

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION

CIVIL SUIT NO. 750 OF 2013

IMPERIAL BANK (U) LTD:..... PLAINTIFF

VERSUS

KAIKA INVESTCO LTD & 2 OTHERS:..... DEFENDANT

BEFORE THE HON. MR. JUSTICE HENRY PETER ADONYO:

JUDGMENT:

1. Brief facts:

The Plaintiff sued the Defendants for outstanding monies owing to it amounting to United States Dollars Eighty Two Thousand, Twelve and Forty Five cents (US\$82,012,45) arising out a loan facility it had extended to the First Defendant together with interest, general damages for breach of contract and costs of the suit.

The other two Defendants were sued jointly with the First Defendant being

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shareholders of the First Defendant and having given personal guarantees for the loan secured by the First Defendant.

The brief facts surrounding this suit is that the Plaintiff extended a loan facility to the First Defendant on the 26th day of March 2012 with the Second and Third Defendants guaranteeing the repayment of the same. The First Defendant defaulted in its obligations and when the Plaintiff proceeded to try realizing the physical securities which had been pledged as securities to the loan the Plaintiff discovered that it could not do so for the First Defendant had concealed them. The Plaintiff is aggrieved by the actions of the Defendants and seeks redress from this Honourable Court.

This matter proceeded exparte for proof upon the fact that Defendants kept house and could not be traced even after the resolute efforts of the Plaintiff to have them served through normal process and also through substituted service.

2. Issues:

- a) Whether there is a valid contract between the Plaintiff and the First Defendant.

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- b) Whether the First Defendant breached the contract.
- c) Whether the Second and Third Defendants are liable for the breach of contract.
- d) Remedies are available to the Plaintiff.

3. Witnesses:

At the trial of this suit when it was set for formal proof, the Plaintiff adduced the evidence of two witness, to wit;-

- a) Mr. Tirunilayi Vaidyanathan, The Plaintiff's Head of Credit (PW1).
- b) Ms. Leilah Nalule, The Plaintiff's Legal Manager (PW2).

4. Exhibits:

Also at the trial, the below listed documents were exhibited by the Plaintiff;

- The Loan Offer Letter dated 26th March, 2012. (Exhibit P1).
- A Customer Statement of Account and Customer Portfolio as at November, 2013. (Exhibit P2).
- Log Books for UAQ 468C and UAQ 820Z. (Exhibit P3).
- Discharge and Subrogation Voucher dated 25th October, 2013. (Exhibit P4)
- Demand Notices dated 4th May, 2013. (Exhibit. P5)
- Letter of Instruction to Bailiffs dated 25th July, 2014.(Exhibit P6).

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5. Law Applicable:

1. The Contracts Act, No. 7 of 2012 of the Laws of Uganda.
2. The Civil Procedure Act, Cap 26 of the Laws of Uganda.
3. The Civil Procedure Rules, Statutory Instrument Number 71-1.
4. Case Law: May Amono v Kiberu Peter Civil Suit No. 338/204.

5. Valid Contract:

The instant suit arises from the fact that the Plaintiff is aggrieved that having granted a loan to the First Defendant, the First Defendant breached the repayment of the loan which resulted from a fully executed loan contract. The plaintiff relies on **Section 10 of the Contracts Act 2010** which defines a contract as an agreement entered into by consent of parties freely who have the capacity to contract for a lawful consideration and with a lawful object with the intention to be legally binding each other. Thus to prove this position, the Plaintiff states through paragraphs 6 and 7 of the witness statement, Mr. Tirunilayi Vaidyanathan (PW1) who is stated to be the head of credit in the Plaintiff bank that on or about the 26th day of March, 2012, the Plaintiff extended a loan facility of United States Dollars Ninety Thousand Only (USD 90,000) at an interest rate of 11% per annum to the First Defendant with the loan to be repaid in Fourty eight (48) equal consecutive installments within a period of Fourty eight (48) months effective One (1) month

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from the date of the Defendants would make a draw down to the loan facility. This offer is evidenced by an offer letter from the Plaintiff to the 1st Defendant (Exhibit P1). The Plaintiff avers that after the aforesaid offer letter was sent to the First Defendant, the Second and Third Defendants signed the offer letter signifying acceptance of the offer terms contained in the letter as officials of the First Defendant. Upon on this action being undertaken by the two officials of the First Defendant, the amount stated in the loan offer letter was disbursed and the First defendant made use of the disbursed funds which it withdrew as seen from the Customer Statement of Account and Customer Portfolio as of November, 2013 which is Exhibit P2. Thereafter, the First Defendant was required, in compliance with the terms of the loan agreement, to reimburse the Plaintiff in forty equal monthly instalments the drawn down amount with an interest at the rate of 11% per annum. The First defendant faltered in total breach of the agreement in contravention of **Section 33 (1) Contracts Act** which provides that the parties to a contract shall perform or offer to perform, their respective promises, unless the performance is dispensed with or executed under this Act or any other law.

The Plaintiff states that by virtue of the provision of the loan agreement, each of the parties the loan transaction was obliged to perform their obligations as stipulated in the offer letter with the Plaintiff having on its part having disbursed

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the loan amount but the First defendant failed to honour its part of the bargain. This is as stated by PW1 in paragraph 6 of his witness statement where he states that the Plaintiff extended a loan facility of United States Dollars Ninety Thousand Only (US\$ 90,000 through the offer letter Exhibit P.2 and the customer's statement of account and the customer's portfolio (Exhibit P2) all go on to show that the First Defendant signed for and received in its account the stated amount with the First Defendant proceeding to renege on its obligations under the contract as seen from this witness testimony in paragraph 8 of his witness statement. Paragraphs 10 to 16 of this witness statement show the purpose for which the loan was acquired, to wit, the purchase of one unit of Mercedes Benz Tractor and one brand new two axle drop side multi-purpose trailer which were eventually acquired and registered as UAQ 820z and UAQ 468C, respectively with the defendants having acquired the same using funds credited to the account of the First Defendant. This witness goes on to state that one of the conditions in the loan agreement was that the vehicle to be procured were to be comprehensively insured and that sometime in February 2013 the vehicle registration number UAQ 468 C got involved in an accident and subsequently the insurers compensated the Defendants with the sum of Uganda Shillings Sixty Seven Million, Five Hundred Ninety two Thousand Shillings Only (Ug. Shs 67,592,000) which was credited to the account of the First Defendant but the **6: Judgment in the favour of the plaintiff bank resulting from non repayment of a loan had and utilized by defendants jointly and severally who failed to repay in accordance with the loan contract agreement: per Hon. Justice Henry Peter Adonyo: March 2015.**

Second and Third Defendants quickly withdrew Twenty Six Million Shillings (Ug. Shs. 26,000,000) without the Plaintiff's consent yet according to Clause 11(d) of the Loan Agreement since loan repayments disbursements were overdue, the Plaintiff had the right to set off from First Defendant accounts the amount due in terms of delayed repayments in addition to the Plaintiff having a right to redeem the securities and thus accordingly the amount paid by the insurers were to be used in paying back the loan which was not to be for the Defendants having utilized the loan facility to buy equipments failed to repay the monthly installments and when the insurers repaid them for loss of equipment instead of meeting their obligations on overdue loan repayments decided to withdraw even the amount put on their account by the insurers. Paragraph 7 of the witness statement of Ms. Leilah Nalule (PW2) confirms this position.

A close look at Exhibit P2 shows that the First Defendant failed to remit the consecutive monthly installments in regards to both principal and interest as required by the loan agreement yet the said document show that the defendants utilized the loan to purchase the vehicles in question and when one of the got involved in an accident proceeded to withdraw the insurance compensation in total disregard of the fact the loan repayment was overdue. This is proof enough that the Defendants were in breach of the clear terms of the contract.

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In paragraph 16 of PW1's statement, this witness further deposes that when they instructed auctioneers to realize the remaining security, the same could not be found on the road and inspite various notices to the defendants refused to pay the outstanding amounts. Indeed Exhibit P1 clause 11 indicate the securities to be realized which were One Unit of Mercedes Benz tractor and one brand new two axle drop side multi- purpose trailer Registration Number UAQ 468C and tractor head UAQ 820z. It was the trailer which got involved in an accident and for which insurance was recovered but the defendants without notice to the plaintiff withdrew the money paid by insurance in compensation. The same defendants also hid tractor thus denying the Plaintiff the opportunity not only to realise the securities but utilizing the repaid insurance compensation to meet the overdue loan repayments. The fact that that the creditor could not realize the security from the debtor in the process of clearing the debtor's obligation is a clear frustration of the contract and thus is indeed a breach of the loan agreement. I would therefore find that whereas a contract did exist between the two parties, there was breach when the repayment schedule was not met resulting in the breach of the contract and I would accordingly find so.

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As regards the Second and Third Defendant's being liable for the breach of the contract, it should be recalled that they signed the loan agreement as guarantors of the contract.

Section 68 of the Contracts Act gives the definition of a **contract of guarantee** as being a contract to perform a promise or discharge the liability of a third party in case of default of that third party and the undertaking may be oral or written.

Further **Section 71 of the Contracts Act** extends the liability of a guarantor to such extent to which a principal debtor is liable unless otherwise limited by the contract itself.

Relating the above provisions of the law to the instant matter and taking note of paragraph 4 of the witness statement of PW2, it is evidentially clear that the Second and the Third Defendants are directors in the First Defendant's company and that they are sued in their personal capacity as guarantors of the loan advanced to the First Defendant. Indeed on Exhibit P1 the Second and Third Defendants appended their signatures as guarantors of the loan contract and since the First Defendant Company breached the loan agreement, the Second and Third Defendants by their signatures invariably agreed to discharge the liability of the First Defendant and are thus liable to the Plaintiff for the debt of the First

Defendant for there is no exclusion clause in the contract which limited their
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liabilities and obligations and thus they would be held liable jointly and severally with the First Defendant to the extent of the whole loan agreement. Thus from my finding above, I would find that the plaintiff has proved its case against the defendants jointly and severally for there has been adduced ample evidence to show that while the First Defendant obtained a loan from the Plaintiff, the Second and Third Defendants guaranteed without limit, the repayment of the loan which the First Defendant has clearly failed to repay and thus would accordingly be jointly and severally liable for the amount due as claimed by the Plaintiff.

6. Remedies available to the plaintiff

a. Special damages:

In the pleadings in this matter, the Plaintiff prays for judgment against the Defendants both jointly and severally of United States Dollars Eighty Two Thousand Forty Five Cents Only (US\$ 82,012.45) being the outstanding balance on the loan facility which was extended to the First Defendant in November 2013 which is due for the First Defendant has clearly defaulted on the loan payment in spite of the fact that it received and utilized the money. Under **Section 64 of Contracts Act** it is provided that a party to a contract reserves the right to sue for specific performance of a contract for where one party to a contract is in breach of the contract the other party may obtain an order of court requiring that party in

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breach of the contract to specifically perform his or her promise under the contract. From the evidence received by this court, it has clearly been shown that since the loan contract was entered into, the monthly repayments have not been met together with its interests and even the securities which was pledge against it cannot be realize for they have either been hidden or for the one which had got involved in an accident , the proceeds arising from insurance compensation was utilized by the defendants and so the Plaintiff is left with no option but to come to court to utilize the provisions of the law above.

My take in this matter is that the Defendants have not been sincere with the Plaintiff and thus ought to be compelled to meet their part of the obligations arising from the contract for a loan which was offered to the First defendant which is owned by the Second and the Third Defendants who verily profited from the loan proceeds which was deposited into an account which they operated in the names of the First Defendant. Thus since there is an outstanding amount due under the said contract , it would be in the interest of the justice of the matter that the defendants be compelled to meet the repayment of the same since they through the First defendant entered freely a binding contract . For that matter I do find the defendants severally and jointly liable to repay the outstanding loan amount and

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thus order them to pay the amount of United States Eighty Two Thousand Dollars Forty Five Cents (US\$ 82,012.45) which has been specifically proved.

b. General damages for breach of contract:

Arising from my finding above, it is true that the Defendants failed to honor their obligations and have since frustrated the Plaintiff's efforts in recovering not only the amount due but even the securities pledged in guarantee of the loan they freely obtained for in paragraph 8(b) of her witness statement PW2 confirms that the Plaintiff bank has been put to immense suffering since they used customers funds to give a loan to the First Defendant which loan has not been serviced for such a long time placing the Plaintiff under the pressure from Bank of Uganda which regulates banking in Uganda as well as the Plaintiff's Board of Directors and shareholders to recover the money thus leaving the Plaintiff in a precarious position which led the Plaintiff to try all means available to it including the hiring bailiffs and lawyers to try to recover what is lawfully due to it thus making it incur further costs. The Plaintiff thus prayed that the court should consider granting it general damages for the inconvenience it was put to by the Defendants in this whole process.

Section 61(1) Contracts Act provides that where there is a breach of contract the party who suffers the breach is entitled to receive from the party who breaches the *12: Judgment in the favour of the plaintiff bank resulting from non repayment of a loan had and utilized by defendants jointly and severally who failed to repay in accordance with the loan contract agreement: per Hon. Justice Henry Peter Adonyo: March 2015.*

contract compensation for any loss or damage caused to him or her. General damages are in law presumed to be the direct natural or probable consequence of the act complained of. They are anticipated future loss as well as damages for pain and suffering and loss of amenity. This was the position held by this court in a recent decision by Justice Henry Peter Adonyo in the case of **May Amono v Kiberu Peter Civil Suit No. 338 of 2014** where found that the defendant caused pain and suffering to the plaintiff and he similarly held that the defendant was liable to pay the plaintiff general damages. Arising from that decision and considering that the situation herein is at fours to that in **May Amono's** case above, I find that a case for the grant of general damages has been made by the Plaintiff in the instant case for the Plaintiff herein duly disbursed the loan amounts in accordance with the loan agreement contract and the Defendants not only received it but utilized it but failed to repay the same when required thus causing the Plaintiff tremendous inconvenience by which it had to not only utilize services of bailiffs and lawyers to try to recover what is lawfully due to it but had to resort to this court process to do recover its due. I note that the Defendants stealthily withdrew insurance refund money from the First Defendant's accounts and even hid the remaining security which could be used by the Plaintiff to realised the loan clearly actions calculated to bring pain, suffering and loss of amenity to the plaintiff. The Plaintiff is indeed a bank of repute legally doing business in Uganda

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it has a right to sustain its business within the Ugandan economy. It therefore has the expectation that while it offers lawful services to its customers such as the Defendants, the customers deemed to be honest and would after securing facilities from the bank meet their obligations for the plaintiff as a banking institution is a custodian of other of its customer's funds which it utilizes to earn an honest living. In the circumstances, I would find that the Defendants failed in their obligations and thus must be made to compensate the plaintiff bank for its suffering which I accordingly put at the tune of Uganda Shillings Thirty Million Only (Ug.Shs.30 million/=).

c. Interests:

It is now trite that the court normally grants interest to a Plaintiff who the successful party in court proceedings. But such interests are either granted upon prayers or upon the court deeming that for the time a plaintiff has been denied the use of his or her money, it lost business from which it could have made a profit. In the instant matter, the Plaintiff through paragraph 8(c) of PW2's witness statement pray for a grant of 11% interest on both the special and general damages per annum from the date of filing this suit and judgment respectively till payment in full. Considering that indeed the Plaintiff has shown the reasons why it should be granted interest in this matter. I would therefore grant the prayer on both the

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special damages and general at the same rate of 11% interest per annum from the date of filing the suit till payment in full and from the date of this judgment till payment in respectively.

d. Costs of the suit;

Section 27 of the Civil Procedure Act provides that costs of a suit should follow the event. It is not in dispute that as a result of the actions of the Defendants, the Plaintiff had to resort to legal process including its coming to this Honourable Court which normally includes incurring added costs. They Plaintiff certainly being the successful party here deserves to be awarded the costs of these proceedings which I do award accordingly.

7. Orders:

In the premises, I find that all the issues framed in this matter have been answered in the affirmative the favour of the Plaintiff and I thus therefore grant the following remedies to the Plaintiff as the Defendants jointly and severally as follows;

- a. Special damages of United States Eighty Two Thousand Dollars, Forty Five Cents Only (US\$ 82,012.45).

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- b. I award the Plaintiff general damages as against the Defendants jointly and severally to the tune of Uganda Shillings Thirty Million Only (Ug . Shs. 30 million).
- c. I award the Plaintiff interests on the special damages and general at the same rate of 11% interest per annum from the date of filing this suit till payment in full and from the date of this judgment till payment, respectively.
- d. I award the Plaintiff the reasonable costs incurred in prosecuting this suit.

I do make these orders at the High Court of Uganda Commercial Division holden at Kampala this 13th day of March, 2015.

Henry Peter Adonyo

Judge

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