THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CIVIL APPEAL No. 0046 OF 2007

[An appeal against the decision and orders of His Worship Charles Sserubuga Esq.; Ag. Chief Magistrate, Kasese Magisterial area; delivered on the 8th of November, 2007; vide KAS – 00 – CV – CS No. 35 of 2007]

WILLIAM TWAKIRANE …….. APPLICANT

VERSUS

VIOLA BAMUSEDE (MRS) ……. RESPONDENT

BEFORE: - THE HON. MR. JUSTICE ALFONSE CHIGAMOY OWINY - DOLLO

JUDGMENT

This appeal seeks the reversal, by this Court, of the judgment and decree of the Chief Magistrate Kasese, in Civil Suit No. 35 of 2007 of that Court; in which, the learned Chief Magistrate gave judgment and decreed for the Plaintiff (Respondent herein) against the Defendant (Appellant herein), from which the Appellant is aggrieved.

The facts of the case are rather simple; namely that in the month of February 1997, the Respondent paid to the Appellant a sum of U. shs. 1,446,500/= (one million, four hundred forty six thousand, five hundred only); meant to bail out the Appellant from police custody, where he was then facing the risk of imminent arraignment and subsequent imprisonment, for having issued to a third party, a cheque which was dishonoured by the bank. As security for the said rescue money the Appellant surrendered, to the Respondent, his house; particulars of which are contained in a written agreement for that purpose.

It was a term of the said agreement that the Appellant would redeem his house by refunding this sum of money within two weeks from the 28th February 1997; this being the date the money was availed to the Appellant, and the agreement made. It was a further term, embodied in the

agreement, that in the event of the Appellant's failure to make the refund in the manner provided for, the house that secured the money paid would be sold off at the face value of the bounced cheque – meaning the amount of money that bailed the Appellant out of the police custody – namely, U shs. 1,446,500/= (one million, four hundred forty six thousand, five hundred only).

The Appellant neither refunded the money in issue, nor any part of it, within the stipulated time or at all; and thus, the Respondent was constrained to have recourse to Court where she obtained the judgment from which the Appellant is aggrieved and has consequently brought this appeal. In his Memorandum of Appeal, he listed two grounds of grievance; which are that:

(1) The learned trial Chief Magistrate erred in law to have entertained a suit which was clearly barred by the Limitation act (Cap 80) which error occasioned a miscarriage of justice to the Appellant and as a result rendered the entire proceedings and the resultant judgment null and void ab initio.

(2) The learned trial Chief Magistrate erred both law (*sic*) and in fact when he considered extraneous matters in computing general damages which were based on mere conjecture and surmise which the Plaintiff never addressed Court on which error occasioned a gross miscarriage of justice to the Appellant.

Mr Mbagire who appeared for the Appellant, argued both grounds of appeal. On the first ground it was his submission that the action in the lower Court, founded in contract, but instituted ten years after the cause of action arose, was brought long after the period of 6 (six) years provided for under the laws of limitation; and yet no extension of time was obtained from Court for doing so. He contended that, on that ground, the trial Court ought to have rejected the plaint under the rules of procedure, for being barred by law.

He further argued that though the Appellant had not raised this point of law at the trial, it was still available to him on appeal; it being an issue of law. He submitted that the suit having been brought long after the period of limitation had set in, it was an illegal suit; and relied on the decision in ***Makula International Ltd. vs. Cardinal Nsubuga and Another [1982] H.C.B. 11;*** for the proposition of law that once an illegality has been brought to the attention of Court, it has to overlook all other issues and resolve the issue of illegality.

Mr Chan counsel for the Respondent aggressively countered the foregoing submission, using a three pronged attack; contending first, that the ground of limitation not having been raised at the trial was unavailable to the Appellant on appeal. Second, he argued that the ***Makula International*** case was decided on facts wholly different from the one before this Court now; as the **Makula *International*** case dealt with the issue of transactions founded on illegality, whereas the instant case was founded on a contractual transaction that was entirely lawful.

Finally, he contended that the Appellant had over the years himself, by conduct, vitiated the written contract with regard to when, and how much to pay; hence the recurrence of the cause of action, with time for purposes of limitation of action starting to run afresh with each fresh accrual of cause of action. Therefore, he concluded, the suit had in fact not been brought outside the period of limitation; hence it had been properly entertained by the trial Court.

Illegality was a matter in controversy, raised for the first time on appeal. The legality of the contract between the parties herein is not in dispute. Rather, the illegality in contention is the alleged contravention by the Appellant, of the Limitation Act Cap. 80; which provides in section 3 thereof that the period available to a litigant, to commence a suit founded in contract, is six years from the date of the accrual of the cause of action.

It is contended for the Appellant that this non compliance with the Statute of Limitation renders the entire trial in the lower Court, and the resultant judgment and decree therefrom, a nullity ab initio. It is important to point out at the outset that in the lower Court, both parties did not benefit from the services of learned counsels at all. The issue of limitation of time was therefore, understandably, not raised by the Defendant (Appellant herein); and also not alluded to by Court.

The importance of raising issues in the pleadings and at the trial cannot be overstated. It is intended to afford one's adversary the opportunity, either from the pleadings or from the issues framed, to prepare the other side's response to such matter raised. Evidence adduced at the trial is so done in accordance with the pleadings and issues raised; and subjected to examination by either side. The case is therefore fought under a platform of transparency which affords either side the opportunity to prepare for, and exhaustively present its case. The appellate Court does not enjoy this latitude.

Nonetheless, it is now well settled that under limited circumstances, an appellate Court may allow new issues to be raised notwithstanding that the party relying on them did not utilise the opportunity at the trial to do so. There is a corpus of authorities where the principle applicable, in a situation such as the one before me now, has been laid down, or restated by the appellate Courts.

In ***Tanganyika Farmers Association Ltd. v. Unyamwezi Development Corporation Ltd., [1960] E. A. 620,*** the Appellant's counsel introduced a point that had not been raised at the trial. Counsel for the respondent objected to it being allowed, on the grounds that it had never been raised in the Court below hence was never argued there. The Court, at p. 626, held that an Appeal Court has the discretion to allow a new point to be taken on appeal as long as it is satisfied that: *'full justice can be done to the parties.'*

In that case though, the Court was not satisfied that it had before it all the facts bearing on the question that had been raised for the first time at the appellate stage; and therefore it declined to rely on the new ground raised. The Court reproduced, with approval, a passage from the speech of LORD HERSCHELL in the case of ***In The Tasmania [1890] 15 A.C. 223*** where at p. 225 the Lord Justice said that where a point is raised, for the first time, at the Court of appeal it *'ought to be most jealously scrutinised.'* He went further and pointed out that the:

> *'Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them in the witness box.'*

The Court also quoted a passage from the decision in the case of ***In Ex parte Firth (1882) 19 Ch. D. 419;*** in a case where the matter raised for the first time on appeal was one in regard to which there had been some evidence before the trial Court; JESSEL M.R. said at p. 429 that:

> *'…the rule is that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point*

from succeeding, it cannot be taken afterwards. You are bound to take the point in the first instance, so as to enable the other party to give evidence.'

In ***North Staffordshire Railway Co. v. Edge [1920] A.C. 254***, where the Court was confronted with the issue of whether or not to allow a new point at the appellate stage, LORD BUCKMASTER, at p. 270 clarified that it should not be the convenience of the Court but rather:

'…whether it is possible to be assured that full justice can be done between the parties by permitting new points of controversy to be discussed.'

In ***Warehousing & Forwarding Co. of East Africa Ltd. v. Jafferali & sons Ltd. [1963] E.A. 385***, the Respondents had at the first appellate Court (E.A.C.A), abandoned its case as presented before the trial Court; and, instead, argued a new point; but not without serious objection by counsel for the Appellant to their doing so. On further appeal the Privy Council cited a passage from the decision in ***Connecticut Fire Insurance Company v. Kavanagh [1892] A.C. 473;*** LORD WATSON stated at p. 480 as follows:

"When a question of law is raised for the first time in a court of last resort … it is not only competent but expedient, in the interest of justice to entertain the plea. … But … the course ought not, in any case, to be followed, unless the court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea."

In ***Alwi Abdulrehman Saggaf v. Abed Ali Algeredi [1961] E.A. 767,*** the first appellate Court had based its decision on a ground that had not been supported by any pleaded facts; and had not been made a ground of appeal. The C.A. (SIR A. FORBES V.-P.) stated at p.775 as follows:

"The circumstances in which a point of law which has not been argued in the court below may be taken on appeal were considered by the Privy Council in ***Perkowski v. City of Wellington Corporation [1958] 3 All E.R. 368.*** *The … appellant there sought to base her case both before the Court of Appeal … and … the Privy Council on a submission which had not been made at the trial. The Court of Appeal … decided that, the point not having been taken at the trial, it could not be taken on appeal. Their lordships of the Privy Council said* (at p. 373 of the report):

> ***'In Connecticut Fire insurance Co. v. Kavanagh, [1892] A.C. 473****, LORD WATSON … after referring to the raising of points of law in an appellate court … said at p. 480:*
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> *'But … the course ought not, in any case, to be followed, unless the court is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts, if fully investigated would have supported the new plea.'*

On the question of pleadings, the Court in the ***Alwi Abdulrehman Saggaf*** case (supra), cited ***Esso Petroleum Co. Ltd. v. Southport Corporation [1956] A.C. 218;*** where at p. 238, LORD NORMAND said:

> *'The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them … To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.'*

The matter raised belatedly at the appellate stage, as has been pointed out, is allegedly an illegality. The well regarded ***Black's Law Dictionary*** defines the noun '*illegality'* as: *"That which is contrary to the principles of law, as contradistinguished from mere rules of procedure."* The same dictionary defines the word *'illegal'* as: *"Against or not authorized by law."* The highly regarded ***The New Shorter Oxford English Dictionary*** defines the word '*illegal'* as: *"Not legal, contrary to or forbidden by law."*

Its counterpart of similar fame: ***Oxford Dictionary of English*** defines the adjective *'illegal'* as: *"contrary to or forbidden by law, especially criminal law."* The said dictionary then proceeds to distinguish between what is *'unlawful'* and that which is *'illegal'*; stating that: *"something which is 'illegal' is against the law; whereas an 'unlawful' act merely contravenes the rules that apply in a particular context."*

In ***Mistry Amar Singh v. Serwano Wofunira Kulubya [1963] E.A. 408,*** (Privy Council) – which concerned the leasing out of lands in contravention of statutory enactments, the Privy Council stated at p. 413 that:

"In his judgment in ***Scott v. Brown Doering, McNab & Co. [1892] 2 Q.B. 724,*** *LINDLEY L.J.; at p. 728, thus expressed a well-established principle of law:*

> *'Ex turpi causa non oritur action. This … legal maxim is … not confined to indictable offences. No court ought to … allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court … It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him.'*

In ***Sadrudin Shariff v. Tarlochan Singh s/o Jwala Singh [1961] E.A. 73,*** in a cause of action founded on contract of repair, neither illegality (that the Respondent, in fact, had no licence to repair vehicles), nor facts upon which a plea of illegality could be based was pleaded; hence illegality as such had not been put in issue in the pleadings, it had instead been raised, *ex - improviso*, during the trial. The Court of Appeal (Gould J.A.) on the wide powers of Court to grant relief, adopted a passage from the judgment of McCARDIE J., in ***Hawkins v. Duche [1921] 3 K.B. 226,*** at pp. 231 – 232 as follows:

> *'It would, I feel, be deplorable if at the very close of a long and costly litigation a defendant should manage to elicit a trivial and inadvertent breach by the plaintiffs of the Act and thereby defeat the whole action which was otherwise well founded. The defendant would, I suppose, in such case then claim his costs. A further result might be that the plaintiff would be barred by the Statute of Limitations from commencing new proceedings after he had gotten relief.'*

Once it is established that in fact the suit was instituted outside the period of limitation then instituting it was *'contrary to or forbidden by law'* and therefore it was illegal to do so. And on the authority of ***Scott v. Brown Doering, McNab & Co.*** and ***Makula International Ltd. vs. Cardinal Nsubuga*** (both cited above), I would be compelled to allow the appeal on this ground alone. An act of illegality is not confined to the transaction between parties. It can be out of an act of a person which offends against the provision of the law; as is alleged here.

However applying the principles laid out in the cases reviewed above, this Court cannot say that there is evidence before it which it could rely on with certitude or satisfaction that the suit was in

fact filed outside the period of limitation. There is the evidence on record amounting to a variation of the original term of the contract; by which settlement of the Appellant's obligation was to be done in the form of some livestock, albeit this having failed. That evidence is wanting with regard to the time this variation was made.

For a Court of appeal, as this one, to exercise its discretion and determine such a point of controversy which was not at all pleaded or canvassed before the trial Court, it must have before it sufficient evidence on which it could carry out an investigation and determine whether if the matter had been raised in at the trial, the lower Court would have had sufficient material to determine the issue. This Court hasn't got much to go by and establish that the suit was filed in violation of the law of limitation. For this reason I must decline to allow this ground of appeal.

The second ground of appeal concerns the quantum of damages. It is well settled that an appellate Court such as this will not interfere with the assessment of damages made by the trial Court unless there is evidence that the trial Court either proceeded on an erroneous principle of law; or the award was outrageously high or ridiculously low, and in fact failed to reflect the measure of damages available to the Plaintiff.

There is a string of cases in our jurisdiction that have re–stated these positions of the law. In the case of ***Uganda Breweries Ltd. v. Uganda Railways Corporation; Supreme Court Civil Appeal No. 6 of 2001,*** Justice Oder, following the authority of ***Bank of Uganda v. F. W. Masaba & Others [1999] 1 E. A. 2,*** halved the sum awarded by the lower Courts; giving the reason for doing so as the wrong principle applied by the lower Courts in arriving at that sum.

In ***Administrator General v. Bwanika James & Others; Supreme Court Civil Appeal No. 7 of 2003,*** Justice Oder, sitting in the second appellate Court, interfered further with the award of damages because even the Judges of the Court of Appeal (the first appellate Court) had used the wrong formula for assessing the damages. He instead applied the formula of subjecting the principal sum claimed, to 10% per annum at simple interest for the period of 17 years the amount had been outstanding; plus general damages.

As for the instant case before me, the trial magistrate proceeded on the basis that since no interest had been agreed upon in the contract, he would award none; but instead award general damages. He took judicial notice of the inflationary situation in the country; and without the assistance of

any evidence to that effect, asserted that a vehicle which cost 3m/= (three million only) in 1997 was, at the time of his judgment in 2007, valued at 15m/= (fifteen million only). Applying this rate of devaluation, he then concluded that the money owed the Plaintiff had inflated to 4,339,500/= (four million three hundred thirty nine thousand, five hundred only), at the time of his judgment.

That might well have been a reasonable way of arriving at compensation by restitution. The problem with that approach however, is that whereas the principle he applied would not attract serious reprimand, the learned trial magistrate had now dangerously immersed himself in the realm of speculation. Had there been evidence to guide him as to the rate of inflation in the country, it would have been a satisfactory mode of assessment of damages; and might not have necessitated any intervention by this appellate Court.

However, and for no apparent justification whatever, the trial magistrate proceeded to impose a 20% interest on the sum of 4,339,500/= (four million three hundred thirty nine thousand, five hundred only) he thought represented in 2007, what was lent in 1997; and backdated the interest to accrue from 1997. That was the fallacy with his mode of assessment of damages. It amounted to enhancing the amount of money owing beyond what would be permissible under the principle of restitution. This award would instead profit the claimant; and yet profiting a party is certainly not one of the purposes for an award of damages.

The modus the trial Court adopted to arrive at the award of damages is manifestly erroneous and the award itself extremely high in the circumstance of the case. True, the principle of restitution here would mean restoring the Respondent (Plaintiff then) in a position of strength similar to where she would have been had the contract been performed by the Appellant. It is most relevant if not altogether necessary to determine the value of the money at the time of judgment, vis-à-vis that of entering the contract. But in arriving at this sum, the Court must look at a number of considerations; inclusive of the fact that there are many imponderables in business. The Plaintiff could have made serious losses in the ten years of cotton business.

Placed in the position the trial Court was in, with no material before me to guide me on the quantum of damages awardable in the instant case, I must nevertheless do the best I can. In keeping with the authority in ***Administrator General v. Bwanika James & Others; Supreme Court Civil Appeal No. 7 of 2003,*** I will subject the contractual sum of 1,446,500/= to a factor of

10% per annum as simple interest for the ten years leading to the date of the judgment of the trial Court. This in my computation, together with the principal sum adds to shs. 2,893,000/= (Two million, eight hundred ninety three thousand only).

I am aware that the Appellant has for no reason whatever abused the very humane intervention by the Respondent, which rescued him from certain criminal prosecution and probable detention. He has put the Respondent to unnecessary trouble and anxiety with his obstinacy in bothering not to perform his part of the bargain for a period now extending into well over ten years. This conduct is certainly an abuse of that most humane gesture exhibited by the Respondent. In the circumstance I find that an award of general damages in the sum of U shs 2,000,000/= (Two million only) is reasonable atonement for the said abuse suffered.

The total decretal sum, of U. shs. 4,893,000/= (Four million eight hundred ninety three thousand only), herein, attracts interests at the rate of 6% per annum from the date of the decree of the trial Court, till payment. For the said reasons then ground 2 of the appeal succeeds. I notice that the Respondent as Plaintiff in the lower Court had waived her rights to costs. Counsels did not address me on the issue of costs. In view of her concession aforesaid, the conduct of the Appellant referred to in this matter, I would therefore order that each party bear their own costs both in this and the lower Court.

Alfonse Chigamoy Owiny – Dollo

JUDGE

04 – 02 – 2009