

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: ODER, TSEKOOKO, KAROKORA, KANYEIHAMBA, KATO JJ.SC.

CIVIL APPEAL NO. 19 OF 2002

BETWEEN

HAJJ BUMALI KADJINGO ::::::::::::::::::::::::::::::: APPELLANT

AND

**THE NON PERFORMING ASSETS
RECOVERY TRUST ::::::::::::::::::::::::::::::: RESPONDENT**

(Appeal from the judgment of the Court of Appeal (Berko, Engwau, Kitumba JJ.A) at Kampala in civil appeal number 62 of 2000 dated 10th. July 2002).

REASONS FOR JUDGMENT OF THE COURT.

This is a second appeal. The appeal is against the decision of the Court of Appeal which heard the first appeal and dismissed it. The first appeal was against the ruling of the Non-Performing Assets Recovery Tribunal. On 17/11/2003 we heard the appeal and dismissed it reserving our reasons for doing so. We now give them.

The appellant together with two other defendants: Kapeeka Coffee Works Ltd and Abu Kasozi Kadjinga, were sued by the respondent for recovery of a sum of 839,030,585/= being part of the money advanced to Kapeeka Coffee Works Ltd. The appellant was sued in his capacity as one of the two directors of the company. When the suit came up for hearing before the Tribunal on 15/2/2000, learned counsel for the appellant and the other defendants, who are not appellants in this appeal, raised preliminary objections. The

appellant's objection was that the plaint did not disclose a cause of action against him. The objection was rejected by the Tribunal and the Court of Appeal. Hence this appeal.

A total of 12 grounds of appeal were framed, namely :-

1. The Hon. Justice of Court of Appeal erred in law when they summarily dismissed the Appellant's appeal having been unfairly biased that the Appellant was dishonest without taking into account the grounds of appeal that had been presented in memorandum of appeal.
2. The Hon. Justice of Court of Appeal erred when they came to a finding that the appellant signed the loan agreement on behalf of Kapeeka Coffee works Ltd.
3. The Hon. Justices of the Court of Appeal erred when they came to a finding that the Appellant mortgaged his property Mailo Register Block 269, Plot 36 and 37.
4. The Hon. Justices erred when they came to a finding that the Appellant covenanted to pay on demand to the Uganda Commercial Bank the loan granted to Kapeeka Coffee Works Ltd.
5. The Honourable Justices of the Court of Appeal erred when they came to a conclusion that the names Kapeeka Coffee Hulleries were inadvertently put on some documents.
6. The Honourable Justices of the Court of appeal further erred when they came to a conclusion that the appearance of the names of Kapeeka Coffee Hulleries on some documents does not change the reality of the situation
7. The Honourable Justices of the Court of appeal further erred when they held that the Appellant knew that the loan was obtained by Kapeeka Coffee Works Ltd for the rehabilitation of Kapeeka Coffee Hulleries and that he was the guarantor.
8. The Honourable Justices of the Court of Appeal erred when they held that the Appellant was dishonest.
9. The Honourable Justices of Court of Appeal further erred when they came to a conclusion that the appellant was jointly and severely(sic) liable with Kapeeka Coffee Works Ltd for the debt.

10. The Honourable Justices of the Court of Appeal further erred in law when they held that the preliminary objection was a mere technicality without any merit.

11. The Honourable Justices of the Court of Appeal further erred in law when they concluded that the Appellant's objection had been prompted by a dishonest motive.

12. The Honourable Justices of the Court of Appeal erred when they awarded the Respondent the costs of the appeal.

Before we proceeded to hear the submissions in respect of the grounds of appeal, Mr. Ruhindi counsel for the appellant, invited the court to strike out a notice for affirmation of the decision of the Court of Appeal. The notice had been filed by Mr. Kalibala counsel for the respondent. Mr. Ruhindi's argument was that the notice offended rule 88(1) of the Rules of this court which requires such a copy of the notice to be served within 7 days. According to him, he was served later than the prescribed time.

After hearing both counsel, we upheld Mr. Ruhindi's contention and struck out the notice for affirmation, as Mr. Kalibala conceded that a copy of the notice had been served on the appellant's counsel out of time.

The respondent's counsel having conceded grounds 2, 3 and 4 and after ground 12 had been abandoned by appellant's counsel, the remaining grounds were argued in the following order: grounds 1,7,8 and 11 together, grounds 5 and 6 also together but grounds 9 and 10 separately.

As for the three grounds which were conceded, we considered them and came to the conclusion that the issues raised in those grounds in fact support the respondent's contention that this case can only be properly decided after hearing evidence from both sides.

On grounds 1,7,8, and 11 Mr. Ruhindi submitted that the Court of Appeal was wrong to hold that the appellant was liable to repay the loan and that he was a dishonest person when there was no evidence to that effect. He also argued that the Justices of Appeal failed to consider the issue of whether or not there was a cause of action.

On his part, Mr. Kalibala, argued that the Court of appeal did not base its decision on the appellant's dishonesty. In his view, the court considered all the issues presented before it before it dismissed the appeal.

The substance of the judgment of Berko, JA (as he then was) which was the lead judgment of the court reads as follows:

"The loan agreement was between the Uganda Commercial Bank and Kapeeka Coffee Works Ltd. The loan was to be used exclusively in the financing and carrying out of the investment project at Kapeeka coffee factory which is known as Kapeeka Coffee Hulleries. The appellant signed the agreement on behalf of Kapeeka Coffee Works Ltd. It is clear from the agreement that Kapeeka Coffee Hulleries is the project for which funding was required.

As a security for the loan the appellant mortgaged his property Mailo Register Block 269 Plot 26 and 37 measuring 0.20 and 0.20 acres respectively at NamaagaBulemezi and covenanted to pay on demand to the Uganda Commercial Bank the loan granted to Kapeeka Coffee Works Ltd. Therefore the mere fact that the names "Kapeeka Coffee Hulleries" have inadvertently been put on some documents does not change the reality of the situation. The appellant knows that the loan was obtained by Kapeeka Coffee Works Ltd for the rehabilitation of Kapeeka Coffee Hulleries and that he was the guarantor. This is a fact which the appellant cannot deny and it would be a dishonesty on his part if attempts to do so (sic). The Tribunal correctly saw through the facade of the falsehood and dishonesty. Therefore the appellant is jointly and severely (sic) liable with Kapeeka Coffee Works Ltd for the debt.

In my view, the preliminary objection was a mere technicality without any merit. The Non-Performing assets Recovery Trust Tribunal was right in rejecting it.

Technical objections prompted by a dishonest motive should not be countenanced by the Courts".

It is true that in that judgment his Lordship did not expressly state that there was a cause of action against the appellant. His holding that the Non- Performing assets Recovery Trust Tribunal was right in rejecting the preliminary objection, however, clearly shows that he was dealing with the issue of cause of action which was the subject of the tribunal's decision. It is not therefore correct to say that the Court of Appeal did not address its mind to the issue of whether or not there was cause of action.

On the question of whether or not the Court of Appeal was justified in holding that the appellant was a dishonest man, we agree with Mr. Kalibala's contention that the decision of the court was not based on the appellant's conduct only but also on some documents presented before the court and the tribunal. It has all along been the contention of the respondent that during the trial the respondent will adduce evidence to prove the appellant's liability. This cannot be done at this stage of a preliminary objection. We agreed with that contention and found no merit in grounds 1,7,8 and 11. They failed.

Regarding grounds 5 and 6, Mr. Ruhindi submitted that the Court of Appeal was wrong to find that the name "Kapeeka Coffee Hulleries" was inadvertently put on some documents when there was no evidence supporting that finding. On the other hand, Mr. Kalibala submitted that the finding did not prejudice the appellant's position since all the documents were indicating that it was Kapeeka Coffee Works Ltd which borrowed the money and the appellant was one of the directors of the company.

This is another point which can be properly decided by the tribunal after examining all the available evidence. The issue as to whether Kapeeka Coffee Hulleries exists as an independent body different from Kapeeka Coffee Works Ltd and which of them borrowed the money is a matter of fact which can only be proved by calling evidence. It cannot be conclusively decided under a preliminary objection. We found no merit in these two grounds which failed.

On ground 9 Mr. Ruhindi submitted that it was premature for the Court of appeal to hold that the appellant was jointly and severally liable with the other defendants to pay the debt. Mr. Kalibala, supported the finding of the court because, in his view, paragraph 2 of the amended plaint shows that the appellant is one of the directors of the first defendant company and therefore liable to be sued.

This ground of appeal is based on the following sentence in the judgment of the Court of Appeal.

"Therefore the appellant is jointly and severely (sic) liable with Kapeeka Coffee Works Ltd for the debt".

On the face of it that sentence may be taken to mean that the court declared the appellant liable to pay the debt. When the passage is read in the context of the whole judgment and the reason why the appeal was lodged, the passage can only mean and must be understood to mean that the appellant was liable to be sued for the debt and that there was cause of action against him. The Court of Appeal could not reasonably have found the appellant liable to pay a debt which had not yet been proved against him. Ground nine also failed.

In the tenth ground of appeal, the appellant's counsel complained that the Court of Appeal erred when it held that the preliminary objection was a mere technicality without any merit.

Considering the history of this case, we are satisfied that the Court of Appeal was justified in treating the preliminary objection as a mere technicality. The arguments by Mr. Ruhindi concerning the issue of a mere technicality, were based on his contention that Kapeeka Coffee Works Ltd and Kapeeka Coffee Hulleries were not the same company and that the word 'Kapeka' and 'Kapeeka' were entirely different. In our view the matters complained of did not affect the respondent's claim against the appellant and the Court of

Appeal rightly referred to them as a mere technicality. There was no merit in this ground, it failed.

It was for those reasons that we dismissed the appeal.

Dated at Mengo this 20th day of April 2004

A.H.O. Oder,
Justice of the Supreme Court

J.N.W. Tsekooko
Justice of the Supreme Court

J. N. Karokora
Justice of the Supreme Court

G.W. Kanyeihamba
Justice of the Supreme Court

C.M. Kato
Justice of the Supreme Court