THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBALE

HCCA NO. 27 OF 2000

JANE KITANDE…….APPELLANT

VERSUS

ROBERT NYENDE……RESPONDENT

BEFORE: THE HON. MR. JUSTICE RUGADYA ATWOKI

JUDGMENT

This is an appeal from the decision of the Grade 1 Magistrate sitting at Tororo dated 29/8/2000, in which he gave judgment in favour of the appellant. The appellant was not satisfied with the net effect of that decision, and appealed to this court.

In the trial court, the defendant did not file a defence and an interlocutory judgment was entered against him. The suit was set down for formal proof. It was from those proceedings that the learned trial Magistrate made the findings and orders complained of in this appeal.

At the hearing of this appeal, the respondent could not be traced and court ordered that the notice of appeal be served on him through publication in the Monitor newspaper. This was done and when appeal came up for hearing the respondent did not appear and was not represented. The appeal proceeded in his absence.

The facts constituting the cause of actions are as follows. The appellant by a written agreement lent money in the sum of shs. 150.000/= to the respondent. It was part of that agreement that the respondent was to repay the principal sum on or before a specified date, together with interest of shs. 50.000/=. It was a further part of the agreement that in case of default to repay the money lent and the agreed interest, as above, the respondent was to suffer a penalty in interest payment in the sum of shs. 5.000/= for each of default.

The short agreement which was written in English was admitted in evidence. It may be illustrative to set it out in full here.

> "I JANE KILADE is lending ROBERT NYENDE A. of Market Sales Office of Jinja P.O. Box 1844 Jinja Graduated tax No. 2578.
>
> Amount of money is one hundred and fifty thousand, and it will be paid by Tuesday 8/4/97 with an interest of fifty thousand to make up two hundred thousand on demand.
>
> (200.000/=)
>
> If not paid by 8/4/97, the internet every day 5.000/=."

The agreement was witnessed and a log book for a motor vehicle apparently belonging to the respondent to the respondent was deposited with the lender, as security.

Upon default to pay the principal sum and any of the interest sums above stipulated, the appellant instituted a suit in the Magistrates Court claiming from the respondent shs. 200.000/=, as the principal sum lent, together with the initial interest, plus the accumulated interest in default of shs. 5000/= per day, for each day in which he was in default, which at the time of filing the suit, were some 1123 days, making the total claim one of shs. 5.615.000/=, in interest alone.

In his judgment, the learned trial Magistrate found that the appellant was a money lender, and that she was not in possession on a money license, as required by the Money Lenders Act, Cap. 264. He decided that while the appellant could lend money as she fit. However, not being a licensed money lender, she could not charge, and therefore could not sue for recovery of, interest on the monies so lent.

The learned trial Magistrate ordered that the appellant recovers. From the respondent only the actual principal sum lent, which was shs. 150,000/=. The appellant was dissatisfied with hat decision hence this appeal.

The memorandum of appeal set out several grounds of appeal. In my opinion, they can all be summarized into one ground as follows:

"That the learned Magistrate erred in fact and in law when he held that the appellant was an unlicensed money lender, and could not therefore charge interest on any monies which she lent out.

I will deal with his as the only ground of appeal, for, disposal of the same effectively disposes of all the grounds of appeal as framed.

It was the submission of Mr. Magirigi for the appellant that the appellant did not identify herself with, nor describe or conduct herself as, a money lender. It was therefore wrong for the trial Magistrate to find as he did that she was a money lender.

The approach to be followed by a first appellate court is that it ought to subject the evidence adduced before the trial court to a fresh and exhaustive scrutiny so that it weighs the conflicting evidence and draw its own conclusion. It is not enough for the appellate court to merely scrutinize the evidence to see if there was some evidence to support the findings and conclusions. Only then can it decide whether the findings of the trial court should be supported. In so doing the appellate court must make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses. Yosamu Kawule Vs. Erusania [1977] HCB 135, Sitefano Baraba Vs. Haji Edirisa Kimuli [1977] HCB 137, Ugachick Poultry Breeders Ltd Vs. Tadjin Kara C.A., Civil Appeal No. 2 of 1997.

In this case, the defendant did not appear in the proceedings in the lower court. He was served by way of substituted service for this appeal, but he did not appear in the trial of this appeal either. The short point of contention raised in this appeal as I identified in the only ground of appeal was whether the appellant was a money lender in terms of Money Lenders Act. Her contention was that she was not. This was neither denied nor controverted, as the suit was ex parte.

According to S.2 (1) of the Money Lender Act, a money lender,

> "Includes every person whose business is that of money lending or who advertises or announces himself or holds himself out in any way as carrying on that business whether or not that person also possesses or earns property or money derived from sources other than the lending of money and whether or not that person carries on the business as a principal or agent."

The appellant was only described in the plaint as an adult female Ugandan. In the very short proceedings in the trial court, she did not describe herself as a person in the business of lending money. There was no evidence that she advertised herself, or held herself out in any way as carrying on that business of money lending.

From the pleading and the record of proceedings it is clear that there was an agreement entered into by the parties herein in which it the plaintiff lent a sum of shs.150,000/= to the defendant to be repaid by a specified date together with interest of shs. 50, 000/=. In event of a default to repay, the defendant was to suffer interest in the sum of shs. 5,000/= for each day default, till payment in full.

The learned trial Magistrate found that the appellant was a money lender. But since she did not have a money lenders certificate as required by section 2 of that Act, the whole transaction was illegal. She could not therefore sue upon an illegal contract. He only allowed her recovery of the principal sum lent.

A matter not unlike the present came before MacKisack, C.J., in Shavabhai G. Patel Vs. Chalurbhai M. Patel [1961] E.A. 361. The court in considering the definition of a money lender, held that the word business in section 2 of the Money Lenders Act imports the notion of system, repetition and community; and the number of money lending transactions, as well as their nature must be considered.

I agree with above. I further agree with the other holding in that case that it is not correct to say that all money lending transaction which are not expected from the operations of the Act by section 22 thereof, must necessarily fall within the Act. A person may properly and lawfully enter into a money lending transaction without being a money lender within the meaning of the Act.

In the Patel case (supra), there were a series of money lending transaction. But they were all restricted to one family. It was held that the plaintiff was not a money lender within the meaning of the Act. That finding therefore disposed of the defence that the transaction was illegal.

I have not found any evidence to show or even remotely to suggest that the appellant fitted in the definition of money lender Act. The trial Magistrates finding that appellant was a money lender

within the meaning of the Act is not supported by the evidence on record or to put it more appropriately, lack of such evidence.

Chitty on Contracts (27th ed.) (Vol.2), at page 606, defines a money loan contract as, "a contract whereby one person lends or agrees to lend a sum of money to another, or at a fixed or determinable future time, or conditionally upon an event which is bound to happen with or without interest."

In the instant case, the parties entered into a contract for a loan of a specified amount of money. The contract was reduced into a written agreement. The loan amount was to be repaid at a date which was specified in the agreement, together with a specified sum of interest. I do not see any illegality thus far.

Chitty (supra) says that the general rule is that interest is not payable on a debt or loan in the absence of express agreement or some course of dealing or custom to that effect. See President of India Vs. La Pintada Compania Navegacion SA [1985] AC. 104.

In the present case, according to the agreement which was admitted in evidence, there was an agreed interest shs. 50,000/= to be paid on top of the principal sum lent of shs. 150,000/=.

Where a borrower fails to repay the loan in accordance with the terms of the contract, the lender has an action against the borrower for the money. In the case before me, the borrower failed to repay the money plus the agreed interest when it was demanded on the due date. He was clearly in breach of the contract. That entitles the appellant the right to sue for and recover her money, the principal sum plus the interest of shs. 50,000/= as agreed.

This leaves for decision the last point in the ground of appeal whether the appellant is entitled to the interest agreed upon in event of default. This is contained in a clause whereby the borrower is under contractual obligation to pay interest at a rate of shs. 5,000/= per day in event of default.

Where the parties to a contract agree that in the event of a breach, the contract breaker shall pay to the other, a specified sum of money, the sum fixed may be classified by the courts either as a penalty, (which is irrecoverable) or as liquidated damages (which are recoverable).

At para. 36-231, page 620, Chitty (supra) writes that a contractual provision for payment of a higher rate of interest after default in payment by the borrower is open to attack as a penalty. The house of Lords decision in the case of Dunlop Pneumatic Tyre Co.Ltd Vs. New Garage & Motor Co. Ltd. [1915] AC. 79, was relied on.

I am in agreement with the views of Dickson J., in the Supreme Court of Canada in the case of Elsey V.J.G. Collins Insurance Agencies Ltd. (1978) 83 DLR. (3rd) 1., which decision was quoted with approval by the Privy Council in Philips Hong Kong Ltd. Vs. Attorney General of Hong Kong (1993) 61 Build. L. R. 49. The learned judge said that the power to strive down a penalty clause is a blatant interference with the freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum. It has no place where there is no oppression.

The question whether a sum stipulated is a penalty or liquidated damages is a question of construction to be decision upon the terms and inherent circumstances of each particular contract, judged at the time of making the contract, not at the time of the breach. Lord Dunedin in the Dunlop case (supra), gave guidance to assist this task of construction. He expounded tests which have been suggested which if applicable to the case under consideration, would prove helpful if not conclusive in determining whether a sum stipulated is a penalty or not.

I will quote only two of them which appear relevant to the case now under consideration. First, it would be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss which could conceivably be proved from the breach.

Second, it will be held to be a penalty if the breach consists only in not paying the sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid.

The agreement stipulated payment of shs. 5,000/= per day of default. When the suit was filed, the default had continued for some 1000 plus days. The amount of the default interest was some shs. 5 million compared to the principal sum of shs. 150,000/=. This sum was, in my opinion not only extravagant, it was harsh and unconscionable. It was oppressive to the borrower and this would bring it within the category allowed by Dickson J., in the Canadian case cited above in which a penalty clause may be struck out in a contract thus justifying interference by the courts with the freedom of contract.

As was pointed out by Chitty (supra), at page 430 para. 7 -046, contract terms which are harsh, exorbitant, or unconscionable will not be enforced by the courts. The default interest was, in my opinion, a penalty, and is therefore irrecoverable.

For the above reasons, this appeal succeeds only in part. The appellant is entitled to recover the principal sum of shs. 150,000/=, plus the agreed interest of shs. 50,000/=. The appellant is also entitled to damages for breach, but this can only be minimal. I will award only shs. 5,000/= under that head which was a prayer in the plaint, but was not considered in the court. The principal sum and the interest shall carry interest at court rate from date of firing the suit till payment in full. The judgment of the trial court is varied accordingly. The respondent shall pay the costs of the suit in this court and in the court below.

RUGADYA-ATWOKI

JUDGE

5/11/2001