

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT MBARARI

HCT-05-CV-CS-0066-2002

PASTORI MUKVATANISE..... PLAINTIFF

**VERSUS**

CENTENARY RURAL

DEVELOPMENT BANK LTD.....DEFENDANT

**BEFORE:** HON MR JUSTICE P K MUGAMBA

**JUDGMENT**

The Judge who heard this case later got indisposed and passed away before he could write the judgment. It is my lot to do what remained to be done

For several years the Plaintiff was a customer of the defendant bank at its Mbarara Branch. On 31st July 2000 the Plaintiff obtained a loan facility of Shs. 8,008,000/- (Shillings Eight Million Eight thousand only) from the Defendant. The Plaintiff pledged as security his certificate of title for land described as Igara Block 14 Plot 39. It is at Katungu, Ishaka. A loan agreement was duly made under which the Plaintiff was to service and pay back the loan within twelve months, ending on the 31st July 2001. Under that agreement the Plaintiff would pay twelve equal monthly installments of Shs. 845,038.71 (Shillings Eight hundred Forty Five thousand Thirty Eight and Seventy One cents) each, starting date being 31st August 2000. The Plaintiff proceeded to deposit three installments with the Defendant amounting to Shs. 1,950,000/- (shillings one million nine hundred and Oily thousand only) by 6th December 2000. It was on 6th December 2000 the Defendant wrote a letter to the Plaintiff recalling the loan and demanding the payment of Shs 9,000,000/= (Shillings Nine Million only) in all. Some money had meanwhile been debited from the Plaintiffs account by the Defendant to credit various other accounts without the consent of the Plaintiff. There was some communication between the Defendant and one Basajjabalaba Hides and Skins Co. Ltd where some information was given to the latter by the former concerning Plaintiffs account with the Defendant. Subsequently Basajjabalaba purchased

the property which had been pledged as security under the loan aforesaid. In consequence of the sale the Defendant released the title deed pledged as security after the sum of Shs 9,000,000/= (Shillings Nine Million Only) was paid to it. The balance of the purchase price of Shs. 6,000,000/- (shillings six million only) was received by the Plaintiff for the purchaser. The Plaintiff brought this suit seeking special and general damages for breach of contract on the grounds that the Defendants recalled the loan prematurely and wrongly debited his account in favour of other persons.

The following facts were agreed at the scheduling conference.

- 1 The Plaintiff had account number 1008724-0 with the Defendant Bank
- 2 The Plaintiff borrowed Shs. 8,008,000/- from the Defendant which was payable in equal monthly installments for twelve months.
- 3 The Plaintiff mortgaged his property comprised in Igara Block 14 Plot 39.

The agreed issues on the other hand were:

- 1 Whether or not the Plaintiff defaulted in the loan repayment.
- 2 Whether or not the Defendant lawfully recalled the loan.
- 3 Whether or not the defendant lawfully consolidated the loan accounts.
- 4 Whether or not the Defendant lawfully debited the plaintiff account in favour of other people.
- 5 Whether or not the sale of the Plaintiffs property was lawfully done.
- 6 Whether or not the Defendant breached its fiduciary duties in respect of the Plaintiffs account.
- 7 The remedies available.

With regard to the first issue, the loan agreement was proffered as exhibit D.I Evidently Shs. 8,008,000/- was the principal sum and Shs.845,038.71/- It was to be payable in twelve equal monthly installments by the Plaintiff to the Defendant in the repayment schedule. Clauses I and 2 of the agreement are relevant. Equally relevant is clause 11 thereof which provides that in the event of the borrower's failure to pay back all the principal sum or any part thereof at the agreed time the lender would be free to sell by private treaty the security pledged under the agreement. While the principal was to be realized within 12 months according to the agreement the Borrower under the contract was obliged to pay Shs. 845,038.71 every month. Prior to the latter of 6th December 2000 recalling the loan one would expect the Plaintiff to have paid the

respective installments for the months of August 2000, September 2000, October 2000 and November 2000. At least Shs. 3,380,154.84 should be reflected as the amount paid by the plaintiff to the Defendant in the premises. Instead by his own admission the plaintiff had managed to pay three deposits amounting to Shs. 1,950,000/- What was on the account did not show the Plaintiff had complied with the repayment schedule. There was no evidence forthcoming for the Plaintiff either that he had complied. I must note in passing that even if there had been no deductions the money did not amount to the agreed installment. According to the Cambridge International Dictionary of English to default is to fail to do something, such as pay a debt that you legally have to do. The letter tendered as Exhibit P2 mentions that there was default resulting from the Plaintiff's failure to pay installments. Consequently I would answer this issue in the affirmative.

The second issue is whether the Defendant lawfully recalled the loan. Needless to say a loan agreement is a contract. I am in no doubt that when the parties agreed the mode of payment of various installments they intended it to be a condition of the loan agreement. Payment was to be effected at given times and in a certain sum. Failure to comply would be breach of a condition, which is implied in clauses 1, 2 and 11 of the agreement. I am constrained to come to this conclusion following *Campling Bros vs. United Air Services* (1952) 19 EACA 155 and *Jiwaji and others vs. Jiwaji and Another* [1968] EA 547. Breach of the condition inevitably led to repudiation resulting in the letter of the defendant recalling the loan. The second issue also is answered in the affirmative.

The third and fourth issues are related. In sum they probe whether the Defendant was entitled to credit money found on the plaintiffs account to accounts of other customers. Neither in the pleadings nor in his testimony does the Plaintiff give particulars of the sums involved or their occasion. In the pleadings he gave a general claim mentioning names of persons whose accounts had been credited by the Defendant. In the course of his testimony he proffered Exhibit P3 showing sums which had been debited from his account by the Defendant and credited to the various other accounts. The names mentioned in the pleadings are similar to those that appear in exhibit P3 which is a Bank Statement. The defendant did not challenge this evidence which means he acquiesced to it. However no evidence is forthcoming from the defence, as it should that it was entitled to debit the plaintiffs account. The defence alleged that the plaintiff had been

a guarantor for the various customers in whose favour the plaintiff's account had been debited. Yet no evidence was given in this direction despite the Plaintiffs' disclaimer. Section 103 of the Evidence Act would on the other hand require such evidence as the burden would then shift to the Defendant. My answer to both issues therefore is in the negative.

Issue five is whether or not the sale of the plaintiffs' property as lawfully done. Exhibit P 6 is a sale agreement for property known as Igara Block 14 Plot 39 situate at Katungu, Ishaka. It shows the plaintiff as the vendor and Hassan Basajja as the purchaser. The defendant is mentioned therein and is said to have signed the agreement but in the absence of a seal there is no evidence of its endorsement of the deed. The Amended plaint at its page 4 shows item (ii) to read:

'upon the illegal and untimely recalling of the loan facility the plaintiff was wrongly harassed, intimidated and out of undue influence harassment and psychological torture he was forced to sell off his property comprised in the security at a giveaway price of Ug. Shs. 98,000,000/= ---'

Order 6 rule 2 of the Civil Procedure Rules ordains that where the party pleading relies on undue influence, amongst others, and in all other cases in which particulars may be necessary, such particulars with dates shall be stated in the pleadings. In *Phillips vs. Phillips* (1878) 4 QBD 127.139 Cotton L J observed:

'What particulars are to be stated must depend on the facts of each case. But in my opinion it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state these facts which will put the defendants on their guard, and tell them what they will have to meet when the case comes for trial.'

The Supreme Court of Uganda in *Okello Okello vs. Uganda Examinations Board* Civil Appeal No. 12 of 1987 (unreported) held regarding fraud that Order 6 rule 12 is mandatory and that particulars of fraud and dates regarding the alleged fraud should be given. The same should be the case with undue influence. Since no particulars are given in the plaint the allegation lacks basis. Even if this were not the case the conduct of the plaintiff throughout is that of a willing vendor. There is no evidence of the plaintiff a University Graduate a Court Bailiff and a man of the world who from the record comes out as exuding confidence and sophistication, ever complained that he had been forced to do what he had not intended to do. As a matter of fact he

went ahead to receive the remainder of the purchase price several months after the agreement of sale of his property was concluded. Given the plaintiff general conduct the allegation that he did what he did because he wanted to avoid arrest would not vitiate this otherwise voluntary act. See Fred Kamanda vs Uganda Commercial Bank, Supreme Court Civil Appeal No. 17 of 1995 (unreported) per judgment of Odoki JSC, as he then was. Regarding the price at which the property was sold, no evidence as given of the value of the property in the year 2000. Evidence of its alleged value in 1998 was not received in Court. Even if it were however the value of property is subject to vitiation and not necessarily towards appreciation. Suffice it to say that the sale agreement was freely negotiated and the price freely arrived at. Pollock on contract 8th Edition at page 175 observes:

‘Valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss, responsibility, given, suffered or undertaken by the other’

Gains and losses are both outcomes of transactions which may be differently named by respective parties to a bargain but this alone does not render a transaction illegitimate. See Dunlop vs. Selfridge [1915] AC 847. I find the sale was lawfully done.

Sixth of the issues is whether or not the defendant breached its fiduciary duties in respect of the plaintiffs’ account. Where a confidential or fiduciary relationship exists between the parties the party in which the confidence was reposed must show that undue influence was not used. Order 6 rule 2 of the Civil Procedure Rules mentions breach of trust as one of those allegations where particulars of the claim must be given in the pleadings together with dates. I have already pronounced myself on this rule and the folly of not heeding it by the party making a claim. It must fail. In any case all that was tendered in evidence was a letter from the Defendant to M/s Basajjabalaba Hides and Skins Co Ltd. The letter is exhibit P.4.

All I find was disclosed was that a loan of Shs. 9,000,000/- was outstanding. The Plaintiff did not show how he had been injured by the disclosure. I find no merit in this claim. All in all this suit must fail except for issues 3 and 4 which I decide in favour of the plaintiff.

Finally I must address the issue of the remedies available. Although exhibit P3 was tendered, the actual amount deducted was neither pleaded nor proved. Special damages must be pleaded and proved specially. See Ssali vs Bwesigye [1978] HCB 188. Since this was not done the plaintiff is entitled to none. I do not doubt from the evidence that the plaintiffs account was debited in a dubious manner. This was a wrong done to him for which he is entitled to general damages. I would award him general damages of Shs. 1,000,000/ at bank interest from the date of this judgment until full realization. The plaintiff is also entitled to  $\frac{1}{4}$  of the Defendant's taxed costs.

P. K. MUGAMBA

JUDGE

13<sup>th</sup> October 2005