

UGANDA / JUDGMENT

# DFCU Bank Ltd v Petua Mugala Katoko (Miscellaneous Application None of 2017) [2018] UGCommC 11 (9 May 2018) [2018] UGCommC 11

COURT

Commercial Court of Uganda

CASE / FILE NUMBER

Miscellaneous Application None of 2017

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO. 0387 OF 2017

(ARISING FROM HCCS NO. 0692 OF 2016)

DFCU BANK LTD:.....APPLICANT

VERSUS

PETUA MUGALA KATOKO:.....RESPONDENT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

R U L I N G:

DFCU Bank Limited referred to as the Applicant brought this application against Petua Mugala Katoko seeking the orders;

1. The Complaint in Civil Suit No. 692 of 2016 Petua Mugala Katoko vrs. DFCU Bank Ltd be rejected for being frivolous, vexatious and not disclosing a cause of action against the Applicant.
2. Costs.

The Application is grounded on;

That the Complaint is frivolous and doesn't disclose a cause of action against the Applicant.

The facts are easily discerned from the pleadings.

Briefly, the Respondent was desirous of selling her land. The 2nd Defendant wanted to buy but she did not have ready cash. So the two agreed that since the 2nd Defendant was looking for money to finance a contract, she would use the title of the Respondent's land to borrow money in excess of what he required and then remove a portion, 500 million to be specific; and pay the Respondent for her land. The land was indeed mortgaged with the Applicant who loaned out the money. The Respondent was paid only 200 million leaving 300 million unpaid. The 2nd Defendant failed to pay hence the suit.

In the affidavit supporting this application Sewaali Jacob on behalf of the Applicant deposed that the Respondent sold her land to the 2nd Defendant at a consideration of 500 million. That at the same time the 2nd Defendant obtained an LPO to supply maize but did not have the money.

That the 2nd Defendant and the Plaintiff then agreed to use the land as security to borrow from the 3rd Defendant and a mortgage was created over the said property. That the Plaintiff and others then guaranteed the said loan.

He further stated that the 3rd Defendant was not privy to the sale agreement and had no knowledge of the transactions and or undertakings between the Applicant and Respondent.

In reply the Respondent contended that the Applicant knew the purpose of the loan and was privy to the Memorandum of Understanding. She denied ever being a director in the 2nd Defendant.

That under clause 4 of the Sale Agreement it was clear that the reason for borrowing from the bank was to secure monies to pay her for her land.

She denied having anything to do with the 2nd Defendant. She deposed in paragraph 6 in the following words;

*"\*That I have never been a shareholder, or officer of the entity known as NEL LINES INTERGRATED SERVICES LIMITED at all and this was at all material times within the knowledge of the Applicant\*."*

The Sale Agreement however clearly suggests that the Respondent was a Director in the 2nd Defendant as seen in paragraph 3 and 4 which read;

*"\*3. The First Party has upon execution hereof made\**

*\*the second party one of its directors for purposes of complying with the Bank's requirements.\**

1. *\*The Second Party shall upon receiving the entire consideration cease to have any interests in the First Party and shall sign forms surrendering the directorship in the First Party\*."*

The two paragraphs indicate that the Plaintiff became Director of the 2nd Defendant on 5th April 2016 and remains so until the full purchase price of the property is paid.

The Plaintiff further claimed she was semi-literate and no one interpreted "the complex legal contents of the mortgage documents to me".

The bank had a fiduciary duty to protect her, but this was done by her independent advisor Advocate Sebaggala Ali Sengendo and Musiige Faisal as their attestation clearly show.

On whether the Bank applied the money recklessly and or negligently, and as a result the Respondent did not benefit, a look at the facility document clearly shows what the money was meant to do.

The purpose for borrowing is clearly spelt out namely that;

*“\*The Facilities are sanctioned solely for purposes of facilitating execution of a contract awarded to the Borrower by World Food Programme. The Borrower undertakes to strictly use the facility for the specified purpose\*.”*

The Facility letter Annexure B was endorsed by the Respondent. It clearly listed her land as security. Annexure C2 shows that she was alive to the use of her land as security. She also executed a personal guarantee, throughout all the proceedings she and the Defendants had the use of an independent advisor.

Going back to the Memorandum of Understanding the purpose becomes clear, it reads;

*“\*WHEREAS\**

1. *\*The Second Party is the owner of land and developments comprised in Kyadondo Block 220 Plot 772 at Kiwatule measuring approximately 0.101 hectares (herein after referred to as “the property”) which she is desirous of selling to the First Party,\**
2. *\*The First Party secured a contract of supply of maize from World Food Programme and desires to use the property as security for the money to be advanced by DFCU Bank (herein after referred to as the Bank) against the supply of maize.\**
3. *\*The First Party is desirous of using part of the money secured from the Bank to pay off the Second Party.\**
4. *\*Before the Bank advancing money against the property requires some nex in between the First Party and the Second party in addition to execution of Power of Attorney by the Second Party\*.”*

Then they agreed thereafter that the Respondent would be paid from the loan amounts.

These undertakings by the 2nd Defendant and the Respondent did not involve the Applicant. Merely mentioning the Applicant in the Memorandum of Understanding did not make her privy to it.

After the parties had entered the Memorandum of understanding, they chose what to tell the Applicant and what not to.

The purpose for the borrowing was to finance purchase and supply of maize. This was what the Applicant was told and infact all parties the Respondent inclusive endorsed the facility documents to indicate what the purpose of the loan was. It did not mention purchase of land

from the Respondent or any other person. The facility document instead emphasized that “The Borrower undertakes to strictly use the facility for the specified purpose” which in this case was “for purpose of facilitating execution of a contract awarded to the Borrower by World Food Programme.”

The foregoing shows that the Applicant was not privy to the arrangement of sale of land.

Infact according to the facility document which all parties signed, payment for land would be a departure from the purpose of the loan.

The sum total is that the suit, based on the Memorandum of Understanding as it is, cannot be sustained against the Applicant which was not privy to the Agreement.

The claim is frivolous, vexatious and does not in my view disclose a cause of action against the 3rd Defendant. It is in that regard rejected as against the 3rd Defendant with costs.

**Dated at Kampala this 9th day of May 2018**

**HON. JUSTICE DAVID WANGUTUSI**

**JUDGE.**

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