

UGANDA / JUDGMENT

Create Consult Limited v Adraiga (Civil Suit 20 of 2021) [2024] UGHC 806 (29 August 2024) [2024] UGHC 806

COURT
High Court of Uganda

BEFORE
Acellam, J

CASE / FILE NUMBER
Civil Suit 20 of 2021

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THE REPUBLIC OF UGANDA IN THE HIGH COYRT OF UGANDA AT ARUA CIVIL SUIT NO. 0020 OF 2021

CREATE CONSULT LTD:..... 10 VERSUS ADRAIGA SWALI
ALLI:.....

BEFORE HON. JUSTICE COLLINS ACELLAM

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IUDGEMENT

Brief introduction

- This is a civil suit brought by way of summary procedure under Order 36 rule 2(a) for 20 orders of:
- Recovery of ugx 219,800,000 (Uganda shillings two hundred nineteen million eight $\$a$)\$ hundred thousand only) from the Defendant.
- Interest on (a) above at the rate of 30% from the date of filing this suit till payment $\$b$ in full.
- $\$c$ \$ Costs of the suit.

Background

The Plaintiff filed a summary suit against the Defendant for recovery of a loan, interest 30 and penalty worth ugx 219,800,000 (Uganda shillings two hundred nineteen million eight hundred thousand only), interest and costs of the suit. The Plaintiff alleges that the Defendant on 2nd July 2020 borrowed USD 14,000 (fourteen thousand United States Dollars) and ugx 40,000,000 (forty million Uganda shillings only) from the Plaintiff with an interest of 10% per month within a period of two months, and in the event of failure 35 to comply with the payment schedule and / or service the loan the same would attract a penalty of 4% of arrears times days in arrears on daily basis.

The Defendant, in his Written Statement of Defence acknowledges receipt of the exact sums for the loan mentioned by the Plaintiff and attaches pay slips of repayment of the 40 loan to the tune of ugx 62,200,000 (sixty two million two hundred thousand shillings only). He avers that the penalty claim made by the Plaintiff of ugx 219,800,000 is not true, is excessive, extortionate, unconscionable and illegal. The Defendant contests the enforceability of the 4% penalty in clause No. 8 of the loan agreement between the Plaintiff and the Defendant. 45

Submission of Plaintiff

The Plaintiff states that, on 29th December 2019, the Defendant borrowed ugx 20,000,000/= with interest of 10% payable within a period of 1 month. On 31st January 50 2020, the Defendant again borrowed ugx 20,000,000/= with interest of 10% payable within 1 month. The Defendant failed to make any payment or fulfill their loan

- obligations in any of these two loans, but yet again borrowed a third loan on 2nd July 2020 from the Plaintiff of USD 14,000\$. The parties then took out a joint loan agreement for all the three loans on 2nd July 2020, where the Defendant undertook to repay all these three loans with interest of 10% per month within a period of two months.
- The Plaintiff also introduced an alternative claim in its submissions of ugx 47,886,464 10 (Uganda shillings forty-seven million eight hundred eighty-six thousand four hundred sixty four shillings only) computed with a flat penalty rate of 4% since the time of default. The Plaintiff avers that, all its efforts to recover this loan proved futile, hence this suit.

15 Submission of Defendant

The Defendant avers that the contents of the loan agreement dated 2nd July 2020 are correct. He has so far paid ugx 68,200,000 (sixty-eight million two hundred thousand shillings only) before and during the hearing of this suit. He contends that the amount claimed by the Plaintiff of ugx 219,800,000/= is not correct, excessive, extortionate, unconscionable and illegal.

The Defendant states that the alternative claim by the Plaintiff offends Order 6 rule 7 and is therefore untenable. He also never sought leave of Court to amend his pleadings therefore this claim must fail.

<u>Submission on Rejoinder</u>

The Plaintiff submits that the penalty clause is a formal and lawful term in a loan agreement. It is recognizable in a number of laws, as summarized therein, and it is 30 therefore a question of quantum not legality of the clause. It is not true that the Plaintiff departed from its pleadings while introducing an alternative claim.

Representation

During the hearing, the Plaintiff was represented by M/S Bundu & Co. Advocates whereas the Defendant was represented by M/S Manzi & Co. Advocates.

Before I proceed with the merits of this suit, I want to note that I have perused through the pleadings and all their supporting documents / witness statements, both Counsel 40 for the Plaintiff and Defendant filed their submissions which I have duly put into consideration to come up with this judgement. There were rejoinder on record. I shall now proceed to enlist the issue in contention.

45 Issues

Issue 1

Whether the 4% penalty in clause 8 of the loan agreement is lawful and enforceable 50 against the Defendant?

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Determination

Submission of Plaintiff

Counsel contends that, the first two loans totaling to a sum of ugx 40,000,000/= at an interest of 10% per month equals ugx 4,000,000/= adding up to ugx 48,000,000/= and the third loan of USD 14,000\$ at an interest rate of 10% per month equals USD 16,800\$. Conversion to ugx at a rate of 3,787/= per 1 $\frac{1}{2}$ \$ as was the rate the filing of this suit, equals ugx 63,621,600/=. Therefore, the total sum of the principal and interest from all the three loans shall be ugx 111,621,600/= (one hundred eleven million six hundred twentyone thousand six hundred shillings only).

Counsel submits that the daily penalty covers the period from September 2020 to September 2021 or the date of filing this suit. The first two loans were given on 29th December 2019 and 31st January 2020 respectively and restructured on 2nd July 2020,

the third loan was given on 2nd July 2020 and all these loans haven't been paid to date. Counsel relies on Section 62(1) of the Contracts Act 2010 and states that it recognizes penalty clauses as lawful, Harlsbury's laws of England 4th Edition Reissue Vol. 12 (pg 486 paragraph 1065), and the case of Ssempe vs Kambagambire (CS 408/2014).

Submission of the Defendant

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Counsel for the Defendant submits that Section 7(1) of the Money Lenders Act Cap 273 expressly prohibits the levying of the penalty on the sum borrowed. Penalty clauses in contracts are generally unenforceable. Counsel relies on the case of *Charles Athembu vs* Commercial Microfinance Ltd & 2Ors, Civil Revision No. 001/2014.

Consideration of Court

The Long title of the Tier 4 Microfinance Institutions and Money Lenders Act, 2016 published in the Uganda Gazette 74 on 28th October 2016, assented to on 5th July 2016 and commenced on 1st July 2017 by Tier 4 Microfinance Institutions & Money Lenders (Commencement) Instrument, 2017 states that; "An Act;... to provide for management and control of money lending business;...; to repeal the Money Lenders Act, Cap 273..."

With all due respect to both Counsel for the Plaintiff and Defendant, the Tier 4 40 Microfinance Institutions and Money Lenders Act, 2016 is and must have been the relevant law for reference in these pleadings as it was enacted and commenced between 2016 and 2017 whereas this suit was filed in September 2021. Reliance on the Contracts Act 2010 and the Harlsbury's Laws of England by Counsel for the Plaintiff is simply unacceptable and inexcusable since there was / is a law in operation in the Ugandan legal 45 system that caters for money lending transactions. It is even worse, and embarrassing for Counsel for the Defendant who refers to the repealed Money Lenders Act, Cap 273.

Section 86 of the Tier 4 Microfinance Institutions and Money Lenders Act, 2016 states that;

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86. Prohibition of compound interest and provision as to defaults.

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- 5 A money lending contract is illegal and unenforceable if it directly or indirectly \$1)\$ provides for;
- The payment of compound interest. \$a)\$ \$\mathbf{b})\$
- The rate or amount of interest being increased by reason of a default in the payment of sums due under the contract.

- 10 Where a borrower defaults to pay the sum payable to the money lender on the due date, the money lender is entitled to charge simple interest on that sum from the date of default until the sum is paid.
- In the instant case, both parties acknowledge that a loan agreement was executed on 2nd July 2020 which provides for a penalty payment on default of 4% per day by the borrower 15

Section 86 of the Tier above, subsections 1(b) and 2 provide for defaults in repayment of the money lent by a money lender. Subsection 1(b) makes illegal and unenforceable a money lending contract which directly or indirectly provides for a rate or amount of interest being increased by reason of a default in payment of sums under the contract. Subsection 2 states that where a borrower defaults to pay the sum payable to the money lender on the due date, the money lender is entitled to charge a simple interest on that sum from the date of default until the sum is paid in full.

In light of the above, I therefore decide that Issue 1 in the negative. Penalty clauses in money lending transactions are unenforceable and illegal therefore clause 8 cannot be enforced against the Defendant.

30 I wish to also address the issue of interest rate in the loan agreement.

Section 90 of the Tier 4 provides for control of interest rates.

90. Control of interest rates.

1) The Minister may in consultation with the Authority, by notice in the Gazette, 35 prescribe a maximum interest rate which a money lender shall charge.

Unfortunately, the Minister has not issued a notice with the maximum interest rate which a money lender shall charge, to date. I shall now make reference to case law to use precedent in persuading me to interpret this provision.

The parties in the instant case agreed to an interest rate of 10% per month which is computed to 120% per annum.

In the case of *Alice Okiror vs Global Capital Save 2004 Ltd* CS No. 149 of 2010, Court 45 held that the rate of 12% per month amounting to 144% per annum was harsh and unfair.

In *Alpha International Investments Ltd vs Nathan Kizito* HCCS No. 131 of 2001, while dealing with a similar situation, Court observed that people often resort to loans in 50 desperate situations and don't find out the legal implications of their actions. The

Learned Judge compared the interest of 240% per annum and the commercial rate at the \$ \mathsf{S} time and held that the interest rate was unconscionable.

The Commercial / Central bank lending rates range from 18% to 25% per annum. I find that the rate of 120% per annum as is in the instant case is harsh, unfair and unconscionable.

Section 88 and 89 of the Tier 4 provide for the Powers of Court & Reopening transactions of money lenders respectively. In the instant case, I will not apply these provisions to alter the interest rate charged in the loan agreement as the Defendant already impliedly acknowledged the 10% rate and admitted to being indebted to the Plaintiff to a tune of ugx 30,800,000/ \$=\$ as balance from the principal and interest of the loan amount, and a judgement on admission is on Court record with a decree. If I did, it will be bring more issues in contention and an appeal or application for review may become inevitable, so I will leave it at this.

In conclusion, issue 1 is resolved in the negative.

Issue 2

Whether the Plaintiff is entitled to recover ugx 219,800,000 from the Defendant? 25

Under Submissions of both the Plaintiff and Defendant, they agree that the Plaintiff came up with the figure of ugx 219,800,000/= while computing the principal sum, interest and the penalty fee under clause 8 on a daily basis.

Under issue 1, I resolved that charging a penalty fee in a money lenders contract is illegal and unenforceable according to Section 86 of the Tier 4. The sum owed by the Defendant must therefore be re-assessed according to the contract, while disregarding the illegal clause and charging a simple interest for default as guided or instructed by Section 86.

I therefore decide issue 2 in the negative. Issue 2 fails.

Issue 3

Whether the Plaintiff is entitled to the reliefs sought? 40

I wish to first deal with the alternative prayer of the Plaintiff for a flat penalty of 4% on the amount 111,621,600/= that ought to be claimed.

I agree with Counsel for the Defendant that under Order 6 rule 7 of the Civil Procedure 45 Rules SI 71-1, no pleading shall raise a new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading, except by way of amendment. Counsel for the Plaintiff did not at any point seek to amend his claim against the Defendant as stated in the plaint.

However, Section 86(2) of the Tier 4 allows a simple interest charged on the sum owed from the date of default until the sum is paid.

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I believe that an interest rate of 4% is fair and acceptable as a simple interest to be charged on the sum owed by the Defendant to the Plaintiff. I therefore allow this prayer.

Under issue 3, the Plaintiff seeks;

Recovery of ugx 219,800,000 or ugx 47,886,464 in the alternative. \$a)\$

These have been addressed under issue 1, 2 & 3 above and a determination given, while also noting that the Defendant admitted to a debt of ugx 30,800,000/= for which judgement on admission was entered.

Both parties agree that the loan amounts given to the Defendant sum upto ugx 40,000,000/= and USD 14,000\$, computed at a rate of 10% per month being ugx 48,000,000/= and USD 16,800\$ (rate of 1\$ at 3,787/=) being ugx 63,621,600/=. the principal and interest on all three loans totaling to ugx 111,621,600/= minus 68,200,000/= so far paid equals to ugx 43,421,600/=.

This Court issues 1 & 2 decided that the penalty of 4% per day is illegal and unenforceable relying on Section 86 of the Tier 4, and calculated a simple interest of 4% being a fair interest rate on default amounting to ugx 4,464, 864/=.

- I therefore order the recovery of ugx \$43,421,600/\$ = as balance owed on the principal and 25 interest from the three loans, and a simple interest sum of ugx 4,464,864/= as fair and acceptable in the circumstances.
- \$b)\$ General damages

It is trite law that general damages are awarded at the discretion of Court. They are awarded to compensate the aggrieved fairly for the inconveniences accrued as a result of the actions of the Respondent. (See Mohammed Tumusiime vs Uganda Revenue Authority HCCS No. 480 of 2016)

Clearly, the Plaintiff's business herein was inconvenienced by the lengthy Court proceedings in this case until its conclusion hence I will allow the prayer for general damages as pleaded by the Plaintiff. The Plaintiff is awarded ugx 10,000,000/= as general damages.

\$c)\$ Interest on (a) above

I hereby award interest of 20% per annum until payment in full, as guided by the Court rates as issued in various cases.

\$d)\$ Costs

By virtue of Section 27 (2) of the Civil Procedure Act, costs follow the event, unless for some reason the court in its own discretion directs otherwise. A successful party can be denied costs if it proved that but for his or her conduct, the litigation could have been avoided. In the instant case, it appears to me that litigation has been dragged by the

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\$\mathsf{S}\$ Defendant who failed to agree with the Plaintiff company and also pay off their loan sums owed. It is for that reason that I award costs to the Plaintiff company.

For avoidance of doubt, judgement is entered for the Plaintiff against the Defendant on the following terms;

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- a) Payment of \$ugx\$ 43,421,600/= as balance owed on the principal and interest from the three loans.
- b) a simple interest sum of ugx \$4,464,864/\$ = as an amount for default in payment of sums owed.
- c) Payment of ugx 10,000,000/ \$=\$ as general damages. 15 d) Interest on (a) above of 20% per annum until payment in full. e) Costs of the suit.

I so order. 20

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..... Collins Acellam

JUDGE \$25\\\$

29th August 2024

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