

UGANDA / JUDGMENT

Kabuye & Anor v Bowerman (Civil Suit No.535 of 2007) [2014] UGHCLD 118 (21 August 2014)

[2014] UGHCLD 118

COURT

HC: Land Division (Uganda)

BEFORE

Luswata, J

CASE / FILE NUMBER

Civil Suit No.535 of 2007

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

CIVIL SUIT NO.535 OF 2007

1. BOB KABUYE

2. PATRICK NYANZI KAGGWA..... PLAINTIFFS

VERSUS

KIM BOWERMAN DEFENDANT

JUDGMENT

BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA

The plaintiffs brought this suit against the defendant to recover land comprised in Kyaggwe Block 441 at Bunakanda (herein referred to as the suit land), general damages and costs of the suit.

The brief facts of the case are that on the 8/12/05 the plaintiffs borrowed shs.4,500,000/- from the defendant at an interest of 5% per month and in return, the plaintiffs pledged the suit land which at the time of the loan was still registered in the name of a one Bosco Rogers Bugembe (as Administrator of the estate of the late Ibulayimu Batuma). The defendant registered a caveat on the suit land on 20/12/05 and soon after left the country. The plaintiffs were unable to trace him to repay the loan when it full due. Upon his return to Uganda in February 2006, the defendant entered upon and took possession of the suit land, chased away the plaintiffs, took over their

tools and equipment and harvested their crops. Thereafter the plaintiff deliberately avoided several reminders to return the plaintiff's title deed and other documents surrendered to him. At some point the plaintiff evicted the defendant from the suit land.

In his defence and counterclaim, the defendant denied the allegations and stated that although on occasion he travels abroad, he regularly returns and spends long intervals in Kampala and Mukono and has a permanent office at Susie House Plot 1001 Ggaba Road at Nsambya which address is well known to the plaintiffs. He denied the fact that the plaintiffs ever made an attempt to repay the loan to him or to his office. He further argued that his entry into the suit land was lawfully done on or about 8/5/2006 and it was also done to preserve the security from encroachers who had started evading it after the plaintiffs' workers had abandoned it. He claimed to have expended some costs towards its maintenance. He contended that the plaintiffs had in spite of repeated demands and reminders, failed to refund the loan and interest and as such, he sought dismissal of the suit and counterclaimed for the repayment of the outstanding loan amount with interest, general damages for breach of contract and costs.

The plaintiffs denied the allegations in the counterclaim particularly the fact that they had ever received any notices to repay the loan. They also argued that the defendant acted illegally when he forcefully took over possession of the suit land.

The parties filed a joint scheduling memorandum but on 27/3/14 when the matter came up for hearing, neither the plaintiff nor their counsel were present to prosecute their claim. The main claim was accordingly dismissed under Order 9 Rule 22 CPR and the counterclaim proceeded **exparte* against the plaintiffs*.* The defendant proceeded to prove his claim by his witness statement filed in court and his counsel presented written submissions upon which this judgment is now based.

Originally three issues were indicated in the joint scheduling memorandum to wit;

1. Whether the defendant's entry on the suit land was fraudulent and/or Illegal?

1. Whether the plaintiff is in breach of the loan agreement?

2. What remedies are available to the parties?

It would follow that the first issue was rendered irrelevant when the plaintiffs failed to prosecute their case. In any case, it is an uncontested fact that, the plaintiffs regained possession of the suit land when they evicted the defendant on 30/6/08. I will therefore proceed to consider the other two issues collectively.

The counterclaimant called only one witness Kim G. Bowerman (defendant/counterclaimant) who filed a witness statement in court on 9/4/14 and which he confirmed at the hearing. Counsel for the counterclaimant filed brief submissions that principally hinged on that statement that proves that the plaintiff borrowed UGX 4,500,000 from the defendant and secured the same with a deposit of the certificate of title in respect of the suit land. The defendant lodged a caveat on the

certificate of title as an equitable mortgage. After failing to secure repayment of the loan, he filed his counterclaim. In his witness statement, the defendant claims the outstanding principal and interest (as at 8/4/14) at Shs.803,730,806.

Counsel further contended that on 8/5/06, the defendant entered upon the suit land to protect it from encroachers and to realize the security, but he was evicted there from by the plaintiffs on 30/5/08. That according to clause 2 and 3, the loan was executed for a period of only 2 months and therefore, the plaintiffs would be in default if they failed to pay within that period. Counsel also argued that according to clause 12, the plaintiffs would be liable to pay the Advocates fee with respect to that transaction, which payment would attract a similar interest rate to that of the loan. He concluded that the defendant is thereby entitled to recover the principal, interest and damages on account of breach of the loan agreement.

The defendant further exhibited various documents to support his counterclaim in court including the caveat, duplicate certificate of title, undertaking to pay, demand notices and a financial statement for outstanding principal and interest as at 8/4/14. Although the counterclaim proceeded **exparte** against the plaintiffs, it is still incumbent upon the defendant to prove his claim.

In the case of **Ronald Kasibante Vs Shell Uganda Ltd HCCS 542 of 2006** breach of contract was defined as the breaking of the obligation which a contract imposes which confers a right of action for damages on the injured party. The fact that the plaintiffs took out a loan of Shs.4,500,000/- from the defendant is an agreed fact and supported by the loan agreement which was admitted in evidence as **Exhibit *DII.*** According to clause 3, the loan repayment period was two months which would put its repayment date to 8/2/2006. There was written demand for repayment by the defendant's agents on 8/2/06, 8/3/06 and 6/5/06 with a threat that the plaintiff would take over possession of the suit land if the default continued. (See ****Exhibits *DVIIA, DVIIB* and *DVIIC*** respectively). There was never any serious contest against those facts and in particular, no evidence that any part of the loan was ever repaid. Further, the letters of demand by the defendant and his agent and the fact that he at at one time took over possession would disprove the plaintiffs' allegations that the defendant deliberately avoided them in order to receive payment and convserely, support the fact that the plaintiffs neglected or failed to pay the loan. I accordingly find that the plaintiffs by failing to repay the loan on time whebn it fell due or at all, were in breach of the loan agreement which entitles the defendant/counterclaimant to general damages and other specific reliefs stemming from the breach. The second issue is accordingly found in favour of the defendant/counterclaimant.

In his submissions, counsel for the defendant sought recovery of the loan and advocates fees with interest compounded at 5% per month, which is stated to be Shs.803,730,806/- as at 8/4/14. They in addition claimed further interest at the same rate from 8/8/14 until payment in full. Those submissions are supported in part by clause 2 of the loan agreement in which it was stated that,

“the loan shall bear interest on the unpaid principal sum at the rate of 5% per month. In the event of default in payment the aforesaid interest rate shall apply to the total of principal and interest due at the time of default till payment in full.”

In my view, the defendant did plead and attempted to prove his claim for recovery of the principal and interest. This was made in what was tendered as **Exhibit DVIII** on 26/5/14. The claim appears under four heads of the following; principal, lawyers fees, surveyors’ fees and money spent on looking after the farm. Each was calculated with a compounded interest at a rate of 5% per month to give a grand total of Shs.803,730,806.

On the contrary I do not agree that the defendant would be entitled to recover the advocate’s fees under the same terms as the loan sum. In my view, clause 12 only provides that in the event that the borrowers (now plaintiffs) failed to pay the advocate’s fees, the lender (now defendant) would meet that cost and reclaim it against them as ***part of the loan repayable under this agreement.*** In my view, clause 12 was not drafted to indicate that the advocate’s fees would carry an interest of 5%. Secondly, beyond the averment of the defendant (in paragraph 8 of his witness statement that he paid a sum of Shs.500,000/- in advocate’s fees, no evidence was adduced to support that claim. The same would apply to the claim (in paragraph 9 for surveyors’ fees of Shs.450,000/-. I thereby decline to grant both claims for advocate’s and surveyors’ fees with interest.

I have already with reason, disallowed the claim for advocates and surveyors’ fees. I take the same view with regard to the claim for “looking after the farm”. Random sums were placed against particular items of expenditure. No attempt was made to prove them by documentary evidence or otherwise. I accordingly disallow that claim as well.

With respect to the loan itself, the security agreed upon was the suit land, and according to clause 7, the consequences of default would be realization of that security by transfer to the defendant’s nominee or sale to any interested purchaser. A transfer to the defendant’s nominee would be legally erroneous as it would amount to a contravention of the mortgage law which generally prohibits self aggrandisement by a mortgagee to realise a loan. On the other hand, attempts by the defendant to take possession of the security, were thwarted when he was evicted by the plaintiffs from the suit land on 30/6/08. In any case, by that time, the land was still not registered in the plaintiffs’ names, and in that form, realisation of the loan would have been legally and practically impossible to achieve. In effect, the only remedy open to the defendant was repayment of the loan with interest, which is in fact, his claim

Going by the loan agreement, an interest of 5% per month would translate to 60% per annum, well above the commercial rates pertaining when the loan was extended and even now. The cardinal rule laid down by Lord Denning in **Harbutt’s Plasticine Ltd Vs Wayne Tank & Pump Co. Ltd (1970) KB 447** is that

“an award of interest is discretionary. It seems to me that the basis of an award of interest is that the defendant(s) has kept the plaintiff out of his money; and the defendant has had the use of it himself. So he ought to compensate the plaintiff accordingly.”

The Court of appeal of Kenya in **Shah Vs Guilders International Bank Ltd (2002) IEA 264** appears to have held the view that where the rate of interest has been agreed, the court is obliged to enforce the agreed rate unless where it is proved to be illegal, unconscionable, or fraudulent. (Emphasis mine). This opinion is reinforced in our S.26(1) can be found in S.27(1) of CPA which provides that;

“Where an agreement for the payment of interest is sought to be enforced, and the court is of opinion that the rate agreed to be paid is harsh and unconscionable and ought not to be enforced by legal process, the court may give judgment for the payment of interest at such rate as it may think just.”

In my considered view, although the defendant has shown that he lost money, a rate of 60% per annum is too high and unreasonable. No special circumstances have been placed before me by the defendant to support such an exorbitant interest rate. I am guided in my opinion by the courts in **Mohamed S/o Mohamedi Vs Athmani Shamte (1960) EA 1062** which found an annual interest rate exceeding 48% to be unconscionable and that of **Bank of Baroda (U) Ltd Vs Wilson B. Kamugunda CA 10/2004** (unreported) of 26% as being unreasonably high. It appears also from the finding of the court in **Mohamad S/o Mohamedei Vs Athmani Shamite (supra)** that even in an undefended suit, the court is not obliged to approve a harsh and unconscionable but contractual rate of interest. This is because the court retains its inherent equitable jurisdiction to reopen unconscionable bargains even when suits are undefended for one reason or another.

I am therefore persuaded by the above authorities to exercise my discretion to interfere with the interest agreed upon in the loan agreement. I strike it down and order that the defendant is entitled to recovery of the principle of Shs.4,500,000/- at the following interest rates;

1. A rate of 8% per annum from 8/2/05 to 8/5/06 when he gained possession and use of the suit land.
2. For the period between 9/5/06 and 30/6/08, the defendant shall be paid a nominal interest of 2% as he was deemed to have been in possession and use of the suit land.
3. The defendant is awarded an interest at a rate of 15% per annum for the period 1/7/09 until payment in full. The interest rate awarded takes into account the period the loan has remained unpaid.
4. The entire claim with respect to payments made to lawyers is disallowed.
5. The entire claim with respect to surveyor's fees is disallowed.
6. The entire claim with respect to money spent on looking after the farm (wages, airtime, transport, etc for 25 months) is disallowed.
7. The defendant is awarded general damages for breach of contract in the sum of Shs.20,000,000 and interest thereon at 8% per annum from the date of judgment until payment in full.

8. The defendant is also awarded costs of the counterclaim.

I so order.

E. K. LUSWATA

JUDGE

21st August, 2014

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