THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT - 00 - CC - CS - 1 - 2007

NOEL NUWE KYAPAKA :: PLAINTIFF

VERSUS

PHILIP RONALD BAGUMA :: 1ST DEFENDANT

PETER MUKIIZA :: 2ND DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

J U D G M E N T:

The plaintiff brought this suit by way of originating summons under order 37 rule 4 of the Civil Procedure Rules for the determination of the following issues:-

i) That the first Defendant mortgaged his property being two pieces of land comprised in Kyadondo Block 244, Plot 7376 and Kyadondo Block 244, Plot 7374 at Muyenga respectively as security for a loan of Ushs.30,000,000/= (thirty million shillings only) advanced to him by the Plaintiff.

ii) That the Plaintiff is entitled to sell/foreclose the said properties to realize the sum owed to him together with all the costs so far incurred.

iii) Whether the Plaintiff is entitled to costs and expenses of this suit.

The facts to this case are not altogether coherent. However, it is the case for the Plaintiff that on the 17th November 2006 the first Defendant approached the second Defendant the proprietor of M/S Quantum Capital financiers for an urgent loan of Ushs.30,000,000/=. Not having the money at hand the 2nd Defendant then called in the Plaintiff who reluctantly accepted to provide the first Defendant with the necessary funds. The first Defendant was asked to provide security for the lending and he did so by providing 2 land titles namely; Plots 7374 and 7376, Block 244 Kyadondo Muyenga. The first Defendant is also alleged to have issued the Plaintiff with a cheque dated 17th November 2006 as further security.

It is alleged that the purpose of the money was to immediately purchase borehole bearings which were to sold to a buyer from Southern Sudan that very day. The transaction was an immediate

one and the money borrowed would be paid back within one day. The Plaintiff provided the money and the bearings were bought. However, the buyer from Southern Sudan did not show up and so the deal fell through. The Plaintiff seeks to recover this Ushs.30,000,000/= because he claims that when he banked the cheque given to him it was returned unpaid.

The first Defendant has another twist to the story and alleges that where he got the money from the Plaintiff, the second Defendant immediately offered to become his partner in borehole deal for the sum of Ushs.10,000,000/=. It is for this reason that the second Defendant was added as a party to the suit. The first Defendant further alleges that the second Defendant returned to him the said titles and escorted him while he went about the transaction. The Defendant alleges that it was only later in the day that the second Defendant changed his mind and requested to take possession a fresh of the two titles. As to the cheque the first Defendant says; he was coerced to sign it when the deal fell through and he only did so because he feared the Plaintiff who he referred to as an *"army man"*. He also denies that the said cheque was ever banked as his bankers have no record of the alleged banking.

At the pre trial scheduling the first Defendant agreed to refund Ushs.15,000,000/= to the Plaintiff but maintained that the balance of Ushs.15,000,000/= should be paid by the second Defendant who had become an equal partner in the transaction. Judgment on admission was then entered for the Ushs.15,000,000/= against the first Defendant and the question of the balance made the issue for trial. Two issues were framed for trial namely;

1- Whether there was a partnership between the first and second Defendant and if so which Defendant is liable to pay the Ushs.15,000,000/=

2- What remedies are available to the Plaintiff

Mr. Ecimu appeared for the Plaintiff, Mr. Mbabazi appeared for the first Defendant and Mr. David Mpanga appeared for the second Defendant.

Issue No. 1: <u>Whether there was a partnership between the first and second Defendant and if so which Defendant is liable to pay the Ushs.15,000,000/=</u>.

Counsel for the second Defendant submitted that Section 2(1) of The Partnership Act (Cap 114) defines a partnership as a relationship

that subsists between persons carrying on business with a view to making a profit. Such a partnership can be express or by conduct.

Counsel for the second Defendant submitted that the first Defendant had not even known the second Defendant until that day of the transaction. They were total strangers and did not even have an express agreement to become partners. Counsel submitted that this alleged partnership was just a ploy by the first Defendant to avoid total liability. Counsel for the second Defendant wondered why the first Defendant signed a personal cheque of Ushs.30,000,000/= when he was alleged to be in partnership with the second Defendant on a 50/50 basis. He submitted that if that was the case the first Defendant should have only signed a cheque for 50% of the amount i.e. Ushs.15,000,000/=. Counsel submitted that the first Defendant's evidence was contradictory and should therefore be handled with caution. Counsel for the Plaintiff agrees largely with the submissions of Counsel for the second Defendant.

Counsel for the first Defendant submitted that the partnership existed but that the second Defendant wanted to pull out because instead of making a profit, the partners made a loss. He submitted that the loss should also be shared, between the partners.

I have considered these arguments and perused the pleadings and affidavits in this matter. As earlier pointed out, the facts of these case are not altogether coherent.

Perhaps this is as a result of the apparent urgency with which the transaction was structured. It appears to me that the business deal put together by the first Defendant created some excitement among all the parties because there was quick money to be made in it. unfortunately, the business deal also collapsed with equivalent speed. In all of this it is very easy to loose track of the primary facts and what the basic transaction was. This was the desire by the first Defendant to secure funding to enable him carry out his business transaction. At paragraph 3 of his affidavit dated 6th February, 2007 he depones

> *"...That having received a deal/request to supply borehole bearings to one Mackathy of Southern Sudan, I in the company of one Micheal Ebatit on the 17th November, 2006 proceeded to quantum capital financiers to see one Peter Mukiiza (the second Defendant...added) for the purposes of soliciting financial assistance to enable me carry out the said business transaction..."*

He further depones at paragraph 4

> *"... That in return for the financial assistance, Peter Mukiiza requested that I give him security for the monies upon which I gave him my land titles for the land comprised in Kyadondo Block 244, Plot 7376 at Muyenga and Kyadondo Block 244, Plot 7376 at Muyenga..."* Eventually it was the Plaintiff (who is known to the second Defendant) who put up the money.

To my mind this is where all the evidence adduced in court by the parties converge, the rest is contentious. Clearly the Defendant's intention was only to get a loan to enable him do his business, which business had a tight turn around period of one day. The Plaintiff deponed at paragraph 7 that the second Defendant

> *"...for a consideration of Ushs.10,000,000/= asked to be a partner... to which I agree...".*

There after the first Defendant, second Defendant and Plaintiff all tugged along together. Is this then evidence of a partnership? I do not think so. The consideration of Ushs.10,000,000/= is as vague as it is perplexing. Counsel for the Plaintiff submits that since the loan

of Ushs.30,000,000/= attracted no interest then the consideration of Ushs.10,000,000/=

> *"…was voluntarily offered by the first Defendant as appreciation for helping him by lending him money on such short notice…"*

With the greatest of respect, this line of argument is untenable. Why would the Plaintiff give an interest free loan to a total stranger? This defies all objective reasoning. It would appear to me that this consideration for the loan, was a form of disguised interest being the cost of the loan to the first Defendant. The reason why the Plaintiff and second Defendant tugged along with the first Defendant is more likely to be because the deal had a quick turn around time and so they would therefore get immediate access to their *"consideration"* if they stayed with the first Defendant. I agree with the authority supplied to court by Counsel for the second Defendant

> **Keith Spier Ltd V Mansell** [1970] 1 W.L.R 333 at 335 (per Harman L.J)

that whether there exists a partnership is one of mixed law and fact, requiring an inference to be drawn from the primary facts found by the trial Judge. The primary facts in this case do not draw an

inference of a partnership but rather a loan. I therefore find that there was no partnership between the first and second Defendant.

The second leg of the issue is which Defendant is liable to pay the outstanding Ushs.15,000,000/=

I have already found from the primary facts of this case that the first Defendant actually took a loan and thus borrowed money. In the case of

> **Klaus Kempt V Yobe Okello** HCCS No. 973 of 2004 (unreported).

I held that if it is proved that a person has borrowed money from another then prima facie there is a legal obligation that it should be repaid. In this case the Defendant borrowed Ushs.30,000,000/= for his own business use. He has agreed to pay back the half of it Ushs.15,000,000/=. I find that he bound to pay the balance of Ushs.15,000,000/=. That completes the first issue.

Issue No. 2: Remedies.

Counsel for the first Defendant submitted that if the transaction is not a partnership then it was a transaction under The Money Lenders Act (Cap 273). This is because both the Plaintiff and the

second Defendant operated money lending companies. Counsel for the first Defendant submitted that if this was a money lending transaction then it was not enforceable under Section 6 of The Money Lenders Act because it was not reduced into writing and signed personally by the borrower. He submitted that the same Section provides that in such a situation any security taken shall equally not be enforceable.

Counsel for the Plaintiff on the other hand submits that this was not a money lending transaction because the Plaintiff is only claiming a refund of Ushs.30,000,000/= lent to the first Defendant without the said Ushs.10,000,000/=. He submitted the law does not preclude individuals from lending money. He therefore prays for judgment against the first Defendant for Ushs.15,000,000/= and interest at 22% per annum from the date of judgment until payment in full.

From the evidence it would appear that the Plaintiff and the second Defendant may be associated with money lending companies namely; Bamuno Ltd and Quantum Capital Financiers. However, there is no evidence that the Plaintiff acted in the capacity of a money lender. The case is filed in the Plaintiff's personal names and

even the cheque of Ushs.30,000,000/= that the first Defendant wrote is in the Plaintiff's personal names. In the case of

> **Investment Masters V Ambrose Koyangure** HCCS No. 312 of 2005 (unreported).

My learned brother Bamwine J. held that not every one who lends money is a money lender within the meaning of the Money Lender Act. In that case the learned Judge found that court cannot raise an inference that a person is a money lender if it is not pleaded as such.

It would appear on the evidence before me that the Plaintiff took a personal risk and lent the first Defendant money. I have already found that it should be paid back and I so order that this be done without further delay within 45 days of this judgment.

As to whether the Plaintiff is entitled to sell and foreclose the said properties to realize the sum owed to him, I say no. The Plaintiff and the second Defendant admit that they are still in possession of the borehole bearings that were purchased, these I believe still have some value which the parties can work around. In the interests of justice given that half of the money has already been paid, I order that the two titles Plots Nos. 7376 and 7374 both of Kyadondo Block

244 be deposited with the Registrar of the court within seven days of this judgment. The said titles being deposited in court will still be available for execution within the meaning of Section 48 of The Civil Procedure Act should the first Defendant fail to pay. On payment of the sums awarded in this judgment the titles shall be returned to the first Defendant with an auxiliary order that the caveats there in be cancelled.

I award interest to the Plaintiff at 22% p.a. on the Ushs.15,000,000/= from date of judgment until payment in full. I also award the Plaintiff and second Defendants their costs of the suit.

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Geoffrey Kiryabwire

JUDGE

Dated: 18/03/08