appear and defend the claim.

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He supported the Application with an affidavit where he repeated the above grounds and added that he first paid Ug. Shs.4,000,000/= [Uganda shillings Four Million] in the month of September 2019 and another Ug. Shs.4,000,000/= [Uganda Shillings Four Million] in the month of October 2019 in the presence of the LC 1 Chairperson and later on paid Ug. Shs.8,000,000/= [Uganda Shillings Eight Million] in two equal installments to the respondent's mobile number 0782451316 using his own mobile number 078498018; that he had contacted MTN customer care which agreed to avail the financial statement of the said transaction. He averred that the cheque dated 17th April 2020 had been issued in error as he had paid the full amount owing and that is why he had requested the Plaintiff/ Respondent not to cash the cheque.

The Respondent/Plaintiff filed an affidavit in reply which more or less repeated the contentions and averments contained in the specially endorsed plaint and the accompanying affidavit.

The Applicant/Defendant filed an affidavit in rejoinder repeating his earlier averments and in paragraph 6 of the affidavit purported to attach the print out from MTN showing that he had paid Ug. Shs.8,000,000/= [Uganda Shillings Eight Million]. The actual print out was not attached.

The Appellant's Application for leave to appear and defend was dismissed on grounds that it did not raise triable issues to support the grant of unconditional leave to appear and defend. Judgment was entered for the Respondent in accordance with Order 36 Rule 5 of the CPR, for the sum Ug. Shs.14,000,000/= [Uganda Shillings Fourteen Million] and interest of 8% from the date of judgement and costs of the Suit.

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Being dissatisfied with the Ruling and Judgment of the trial Magistrate, the Appellant filed this Appeal on the following grounds;

1. The learned trial Magistrate erred in law and fact when she failed to express herself on whether it was a loan's Agreement when making a Ruling.
2. The learned trial Magistrate erred in law and fact when she ignored evidence that money had been paid at the LC1.
3. The learned trial Magistrate erred in law and fact in sanctioning an illegality when she upheld a sales agreement yet the transaction was a loan's Agreement.

Representation

The Respondent was represented by Mr. Sekatawa Alex while the Appellant appeared to be self- represented even though his submissions were filed by Higenyi, Ngugo and Wadamba Advocates. Both Parties filed written submissions.

Consideration of the Appeal

This Court, sitting as the first Appellant Court, has a duty to subject the evidence as a whole to a fresh and exhaustive examination and reach its own decision evidence. **See: Fr. Nasereno Begumisa and 3 others versus Tibebaga Civil Appeal No.17 of 2002.**

Ground 1: The learned trial Magistrate erred in law and fact when she failed to express herself on whether it was a loan's Agreement when making a Ruling.

Counsel for the Appellant argued that the trial Magistrate in her Ruling did not clearly state whether it was a friendly loan of a Loan's Agreement and

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went ahead to make a Judgment in default for recovery of Ug. Shs.14,000,000/= [Uganda Shillings Fourteen Million]. He argued that the Appellant borrowed a sum of Ug. Shs.12,000,000/= [Uganda Shillings Twelve Million] from the Respondent but instead made a Sales Agreement speculating that the Appellant sold land to the Respondent and that the Appellant was to pay Ug. Shs.15,000,000/= [Uganda Shillings Fifteen Million]. That the issue for determination is whether or not the Appellant's Application in the Magistrates Court had raised any triable issues for which the Appellant could be granted leave to appear and defend under Order 36 rule 4 of the CPR. The Appellant's Counsel contended that the Appellant's Application had raised triable issues which was to determine whether the Agreement entered into is a Loan's Agreement or a Sales Agreement. He relied on the case of **Makula Interglobal Trade Agency Versus Bank of Uganda HCCS No.950 of 1985** where it was held that in a summary Suit, before leave to appear and defend is granted the Applicant must show that there is a bonafide triable issue of fact and law. Learned Counsel for the Appellant further argued that Order 36 rule 4 of the CPR is to the effect that an Application for leave to appear and defend shall be supported by an affidavit which states whether the defense goes to the whole or part only of the Plaintiff's claims. He concluded that the Appellant should have been granted leave to appear and defend.

Counsel for the Respondent opposed this ground of Appeal and submitted that the Agreement which was attached to the plaint and marked as annexure A in the lower court was a Sales Agreement and not a loan Agreement as purported by the appellant. That the contents of the said Agreement allude to the fact that the Appellant had sold his land situated

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at Kanyogoga and the Respondent paid in cash a consideration of Ug. Shs.20,000,000/= [Uganda Shillings Twenty Million] which was received by the Appellant. He contended that **Section 2 and 10 of the Contracts Act 2010** defines a Contract as an Agreement enforceable by law and made with free consent of the parties with capacity to contract for a lawful consideration and with a lawful object with the intention to be legally bound. That as per the aforementioned sections, the Appellant made an offer to the Respondent to buy land, the offer was accepted and that the intention was only of buying and selling the land and not of giving the appellant a loan as he alleged in the lower Court.

Further, Counsel submitted that the Respondent paid a consideration for the land and that such a consideration could not be paid when the contested Agreement was a Loan Agreement. He fortified his argument by relying on the case of **Green Boat Entertainment Ltd Versus City Council of Kampala HCCS No.580 of 2003**, where Court emphasized the essential of a valid Contract as follows,

"In the law when we talk of a contract, we mean an Agreement enforceable at law, for a Contract, intention to contract, consensus ad idem, valuable consideration legality of purpose and sufficient certainty of the terms, if in a given transaction any of them is missing, it could be as well called something other than a Contract". He concluded by submitting that there was a contract between the Respondent and the Appellant and that the said Agreement is legally binding.

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Analysis and Determination

The Appellant faults the trial Magistrate for failing to consider that the Agreement tendered was a Loan Agreement. The law on summary suits is contained in Order 36 of the CPR and the whole purpose of summary suits is to resolve matters when the Plaintiff claims a liquidated demand for which the Defendant has no defence. Order 36 Rule 3 of the CPR establishes the requirement for filing an Application for leave to appear and defend where the Defendant has claims to have a defence. In the instant case, the Respondent's claim was for recovery of Ug. Shs. 14,000,000/= [Uganda Shillings Fourteen Million] being balance of money arising from an Agreement of sale of land. The Appellant filed an Application for leave to appear and defend and not only denied the claim but also raised a defence that there was no Sale Agreement between the Parties but rather a loan which was secured by the Agreements and was repaid. An agreement dated 29/08/2019 is on the record showing that indeed the monies were advanced to the Appellant and in his written statement of defence, he states that he borrowed a loan of 12 million Ugandan Shillings from the Respondent at an interest of 25% repayable within one month and that he was supposed to pay Ug. Shs.15,000,000/= [Uganda Shillings Fifteen Million] to the Respondent. The Appellant claimed to have repaid the money. In her Ruling, the trial Magistrate dismissed the Application on grounds that the Appellant did not adduce evidence to prove the alleged Loan Agreement and that he admits to have executed a Sales Agreement.

I have carefully perused the record of the lower Court and established that the Appellant claims that he did not enter into a Sales Agreement with the Respondent but rather a Loan Agreement and has fully paid the

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amounts therein. This Court is of the opinion that the Trial Magistrate reached the correct conclusion having fully appraised the evidence on record. The Trial Magistrate referred to the affidavit evidence as wild allegations because they were not supported by any evidence; the annexures that were said to be attached were not. I fortify this finding with the case of **Godfrey Katunda vs Betty Atuhairwe Bwesharire, High Court Misc. Application No. 185 of 2004** unreported in which His Lordship P.K. Mugamba (as he then was) was of the view that annextures are part of the affidavit of the Applicant which in turn is pivotal to the Applications.

The Trial Magistrate therefore did not fail to pronounce herself on the Loan Agreement. She weighed the evidence and found that the parties had entered a Sale Agreement which was endorsed by both parties. In the result, this ground of Appeal therefore fails.

Ground 2: The learned trial Magistrate erred in law and fact when she ignored evidence that money had been paid at the LC1.

In support of ground two of the Appeal, learned Counsel for the Appellant submitted that the Appellant clearly stated in his affidavit in support of his Application for grant of leave to appear and defend that on the 29th August 2019 the Appellant borrowed a sum of Ug. Shs.12,000,000/= [Uganda Shillings Twelve Million] from the Respondent but instead executed a Sales Agreement speculating that the Appellant sold land to the Respondent and that the Appellant was supposed to pay back to the Respondent Ug. Shs.15,000,000/= [Uganda Shillings Fifteen Million].

Counsel further submitted that the Applicant paid Ug. Shs. 4,000,000/= [Uganda Shillings Fourteen Million] to the Respondent in September and

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another Ug. Shs.4,000,000/= [Uganda Shillings Four Million] in October 2019, in the presence of the LC1 of Kanyogogo, Kazzi-Nagojje Subcounty, Mukono District. Counsel faulted the learned trial Magistrate for not taking into consideration the 8 million which was paid to the respondent in the presence of the LC1 Chairman.

On the other hand, learned Counsel for the Respondent submitted that the Appellant never paid any money at the LC1 as he purports, he argued that Section 101(1) of the Evidence Act Cap 6 provides 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 that those facts exist."*

It was further submitted for the Respondent that at the time when he wanted to take possession of the land which he bought from the Appellant, he discovered that the said land was not owned by the Appellant. That the Respondent then demanded for the repayment of his purchase price from the appellant which he agreed to pay back since he also knew that he had acted fraudulently and that he was not the owner of land, the respondent counsel maintained that the Appellant only paid Ug. Shs.6,000,000/= [Uganda shillings Six Million] and the balance of Ug. Shs.14,000,000/= [Uganda Shillings Fourteen Million] owing which led the Respondent to file a summary suit. He argued that the Appellant did not produce evidence that he had paid money at the LC1.

Analysis and Determination

The position of the law as already discussed under *Order 36 rule 4* of the *Civil Procedure Rules,* is unconditional leave to appear and defend a suit will be granted where the Applicant shows that he or she has a good

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defence on the merits; or that a difficult point of law is involved; or that there is a dispute which ought to be tried, or a real dispute as to the amount claimed which requires taking on account to determine the amount or any other circumstances showing reasonable grounds of a bona fide defence. The Applicant should demonstrate to Court that there are issues or questions of fact or law in dispute which ought to be tried. The procedure is meant to ensure that a Defendant with a triable issue is not shut out. (See **M.M.K Engineering v. Mantrust Uganda Ltd H. C. Misc Application No. 128 of 2012; and Bhaker Kotecha v. Adam Muhammed [2002] 1 EA 112).**

In **Makula Interglobal Trade Agency v. Bank of Uganda [1985] HCB 65,** it was held court that:

"Before leave to appear and defend is granted, the Defendant must show by affidavit or otherwise that there is a bonafide triable issue of fact or law. When there is a reasonable ground of defence to the claim, the Defendant is not entitled to summary Judgment. The Defendant is not bound to show a good defence on the merits but should satisfy the Court that there was an issue or question in dispute which ought to be tried and the Court shall not enter upon the trial of issues disclosed at this stage."

In the instant case a perusal of the Appellant's/Applicant's Application in the trial Court, I discern the following contentions which, he claimed, entitled him to be granted leave to defend the main suit.

These are:

i. That the whole amount contracted was Ug. Shs.12,000,000/= [Uganda Shillings Twelve Million] with an interest of 25% which was

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fully paid by payment of Ug. Shs.16,000,000/= [Uganda Shillings Sixteen Million] and which is full and final settlement arising from the Agreement.

ii. The Agreement executed as a Sale Agreement was a friendly Loan Agreement.

In the case of **Anglo Fabrics (Bolton) Ltd & Anor Vs African Queen Ltd & Anor HCT-CC-CS-0632-2006, Justice Yorokamu Bamwine held that**, a fact is said to be proved when the Court is satisfied as to its truth. The evidence by which that result is produced is called the proof. The general rule is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. When that party adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof: that is, his allegation is presumed to be true, unless his opponent adduces evidence to rebut the presumption.

The Appellant claimed to have paid Ug. Shs. 4,000,000/= [Uganda Shillings Fourteen Million] in September and another Ug. Shs. 4,000,000/= [Uganda Shillings Four Million] in October before the LC1 Kanyogogo, Kazzi-Nagojje Sub county, Mukono District but he does not produce any evidence to support the averment. He did not produce any receipt for the funds or any other form of acknowledgement. He does not disclose the name of the LC1 Chairperson nor did the Chairperson depose an affidavit to corroborate the Defendant/Appellants side of the story.

In the instant case, the appellant averment that he paid back the Ug. Shs.12,000,000/= [Uganda Shillings Twelve Million] was not proved;

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whether it was before the LC1 or through mobile money. It was the duty of the Appellant to prove these allegations otherwise, no Court can make orders on mere assertions. In the result, I find that the trial Magistrate was right to find as she did. Accordingly, this ground of Appeal also fails.

Ground 3: The learned trial Magistrate erred in law and fact in sanctioning an illegality when she upheld a Sales Agreement yet the transaction was a Loan's Agreement.

It was submitted for the Appellant that the trial Magistrate sanctioned an illegality when she upheld a sale agreement and yet the transaction was a Loan Agreement. The ground of Appeal is not clear, however this Court discerns that the contention to be that the there was a "friendly" loan that was given to the Appellant by the Respondent and the parties instead executed a Sale Agreement for land. This seems clear from the submissions in rejoinder filed for the Appellant.

The submissions in support of this ground for the Appellant are with due respect disjointed and a repetition of what had earlier been argued on the amounts that had been contracted and the payments made. This Court will therefore not repeat the submissions.

On the issue that the learned trial Magistrate sanctioned an illegality, Counsel for the Respondent asserted that the trial Magistrate did not sanction any illegality and he also affirmed that the Agreement was for sale of land and not a Loan Agreement and that the trial Court relied on the said Agreement to come up with the final findings and the Judgment. He concluded by praying that this Court dismisses the Appellant's Appeal with costs for lack of merit and upholds the decision of the lower Court.

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Analysis and Determination

In the locus classicus case of **Makula International Ltd Versus H. E. Cardinal Nsubuga & Anor (1982) HCBII** it was held that;

"Court cannot sanction what is illegal and an illegality once brought to the attention of the Court overrides all questions of pleadings including admissions made thereon."

The submissions in support of this ground as laid out by the Appellant do not support the ground as framed, however in his submissions in rejoinder he contends, by citing the case of **Scott versus Brown, Doering, Mcnab & Co (1892) @QR 724 at & 28 where Lindley L.J** opines that this is an old and well known maxim is founded on good sense and expresses a clear and well recognized legal principle which is not confined to indictable offences. No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal.

The Appellant further submits that his defence of a Loan Agreement formed a triable issue as the Trial Magistrate was bound to investigate whether this was a Sales Agreement or a Loan Agreement.

As found by this Court earlier in ground 1 the Trial Magistrate correctly appraised the evidence and came to a correct conclusion. This Court will not belabor that point any further.

The Appellant raises the defence of an illegal contract which was supported by his evidence when he claimed that in fact there was a friendly loan Agreement and not a Sale Agreement. That therefore the illegality of the contract served as triable issue of fact or law.

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It seems to me that contention of the Appellant is that the Respondent is not an authorized money lender he cannot sue on an Agreement which is illegal.

It is my considered opinion that the Appellant did not discharge the burden of proof to show that the Agreement was indeed a Loan Agreement. That burden does not shift as already shown in **Anglo Fabrics (Bolton) Ltd & Anor Vs African Queen Ltd & Anor supra**.

The Appellant seems to be raising ground of an "illegality" which he fully participated in order to curtail or deny a contract which he executed, received the consideration and failed to deliver on his end of the contract. This in my view would amount to unjust enrichment. It is my considered opinion that the inconsistencies in the affidavit of the Appellant/Applicant rendered his evidence of little or no probative value. To this end I find that there was no illegality sanctioned by the trial Magistrate. This ground of Appeal also fails.

In conclusion the Court makes the following Orders;

1. The Appeal is dismissed.
2. The Ruling of the lower Court is maintained.
3. The Appellant is ordered to pay costs in this Court and the one below.

Dated at **Mukono t**his ...12th...day of **May 2023.**

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Christine Kaahwa

JUDGE