IN THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

CIVIL SUIT NO. 654 OF 2017

ECOBANK UGANDA LIMITED::PLAINTIFF

VERSUS

1. **KING JAMES COMPREHENSIVE SCHOOL LTD**
2. **ODONGO DICKSON**
3. **AJWANG EVALINE::DEFENDANTS**

BEFORE: HON. LADY JUSTICE ANNA B. MUGENYI

JUDGMENT

The Plaintiff brought this suit against the Defendants jointly and severally for recovery of UGX 2,447,203,702.97/ =, interest thereon at a rate of 23% per annum from the date of filing of the suit and for costs of the suit.

The brief facts constituting the Plaintiff's case are that in May 2014, the Defendant borrowed UGX 2,000,000,000/ from the Plaintiff for the construction of a nursing and Midwifery School in Lira, and the loan documents were duly executed on the 16th May 2014 together with a Mortgage Deed over properties in Erute and Kwania Road. In addition, the 2nd and 3rd Defendants provided personal guarantees for further security. The loan was to be repaid termly according to the school calendar within a period of 5 years.

That there was breach by the 1st Defendant through failure to ensure that the students paid school fees using the account since the third term instalments of

2015, wherefore the Plaintiff issued statutory notices of default and sale; and sold several movable properties but faced challenges with the rest of the security. The Plaintiff has suffered loss due to the non-repayment of the loan and accrued interest, hence this suit. That the 2nd and 3rd Defendants are in breach of the guarantee agreements, having failed to pay the outstanding balance upon default.

The Defendants filed their Written Statement of Defence (WSD) wherein they admitted to the loan but added that the 1st Defendant serviced it to a tune of UGX 982,000,000/ but that the Plaintiff altered the information of its account by deleting some payments amounting to UGX 641,950,000/ without the knowledge of the 1st Defendant. In addition, that the Plaintiff breached the terms of the loan by requiring the Defendant to pay the loan in instalments as opposed to the termly instalments agreed upon, and that the notice of default was issued when the 1st Defendant was not in default.

In their Counterclaim, the Counterclaimants/Defendants sued the Counter Respondent/Plaintiff for a declaration that the Counter Respondent's acts and omissions are fraudulent and amounts to breach of contract. The particulars of fraud pleaded are that the Counter Respondent altered its account without its knowledge, concealed information regarding the amounts paid by the 1st Plaintiff, misrepresented on non-payment of the loan and confiscated the Claimant's property without due process of the law.

In reply to the WSD and Counterclaim, the Plaintiff denied that allegation that the 1st Defendant has so far paid UGX 982,000,000/ and all amounts collected through fees collection and sale of securities is reflected in the statement; and they deny altering any information on the account. Instead, they aver that the total amount

DMB

paid is UGX 470,380,898/ and prayed that the suit be allowed in the terms in the plaint.

REPRESENTATION

During the hearing, the Plaintiff was represented by M/s Sebalu & Lule Advocates whereas the Defendants were first represented by M/s Kajeke & Magara Co. Advocates and later by M/s Opyene & Company Advocates.

JUDGMENT

I have carefully read the pleadings and listened to the testimonies of the witnesses in this matter as well as considered the submissions herein. During the scheduling conference, the following issues were raised for resolution by the Court:

1. **Whether the 1st Defendant is in breach of the loan facility agreement?**
2. **Whether the payment of UGX 401,043,543/ from the development partners is recoverable by the Plaintiff from the 1st Defendant in addition to the UGX 2,046,513,938/?**
3. **If so, whether the 1st Defendant is liable to pay the Plaintiff the sum of UGX 401,043,543/ to the benefit of the development partners?**
4. **Whether the Plaintiff fraudulently tampered with the 1st Defendant's account statement?**
5. **Whether the Defendant in counterclaim acted illegally in impounding and disposing off the Counterclaimant's properties?**
6. **Whether the Defendant in the Counterclaim illegally and fraudulently altered the terms of the loan?**

7. **Whether there are any remedies available to the parties?**

I will proceed to determine Issues 1 and 6 as well as Issues 2 and 3 together since they are all intertwined.

Issues 1 and 6

Whether the 1st Defendant is in breach of the loan facility agreement and whether the Plaintiff illegally and fraudulently altered the terms of the loan

Counsel for the Plaintiff submitted that the 1st Defendant breached Clause 6 of the facility agreement by failing to pay the loan within 60 days from the date of disbursement which was 23rd October 2014 when the final tranche was made; and that the facility should have been paid by October 2019 if the instalments had been paid as agreed. He added that even upon finding an auditor and agreeing to be bound by the findings, the auditor's report said the 1st Defendant was indebted to the Plaintiff to a tune of UGX 2,046,523,938/. That DW1 admitted to the default in payment during cross examination saying the last payment was made in August 2015 after making total remittances of UGX 622,822,816/.

In relation to the allegation of change of loan payment terms from termly without the consent of the 1st Defendant, Counsel for the Plaintiff submitted that the Plaintiff had to debit the account because the 1st Defendant was perpetually in default; and that they were allowed to transfer any sum to the credit of the 1st Defendant's facility under clause 10.2.2. He added that DW1 admitted that there was a default in crediting the account with the said UGX 600,000,000/ per term; and that it was a profound clause in the contract levying a 5% penalty for default.

On the amounts disbursed and repaid, Counsel submitted that PE 11 showed that the Plaintiff credited the 1st Defendant's account with UGX 990,000,000/ on 5th

June 2014, UGX 51,000,000/ on 23rd July 2014 and UGX 500,000,000/ on 23rd October 2014; and that on 30th October 2014, UGX 217,269,452/ was debited, out of which UGX 123,519,452/ was apportioned to interest and UGX 93,750,000/ was apportioned to the principal sum. When the next term was due, UGX 31,763,569/ was debited from the 1st Defendant's account, lower than the instalment obligation. That as a result, the Plaintiff had to keep collecting monies paid onto the 1st Defendant's operational account to shore up the default and that this explains what the Defendant refers to as a change of payment terms from termly. That the default made it impossible for the Plaintiff to debit the account in a termly manner as it had to keep debiting subsequent credits or deposits until the instalments were met. He concluded that the Defendants cannot be allowed to benefit from their own default. In addition, he said the Defendants have failed to show how the alleged change in payment terms affected their ability to honour its obligations despite selling off the school bus and the 2nd Defendant's property.

In relation to failure to provide payment schedules, Counsel submitted that it was never pleaded and that it should be expunged. However, he submitted that the Defendants were aware of the payment schedule because in PE 10, the 1st Defendant wrote a letter requesting for a restructure and DW1 conceded that he did not write demanding for a payment plan, instead they instructed their lawyers to write to Bank of Uganda about the purported tampering of the loan account.

Counsel for the Defendants did not file submissions, therefore, I have considered the Plaintiff's submissions and the evidence on record, and I find as follows.

In considering whether or not the 1st Defendant is in breach of contract, it is important to define what it means. It is defined by ***Black's Law Dictionary 5th Edition at page 171*** as *'where one party to a contract fails to carry out a term.'*

Similarly, the Court in ***Nakawa Trading Co. Ltd versus Coffee Marketing Board Civil Suit No. 137 of 1991*** defined a breach of a contract as:

'where one or both of the parties fails to fulfil the obligations imposed by the terms of a contract.'

It was explained further by the High Court in ***Stanbic Bank Uganda Limited Versus Haji Yahaya Sekalega T/A Sekalega Enterprises High Court Civil Suit No. 185 of 2009 at page 6*** where Court held:

"A breach of contract is the breaking of the obligation which a contract imposes which confers a right of action in damages to the injured party. It entitles him to treat the contract as discharged if the other party renounces the contract or makes performance impossible or substantially fails to perform his promise."

In the instant case, it is not in dispute that the Plaintiff granted the 1st Defendant a loan facility of UGX 2,000,000,000/ and that they signed an agreement PE 2 dated 16th May 2014. According to Clause 16 (iv) of the facility letter PE 1, the 1st Defendant was to deposit school fees proceeds of not less than UGX 600,000,000/ on the account per term and under clause 8 repayment was to be termly. As it stands, the 1st Defendant has not fully serviced the facility, hence this suit. However, they argue that the default is as result of change in the payment schedule by the Plaintiff.

I have looked at DE 1, the schools' calendar for 2016, and note that whereas it is not for 2014, it could guide this Court on determining the term periods because usually the variance is not big. Therefore, since the first two tranches of the money were disbursed on 5th June 2014 and 23rd July 2014 respectively, it can be rightly said that they were disbursed within Term 2 which according to the calendar was

from 6th June 2016 to 2nd September 2016. The last tranche was disbursed on 24th October 2014, in term 3.

Whereas, during cross examination, PW 1 said that the first instalment was due on 30th October 2014 and the second on 31st January 2015, and that the 1st Defendant was only able to pay UGX 217,000,000/ by 30th October 2014, I find that other than the loan statement on page 32 of PE 7 which is the BDO Auditor's report, the Plaintiff did not produce the loan schedule for the repayment of the loan. It would therefore be hard to confirm that the first instalment was due on 30th October 2014, a few days after the last tranche of the money was disbursed. Even if it were so, without a loan schedule it would be impossible to determine the amount which was due for the 1st instalment.

Whereas PW 1, in cross examination, states that the first two disbursements form one agreement, the two only amount to UGX 1,500,000,000/ and yet the loan agreement is for UGX 2,000,000,000/. Therefore, it can be said that the Plaintiff only fulfilled its obligation after disbursing the remaining balance on 24th October 2014.

According to clause 5 of PE 1, paragraph 1 of the Loan Agreement PE 2 and paragraph c of the Legal Mortgage PE 3, the Plaintiff agreed to lend to the 1st Defendant a loan of UGX 2,000,000,000/ and in the absence of any clause in the agreement that the money would be disbursed in instalments and that the first repayment instalment would be due after the first two tranches were disbursed, I find that the termly instalments became due after the Plaintiff had fulfilled its obligation of disbursing the entire UGX 2,000,000,000/. Therefore, if the Plaintiff fulfilled its obligation in October 2014, which was in the middle of third term, the

first instalment would be due either at the end of the Term 3 in December 2014 when school fees had been fully deposited or even Term 1 of the following year.

Subsequently, it is obvious that the Plaintiff altered the repayment schedule and the Auditor also came to the same conclusion in clause 4.3.6 of the Report (PE 7) at page 17 which is on page 57 of the Plaintiff's Trial Bundle where he noted:

"Based on the review of the loan amortisation schedules shared by the bank, we noted that there were four (4) loan repayment instalments to be made each year contrary to section 8 of the loan offer letter (EUG/CA/075/14) dated May 16, 2014 that states that the facility shall be repaid termly in accordance with the repayment schedule attached."

The ***Bank of Uganda Financial Consumer Protection Guidelines 2011*** which was referred to by the Defendant provides for notice of changes to terms and conditions in ***Guideline 8***. It states that:

"A financial services provider shall ensure that a customer is notified at least thirty days in advance before implementing any changes to terms and conditions, fees, or charges, discontinuation of services or relocation of premises of the financial services provider."

It is therefore clear that the payment schedule was changed without proper notification to the 1st Defendant because PW 1, in cross examination, stated that the Head Credit had verbally informed the 1st Defendant but there is no proof of the same as the said person did not appear to give such evidence. It is trite law that parties are bound by the terms of their contract and a Court of Law cannot rewrite a contract between the parties (See ***National Bank of Kenya V Pipe Plastic Sankolit (k) Ltd & Another [2001***]).

Whereas PW 1 argues that the system only has quarterly, monthly and one-off payment, the loan agreement between the parties indicated it is termly and clause 16 (iv) of PE 1 on deposit of school fees proceeds on the account per term leaves no doubt that the repayment should have been termly as opposed to quarterly. In addition, there is no evidence that the loan amortisation schedules on page 72 of the PTB were agreed upon by the parties or even shared with the 1st Defendant, therefore, being that it even departs from the termly agreement, it cannot be relied on to determine default on repayment.

However, all the above notwithstanding and as Counsel for the Plaintiff put it, the 1st Defendant has not produced any evidence to show that the change in schedule affected their repayment of the loan. Under ***Section 33 (1) of the Contracts Act 2010***, parties to a contract should perform their respective promises unless the performance is dispensed with or excused under this Act or any other law like discharge by frustration and under ***Section 66 of the Contracts Act No. 7 of 2010*** if the breach is a fundamental one which goes to the root of the contract.

In this case, whereas I find that Plaintiff changed the payment period from termly to quarterly, there is no evidence that it affected the 1st Defendant's ability to repay the loan. During cross examination of DW1 and from the reference to Appendix 3b of PE 9 on page 67 of the PTB, it is clear that at no point did the 1st Defendant fulfil their obligation under clause 16 (iv) of PE 1 that required them to deposit school fees deposits of UGX 600,000,000/ per term. They not only failed to deposit that but also deposit to have a bare minimum of UGX 133,000,000/ being only the principal sum that should have been paid per term if the UGX 2,000,000,000/ is divided by the 15 school terms in the period of 60 months when the loan should have been repaid. DW1 also admitted that the only big instalments

made were from the loan disbursements of the third tranche and from the sale of the motor vehicle.

In the premises and from the foregoing, the first issue is answered in the affirmative.

Issues 2 and 3

As to **whether the payment of UGX 401,043,543/ from the development partners is recoverable by the Plaintiff from the 1st Defendant in addition to the UGX 2,046,513,938 and whether the 1st Defendant is liable to pay the said sum to the Plaintiff to the benefit of the development partners**, Counsel for the Plaintiff submitted that the Auditor was barred from wading into legal issues therefore he did not resolve this issue except that under paragraph 4.3.4, they found that the guarantors had paid UGX 401,043,543 which Counsel submitted was a manifest error as the 1st Defendant's account statement (PE 11) shows that the total amount credited on the account was UGX 470,380,898/. Further, that Article V Section 5.01 of the SIDA/USAID Guarantee agreement (PE 9) obligates the Plaintiff to recover the amounts from the Defendants who benefited from the guarantee. That the said sum was used to reduce the 1st Defendant's outstanding arrears as it was listed as security under Clause 11 (iv) of PE 1. Counsel concluded by praying that Court makes an order for refund of the said monies with interest at commercial rates from the date of application.

I have looked at the evidence on record and the Plaintiff's submissions and find that the Guarantee in issue was listed among the securities for the loan under Clause 11 (iv) of PE 1. It follows, therefore, that PE 9, the Guarantee Agreement was signed amongst The Swedish International Development Cooperation Agency (SIDA), The United States Agency for International Development (USAID) and

the Plaintiff. Looking at page 15 of PE 7 on pages 55 and 56 of the PTB, the Auditor agreed with the Plaintiff's evaluation to find that the amount paid by the guarantors were UGS 159,689,764 and UGX 241,353,779 from USAID and SIDA respectively. On the contrary, looking at PE 11, the 1st Defendant's bank statement, I find that the guarantors deposited UGX 227,384,818 on 24th February 2017, and UGX 242,996,080 on 24th March 2017 which makes a total of UGX 470,380,898/ as opposed to the UGX 401,043,543/ found by the Auditor. In his submissions, Counsel for the Plaintiff concedes and said it was an error. Therefore, it is now for this Court to determine whether or not the said sum is recoverable by the Plaintiff of for the benefit of the guarantors.

Section 68 of the Contracts Act No. 7 of 2010 defines a contract of guarantee as:

'a contract to perform a promise or to discharge the liability of a third party in case of default of that third party, which may be oral or written.'

The nature of a contract of guarantee was explained by Justice Madrama in ***Barclays Bank of Uganda Ltd V Jing Hong and Guo Dong HCCS No. 35 of 2009*** where he cited the case of ***Paul Kasagga and Another v Barclays Bank (u) Ltd (HCT-00-CC-MA- 0113-2008)*** where it was held that:

"A guarantee is a contract whereby a person contracts with another to pay a debt of a third party who notwithstanding remains primarily liable for such payment...A guarantee obligation is secondary and accessory to the obligation the performance of which is guaranteed. The guarantor undertakes that the principal debtor will perform his obligation to the creditor and that the guarantor will be liable to the creditor if the principal debtor does not perform."

According to ***Alice Norah Mukasa V Centenary Bank Limited and Bonny Nuwagaba Civil Suit No. 77 of 2010:***

"The purpose of a guarantor to a loan is to render assurance to the lender that in the event the borrower dies or fails to pay back the loan sums, the guarantor would pay the money. This is why the mortgage agreement makes the borrower and the guarantor jointly and severally liable."

In the instant case, it is clear that even upon the sale of some of the securities of the loan, the 1st Defendant failed to pay back the entire loan, so the guarantors paid the UGX 470,380,898/ which now the Plaintiff seeks to recover from the 1st Defendant for the benefit of the guarantors.

Section 81 of the Contracts Act 2010 provides for the rights of guarantor on payment or performance and more specifically, that the guarantor is '*invested with all the rights which the creditor had against the principal debtor.*' According to Section 82 of the same Act, the guarantor is entitled to part of the very security at the time the contract of guarantorship is made, and he is also entitled to indemnity under ***Section 85 of the Act***; which provides:

"(1) In every contract of guarantee, there is an implied promise by a principal debtor to indemnify a guarantor.

(2) A guarantor is entitled to recover from a principal debtor any sum the guarantor rightfully paid under the guarantee on the contract."

In this case, under ***Article V Section 5.01 of PE 9 at page 94 of the PTB***, the guaranteed party which is the Plaintiff in this case, is enjoined to continue pursuing all reasonable collection efforts against the defaulting borrower after making a claim under the Agreement. This suit therefore is one such endeavour to recover

the outstanding amounts. Further, ***Section 5.02*** provides for reimbursement of the guarantors and states:

"If the guarantors have paid a claim with respect to a qualifying loan, and the guaranteed party, following the submission of a claim, receives or recovers any funds relating to or in satisfaction of amounts owed by the defaulting borrower under the qualifying loan, whether received or recovered directly from the borrower, another guarantor, a collateral agent or any other party, (any such funds, hereinafter defined as 'recovered funds') the guaranteed party shall promptly reimburse USAID and SIDA on a pro rata basis...."

In this instant case, as evidenced by PE 11, the Plaintiff being the guaranteed party here received UGX 470,380,898/ therefore, they are obligated under section 5.02 above to promptly reimburse the guarantors when they receive any amount in satisfaction of the amounts owed by the 1st Defendant. Therefore, pursuant to the guarantor's right to recover any sums paid under Section 85 (2) of the Contracts Act 2010, and in line with Section 5.02 of the PE 9, I find that the UGX 470,380,898/ is recoverable from the Plaintiff for the benefit of the guarantors in addition to the money owed by the 1st Defendant to the Plaintiff.

In other words, the 1st Defendant is liable to pay the Plaintiff the sum of UGX 470,380,898/ to the benefit of the development partners.

Issue 4

Whether the Plaintiff fraudulently tampered with the 1st Defendant's account statement

As to whether the Plaintiff fraudulently tampered with the 1st Defendant's account statement, Counsel for the Plaintiff submitted that the Defendants did not dispute

the level of indebtedness being UGX 2,046,513,938/ at the time of writing off, and also used the same bank statements they claim are fraudulent; without adducing evidence to support the fraud. That in the premises, Court should make a finding in the negative and enter judgment for the Plaintiff for the sum found by the auditor UGX 2,046,513,938/.

I have properly looked at the evidence on record and considered the Plaintiff's submissions. Fraud is defined by Court in the case of ***Frederick Zaabwe V Orient Bank & Others SCCA No. 4 of 2006*** to mean:

"The intentional perversion of the truth by a person for the purpose of inducing another in reliance upon it to part with some vulnerable thing belonging to him or her or to surrender a legal right. It is false representation of a matter of fact whether by words or by conduct, by false or misleading allegations or concealment of that which deceives and it is intended to deceive another so that he or she shall act upon it to his or her legal injury."

It is trite law that fraud must be strictly proved, and that the burden is heavier than on a balance of probabilities as is generally in civil matters (See ***Kampala Bottlers Ltd V Domanico (U) Ltd SCCA No. 22 of 1992***). In light of the two above cases, there is no evidence of intentional tampering with the bank statements as to divert truth as a simple comparison of PE 11 and DE 3 show the same entries except that DE 3 started from 21st April 2015 up to 25th May 2015 whereas PE 11 is from 26th May 2014 to 31st March 2017. The audit report mentions that both parties submitted bank statements and no mention of any discrepancies is made.

This issue is accordingly settled in the negative.

Issue 5

Whether the Defendant in counterclaim acted illegally in impounding and disposing off the Counterclaimant's properties

As to whether the Plaintiff illegally disposed of the Defendant's properties, Counsel submitted that DW 1 conceded to writing instructions to the bailiffs to sell the 1st Defendant's bus as well as his private vehicle. Further, that since he wrote in his capacity as Managing Director and shareholder, he is the mind of the company and is estopped from claiming that he did not have instructions to do so.

I have considered the evidence on record and submissions and find as follows. DW 1 in paragraph 20 mentioned that the Plaintiff impounded the school bus Isuzu Registration No. UAS 451 B and his personal vehicle Toyota Prado Land Cruiser Registration No. UAX 213 V; and that it was done without any legal process and he only consented to releasing the two vehicle because he was under a lot of pressure.

Whereas it is true that the said bus and motor vehicle were not part of the securities charged under clause 7 of PE 2, the 2nd Defendant wrote in a letter dated 7th July 2015 on page 117 of the PTB requesting FIT Auctioneers to dispose of the bus and deposit the proceeds on their account held with the Plaintiff. It is also true that DW1 executed a personal guarantee (PE 4) on page 21 of the PTB in favour of the Plaintiff. Looking at the demand notices on Tab 13 of the DTB, by August 2015 when DW 1 wrote the said letter, the 1st Defendant was already defaulting on repaying the loan. Therefore, being a guarantor, it is likely that he sold his personal vehicle to help reduce the level of indebtedness.

In addition to claiming that he was under pressure to write the said letter, DW 1 said that he wrote the letter in his personal capacity and not as Director on behalf

of the 1st Defendant, and also that he did not have the authorisation to do so. I find that since the two motor vehicles were not legally charged securities and so were not registered as such, in the absence of evidence to prove any coercion, the letter written by DW 1 together with other letters handing over the vehicle is proof that the motor vehicles were sold with the consent of the 2nd Defendant.

This Issue is answered in the negative.

Issue 7

Whether there are any remedies available to the parties

Counsel for the Plaintiff prayed for recovery of UGX 2,046,513,938/ and UGX 470,380,898/ and submitted that being that they are special damages, it ought to be awarded with interest at commercial rate. He cited the case of ***Shell Uganda Ltd V Captain Naeem Shair Chaudry Civil Appeal No. 32 of 2010*** to support his argument that interest on special damages begins to run from the date of filing the suit until payment in full. He also prayed for costs of the suit.

Since the 1st Defendant was found to be in default of repaying the loan, the only remedy is an order for payment. ***S.61 (1) Contracts Act*** provides:

"a party who suffers breach of contract is entitled to compensation for the loss".

Further, the Court in ***Barclays Bank of Uganda Ltd v Bakojja Civil Suit 53 of 2011*** held that:

"the only compensation for non-payment of debt is payment of debt."

In light of the above decisions, judgment in the suit is entered in favour of the Plaintiff and the Counterclaim is dismissed with the following orders:

1. **The Defendants are hereby ordered to pay the Plaintiff the sum of UGX 2,046,513,938/ being the total outstanding sum.**

2. **Interest on (1) above at a rate of 23% per annum as agreed by the parties from the date of filing the suit till payment in full**

3. **The Defendants are ordered to pay UGX 470,380,898/ for the benefit of USAID and SIDA.**

4. **Costs of the suit and the Counterclaim are awarded to the Plaintiff.**

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HON. LADY JUSTICE ANNA B. MUGENYI

DATED.....15/9/23.....