THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

(CIVIL DIVISION)

CIVIL SUIT NO. 0002 OF 2014

BETTY BYABASHAIJA----------PLAINTIFF

VERSUS

MUNANURA YEYARD----------RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The Plaintiff brought a suit for recovery of Ug. Shs. 122,680,000 (One Hundred Twenty Two Million Six Hundred Eighty Thousand Shillings Only) against the Defendant claiming that on several occasions between 2011 to 2013 she advanced the Defendant on the promise that it was for business development which business never existed and that he failed/neglected and/or refused to pay.

In his Defence, the Defendant denied the alleged indebtedness and maintained that they had a business relationship and that the amounts claimed represented money deposited for purposes of purchasing fabrics on behalf of the Plaintiff and remittances of money accountability to the Defendant.

AGREED ISSUES.

1. ***Whether the sum of Ug.Shs 128,980,000/= was money had and received by the defendant from the plaintiff and if so whether the defendant balance of Ug. Shs 114,980,000/= is due and payable to the plaintiff?***

2. ***What remedies are available to the parties?***

At the hearing, the Plaintiff testified alone and relied on documents that were tendered and marked **Exh.P.1** to **Exh.P.34** while the defendant testified himself and called two other witnesses to wit; Kibuule Joseph alias Kadogo (DW2) and Tefro Tibamanya (DW3).

Issue 1

RESOLUTION OF THE ISSUES:

The plaintiff has amended the 1st issue in order to address clearly the matter for court's determination and this court adopts the same as framed as follows;

Whether the Plaintiff lent and or advanced to the Defendant a sum of Ug.Shs.128,980,000/= and if so, whether the Defendant is liable to refund the outstanding balance of Ug.Shs.114,980,000/= to the Plaintiff.

The plaintiff submitted that the money lending transaction between the Plaintiff and the Defendant was a normal and or an ordinary lay person's transaction between people who knew each other as simple friends commonly referred to as "**Friendly Loans**". With this in mind, is important to then define what the terms to "Lend" and "Advance" mean.

Both the Free Online Dictionary and the Online Oxford English Dictionary define the words "Lend" and "Advance" as follows;

"To lend" means;To allow the temporarily use of something on condition that the thing or its equivalent will be returned.

To provide money temporarly on condition of repayment, usually with interest.

To make a loan

And

"To advance" means;

To lend money to someone

To pay money to someone before the due date"

The plaintiff's case and her testimony in court is that the Plaintiff who knew the Defendant, lent and or advanced money to the Defendant to the tune of Ug.Shs.128,980,000/= between the period 2nd February 2011 to 30th April, 2012 on the understanding that the Defendant would pay it back.

The plaintiff in her evidence testified that a total sum of **Ug.Shs.128,980,000/=** was on various dates deposited on the Defendant's **Barclays Bank A/c No. 6002918984** as evidenced in the summary of the transfers for the entire sum and this was supported by the Barclays Bank Money Transfer Forms for the said sum of money and the Defendant's Bank statement confirming the said deposits.

The defendant contended that these deposits totaling shs 128,980,000/= were monies partly deposited by the Plaintiff for the following purposes;

To be used by the Defendant in buying materials such as fabric for and on behalf of the Plaintiff who the Defendant alleges was a business partner.

It was money that the Plaintiff's relatives owed the Defendant and hence a repayment.

It was money for payment for cars that the Defendant allegedly sold to the Plaintiff and her Brother.

The courts of law have on various occasions encountered cases of this nature where people have lent to their friends in what is referred to as "**Friendly Loan"** or **"Soft Loans"** and its now trite law that for as long as money is proved to have been received by the Defendant like in this case, then the onus shifts to the Defendant to show that the said money wasn't supposed to be repaid.

In the case of **KLAUS KEMPT VS. YOBE OKELLO HCCS No. 0973 of 2004** wherein the Plaintiff upon the Defendant's request gave the Defendant who was a friend a sum of Euros 4,500 to help the Defendant rescue his property from being sold by a bank upon default on a mortgage. The Defendant in the above cited case in refusing to pay back the Euros had set up a lie or contention that the said money was rent paid by his friend for having stayed in his house for two years and therefore not refundable.

The Trial judge, **Hon Justice Geoffrey Kiryabwire** had this to observe and or hold on page 6-7 of his Judgement;

"***Counsel for the defendant however is not clear as to the legal effect of a friendly advance/loan as opposed to a loan per se'. Indeed, one these days does see a string of cases coming up where one party or the other raises a claim or a defence based on a "friendly loan". This is now becoming notorious enough to us at the bench to take judicial notice of this practice. An example of another such case is Gede Rwewa vs. Ruth Bunyenyezi HCCS No. 181 of 2004 (un reported) where the money was allegedly advanced for a Pyramid Scheme called gifting circles.***

However, it is difficult to find a common thread between all these cases as to the legal effect of such a friendly loan. It would appear to me that what can be said of a friendly loan is that it is a loan given informally between the lender and the borrower. It can be given for a variety of reasons and each case should be handled on its own merits. However, such informal facilities are expected to be paid back and that is why nonpayment leads to court cases. To my wind, a loan or a friendly advance/loan is in legal terms a loan within the meaning assigned to it by Blacks Law Dictionary (supra). There is a primafacie legal obligation that it be repaid".

Further, in the English case of **Selden vs. Davidson (1968)2 ALL. ER page 755** the Court of Appeal in handling a matter where the Plaintiff sued for a refund of money given by the Plaintiff to his former driver had this to say;

At page 757, **WILMER L.J** held as follows;

"***In other words, iam not prepared to say the learned judge gave a wrong ruling when he decided, as he did, that it was for the defendant to begin, the burden of proof being him to make good the assertion put forward in his defence.***

The way l look at it is this. Payment of the money having been admitted, primafacie that payment imported an obligation to repay in the absence of circumstances tending to show anything in the nature of a presumption of any advancement.

This is not a case of father and child, or husband and wife, or any other such blood relationship which could have given rise to a presumption of advancement…..."

The Hon. Justice went on further to hold as follows;

"***No such consideration arise in the present case; indeed, they are clearly ruled out because we have from the defendant in this case a clear admission of payment of the money, and no suggestion that it was paid in settlement of an existing debt, or that it was given in return for cash, or anything of that sort…… if the defendant seeks to evade repayment of the money which was paid to him, it seems to me that the learned judge was right in placing the onus on him to prove the facts which he alleges show that the money was not repayable***"

And EDMUND DAVIES L.J in the same case of Seldon (supra) agreed with his colleague WILMER L.J and had this to say at page 759.

"…..i ask myself what is to be inferred as to the nature of the transaction when the simple payment of money is proved admitted between strangers. I entirely agree with WILMER L.J, that on that bald state of affairs, proof of payment imports a primafacie obligation to repay the money in the absence of circumstances from which a presumption of advancement can or may arise".

In the present case, payment and or receipt of the sum of **Ug.Shs.128,980,000/=** into the Defendant's mentioned Bank Account was not denied at all by the Defendant. Further, it is not the Defendant's case that he repaid the said money.

This state of affairs on the basis of the Plaintiff's testimony and the authorities cited above, imports a strong primafacie obligation on the Defendant to repay the money save the sum of Ug.Shs.14,000,000/= that he paid on the 19th July 2013.

It is true that the Defendant did by his defence come up with some explanations and or defences hoping that those allegations will help him evade the repayment, to use WILMER L.J's word in the seldon case (supra). The onus is still on the Defendant to prove otherwise.

The defendant's counsel in his submissions cited the HALSBURY'S LAWS OF ENGLAND VOLUME 40(1) (2007 Reissue) Paragraph 5, An action for money had and received in an action issued by Claimants who are for example seeking to recover from the Defendant money which has been paid to the Defendant.

i. By mistake
ii. Upon a consideration which has totally failed
iii. As a result of imposition, extortion and oppression
iv. As the result of an undue advantage which has been taken of the claimants situation

According to the Plaint, the Plaintiff in Paragraph 4(a) averred as follows. '' the Plaintiff on several occasions between 2011 to 2013 advance money to the Defendant through Stanbic Bank and Barclays Bank Mbarara Branch respectively totaling to Uganda Shillings One Hundred Twenty Two Million Six Hundred Eighty Thousand Only shs. 122,680,000 (copies of the Bank slips are hereto annexed as "A") promising her that it was for business development which business never existed and the Defendant was to date neglected failed and/or refund to pay.

Imperative therefrom, the Plaintiff claims in for money advanced to the Defendant on the promise of Business development which never existed. In my considered opinion, the claim in the instant case can only be maintained upon a

consideration which has totally failed and not one where Court has to infer an obligation to repay.

Contrary to her pleadings, in cross examination, the Plaintiff testified that the said money 128,980,000/= included the money that remained unpaid after the election period. She later also testified that the amount advanced after the election period was 128,980,000/= and further that the claimed is part of the money that was claimed in the criminal case. Finally she testified that she lent to the Defendant the money and it was supposed to be paid back. This testimony was not only a departure from the pleadings but also contradictory in material particular.

Oder JSC (R.R) stated in **INTERFREIGHT FORWARDERS (U) VERSUS EAST AFRICAN DEVELOPMENT BANK EARL (1990-1994) EA 117 at Page 125** the system of pleadings is necessary in litigation, it operates to define and deliver with it clarity and precision the real matter in controversy between the parties upon which they can prepare and present their respective cases and upon which, the court will be called upon to adjudicate between them. …thus issues are formed on the case of the parties so disclosed in the pleadings and evidence is directed at the trial to the proof of the case so set and covered by the issues framed. He will not be allowed to succeed on a case not set up by him and be allowed at the trial to change his case or set up a case inconsistent with that which he alleged in the pleadings expect by way of amendment of the pleadings.

In **MOHAN MUSISI KIWANUKA VERSUS ASHA CHAND SCCA 12/2002** it was observed that a party's departure from his or her pleadings in a good ground for rejecting the evidence and such a litigant may be taken to be a liar. The above decision was also relied on in **SEBUGHINGIRIZA VERSUS ATTORNEY GENERAL HCCS No. 251 of 2012** where Lady Justice Monica Mugenyi heed that a party who departs from his pleadings and gives evidence contrary thereto would be deemed to be lying.

The Plaintiff evidence imports two irreconcilable theories. The first one being that of lending and where she testified that "she kept on helping him with some money on the understanding that he would pay it back" and further that "he

pestered me with requests for more advances to enable him complete his projects which I continued to do."

The second theory is that advanced by her pleadings and corroborated by her testimony in Ex D16 which is that she was made to invest in a business she later discovered was non-existent. As regards the theory, the Plaintiff was duty bound under the provisions of Section 101 of Evidence Act Cap 6 to prove the existence of the facts as alleged in paragraph 4(a) of the Plaint herein, that is, that she advanced money to the Defendant promising her that it was for business development which business never existed. The defendant's counsel cited the judgment of **Mayindo DCJ** (as he then was) held in the case of **JOVELYN BARUGAHARE VERSUS ATTORNEY GENERAL SCCA No. 28/1993** that where the Plaint discloses questions of fact, they had to be proved by evidence.

In the instant case, whereas there was evidence of money sent through the Barclays Bank Account, there was no proof of money alleged to have been sent or deposited through Stanbic Bank and further no proof or evidence was brought regarding the business development or the business that non-existent.

Whereas the Plaintiff PW1 is on record to have testified on oath, Ex D16 that she partnered with the Defendant in the business, she distanced herself from any involvement in business with the Defendant cross-examination in the instant case.

The departure from what the Plaintiff pleaded in her plaint is further compounded by the inconsistences/contradictions in her evidence. During cross-examination regarding the claim of Ug. Shs. 128,980,000/= the Plaintiff testified that the said sum included money that remained unpaid after the election period and that he used to pay back the money by making deposits on her Barclays Bank account.

She after testified that the amount advanced after the election period was 128,980,000/=. When asked how she came to make the advances, she testified that the Defendant would call her and request for money but that she had no evidence of the requests. She also testified that the money was supposed to be

paid by cash or banking on her DFCU, Barclays and Post Bank accounts. She further stated that she received money from Mr. Munanura on these accounts but could not specify how much she received on each account. Further, that save for the money deposited on her account during the period of 3rd January 2013-27th January 2013 which she attributed to the road works, the purpose of the money paid before 3rd January 2013 when she went to Lira and after 27th January 2013 when she left was to pay back loans and that these loans were part of the money claimed that is, Ug. Shs. 128,980,000/=.

Despite claiming that the Defendant had paid back some of the money which consisted of loans from Barclays and Post Bank, she went on to claim that the same receipts (money paid to her accounts) was repayment for loans from PESA, Kinyago Laban, payment for survey of the Defendants land, payment to her brother all of which she had no evidence thereof.

Even if it was to be believed that only money deposited on her accounts outside 3rd January 2013 – 27th January 2013 is what by her own admission in cross-examination constituted repayments by the Defendant of part of the money claimed, a scrutiny of Ex. D1, D2, D3 and D4 bearing dates outside the said period total to Ug. Shs. 58,840,000/=. This would be in specific reference to Ex. D1 A,B,C,D,E,F,G,H,I,J,K,L,M, Ex. D2 A, D3 A, B, C and D. There would therefore be no basis for a claim of Ug. Shs. 128,980,000/=.

Even deposits she attempted to attribute to funds for the construction, her evidence of accountability for the same through what she referred to as "accountability" was discredited by her own evidence when she conceded, that the purported accountability was never acknowledged as being received, it did not indicate who prepared it and was not addressed to anyone these deficiencies were compounded by her own admission that she did not know how to prepare an accountability report.

In **ADAM BALE & 2 ORS VERSUS WILLY OKUMU, HC Civil Appeal No. 21/2005**, Justice Bashaija K. Andrew while referring to the case of NAKAM NAIRUBA MABEL vs CRANE BANK LTD HC Civil Suit No. 338/2009 stated as follows;

> "the law relating to contradictions and inconsistencies is well settled that when they are major and intended to mislead or tell deliberate untruthfulness, the evidence may be rejected if however they are minor and capable of innocent explanation, they shall not have that effect"

Therefore the departure from the pleadings and the subsequent contradictions, inconsistencies in PW1's evidence only render her an unreliable witness, a liar and her evidence inadmissible.

According to Lord Nicholls of Birkenhead in **RE H (Minors) (1996) AC 563 at 586**, balance of probability standard means that

> "a court is satisfied that an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not when assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case that the more serious the allegation the less likely it is that the event occurred and hence the stronger should be the evidence before the court concludes that the allegation is proved on the balance of probabilities" (see **In RE B (Children) 2008 UKHL 35**)

On the other hand, the Defendant testified that the money sent to his account as indicated in Ex P1 was for purchasing materials/ fabric for the Plaintiff's business. As a result of the said arrangement the Plaintiff sent several sums of money to his Barclays Bank Account as indicated in the several money transfer forms save for the transfer dated 20th September 2011. It is also his uncontroverted evidence that the transfer dated 20th September 2011 of Ug. Shs 40,000,000/= was a payment from a one Kennedy Ochoro, his friend in Nairobi. That the money was deposited on a KCB Account in the names of a one Tefuro Tibamanya (a nephew to the Defendant) who withdrew it and handed it over to the Plaintiff to remit the same to the Defendant.

DW3 corroborated DW1's evidence in this respect and confirmed that he went with the Plaintiff to Barclays bank to send the said money to the Defendant and that the Defendant called him to confirm that he had received the said money.

It must be noted that PW1 under cross examination attempted to explain this amount by alleging that it was from her payment from NAADS but failed to produce any document to prove it. In her own words she stated that "I don't remember when it was paid. I don't know how much was paid from NAADS. I do not know whether I can get evidence of that."

According to the defendant's counsel, it is inconceivable that she could remember that it was a NAADS payment but could not remember when it was paid, how much it was or whether she could obtain evidence of the same, clearly evidence of a blatant lie. On the other hand the coincidence of a payment of Ug. Shs. 40,000,000/= on DW3's account, a withdrawal of the same and handover to the Plaintiff on the day it was deposited and the subsequent deposit on the Defendant's Account by the Plaintiff leads to no other inference other than that the Ug. Shs. 40,000,000/= deposited on the Defendant's Account on 20th September 2011 was a payment from Kennedy Ochoro remitted through the Plaintiff and not money lent or advanced to the Defendant. The evidence of DW1 regarding the purchase of material/ fabric for the Plaintiff's business is corroborated by that of DW2 whose evidence despite the effort of Counsel for the Plaintiff, remained uncontroverted.

DW2 testified that he was always given money by the Defendant which was either always preceded or followed by instructions from the Plaintiff on what to purchase. He relied on a list which clearly showed the money that he received on the various dates while the arrangement lasted. Attempts to discredit this evidence failed and the witness further clarified that it was based on entries in his book relating to the money received and used for the Plaintiff's purchases on the respective days. He further testified that he did not have relied on by the Plaintiff the receipts because they were always packed with their respective batches of fabric/ material and sent to the Plaintiff.

With respect to the presumption of a loan or lending arrangement, we have perused the authorities relied on by the Plaintiff and found them to have been quoted out of context not only because they are irrelevant to the nature of the dealings between the Plaintiff and the Defendant as alleged in the Plaint but also

because a conclusion on an implied prima facie obligation to repay depends on the facts of each case and not just the absence of circumstances tending to show a presumption of advancement.

In defendant's counsel opinion is that the duty upon the Defendant is to show that there are circumstances which negate the implied obligation to repay other than just the presumption of advancement. In considering whether court can imply an obligation on the part of the Defendant to repay the money claimed in the instant suit, we do invite court to also look at the following;

Despite the Plaintiff claiming she borrowed Ug. Shs. 22,000,000/= from Barclays bank, Ug. Shs. 100,000,000/= from Post Bank in four tranches, that is one of Ug. Shs 70,000,000/= and three of Ug. Shs. 10,000,000/= which formed the basis for her advances to the Defendant, one wonders why none of the said figures appears in the money transfer forms exhibited.

The amounts deposited are rather small and multiple with short intervals between them making them rather suspect to have constituted money borrowed or advanced for road construction. If juxtaposed against the amounts she maintains were received while in Lira over a period less than one month, it is clear it could not have been for that purpose on a balance of probabilities.

The defendant had denied being lent money, refused to pay back money advanced prior to the dealings the subject of the instant claim that the plaintiff would continue to advance the Defendant more money with the anticipation of being paid back. That notwithstanding, it is also inconceivable that the Plaintiff would receive money on her Bank Accounts from the Defendant and opt not to consider it payment of money hitherto advanced to the Defendant and go on to remit it to another person or use it to the benefit of the Defendant yet the Defendant owed her money and had proved to be a difficult person to recover money from.

All the above issues render the presumption of an obligation to repay untenable in the circumstances. It would also be odd if, in respect of unproven / substantiated allegations in the Plaint, the insufficient evidence could nonetheless

be regarded as a sufficient factual basis for satisfying court that there is a real possibility of a presumption to repay the money in the claim.

The defendant's counsel submitted and prayed that court finds that the sum of Ug. Shs. 128,980,000/= was not money had and received by the Defendant from the Plaintiff and that it is therefore not due and/ or payable.

The defendant in his defence analysed with the plaintiff's evidence shows that there was a working relationship between the two parties and money moved from one party to the other. The plaintiff testified that the money was sent for purposes of the business of construction which the defendant owned and had intended to have the plaintiff join as a partner.

The defendant denied any indebtedness to the plaintiff contending in his defence that he was carrying business with the plaintiff since 2010 and the money was deposited on his Barclays and Stanbic Account and which money would be subsequently withdrawn for purposes of making payments on the plaintiff's behalf.

The defendant further in his defence contended that other money transfers to his account where money that the plaintiff and her relatives owed him.

The defendant averred in his defence that he sold 2 motor vehicles Toyota Rover UAP 619W and Land Cruiser Chassis No. JT111GJ9500064957 to the plaintiff and the Plaintiff's brother at a sum of Ug Shs 35,000,000/= and 25,000,000/= part of which was paid by the plaintiff by way of money transfer to his account.

The evidence adduced by the defendant to deny any indebtedness in the defence significantly changed at the time of the trial as can be seen above and this makes his evidence very suspect and quite unbelievable.

The defendant in his testimony confirmed that he sent money to plaintiff while at Lira since she did not have work to do at Kampala and the plaintiff also testified that the defendant used to send her money for purposes of the project at Lira and this money was specifically for the project at Lira.

The plaintiff acknowledged receipt of a part payment by the defendant of 14,000,000/= on 19th July 2013. The defendant does not mention this fact in his defence. The plaintiff testified that she went to Lira in order to be paid and she was receiving money from the defendant for payment of employees.

The plaintiff's case is consistent since she complained at police and the defendant was charged for obtaining money by false pretences. She obtained loans from Barclays bank and post bank and advances some of this money to the defendant.

This court is persuaded to believe the testimony of the plaintiff on the balance of probabilities that she gave money to the defendant who was bound to return it but failed to do so. The defendant's defence is quite unbelievable since it was a total departure from his pleadings and failed to explain some transactions between himself and the plaintiff in respect of the money transactions.

The defendant admits receiving money from the plaintiff although he gives it a different purpose. In the case of ***Asuman Mutekanga vs Equator Growers (U) Ltd SCCA No. 7 of 1995*** where it was held that "There is no better evidence than an admission by a party"

The defendant failed to explain money he received through his own bank accounts from the plaintiff to satisfaction of the court.

According to the plaintiff's documents exhibited on court record and the fact they are not challenged leaves the plaintiff's case as clear evidence for receipt of money and the defendant is estopped from denying receipt of such money. The law is settled on failure to challenge evidence on a material or essential point, then such evidence is deemed admitted as inherently credible and probably true. See ***Uganda Revenue Authority vs Stephen Mabosi No. SCCA No. 26 of 1995.***

The Plaintiff has been able to prove that he gave the Defendant the said sum of **Ug.Shs.128,980,000/=** through the various transfers to the Defendant's Account at Barclays Bank as shown by the several Exhibits P.1 to P.28.

The Plaintiff also acknowledged receiving a sum of **Ug.Shs.14,000,000/=** as part payment from the defendant.

The 1st issue is resolved in the positive.

What remedies are available to the parties?

The plaintiff is awarded a sum of **114,980,000/=** as money had and received from the plaintiff after deducting what the plaintiff received as a part payment.

General damages

General damages are such as the law will presume to be direct natural probable consequence of the act complained of. In quantification of damages, the court must bear in mind the fact that the plaintiff must be put in the position he would have been had he not suffered the wrong. The basic measure of damage is restitution. See ***Dr. Denis Lwamafa vs Attorney General HCCS No. 79 of 1983 [1992] 1 KALR 21***

The character of the acts themselves, which produce the damage, the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstance and nature of the acts themselves by which the damage is done. See ***Ouma vs Nairobi City Council [1976] KLR 298.***

In the present case, the plaintiff has sought general damages for the suffering she has endured when the defendant refused to repay her money. She took up loans and has suffered in repaying them back with interest. Considering the circumstances of the case, the plaintiff is awarded a sum of 20,000,000/= as general.

Interest

Section 26 provides for an award of interest that is just and reasonable. In the case of ***Kakubhai Mohanlal vs Warid Telecom Uganda HCCS No. 224 of 2011***, Court held that;

> " ***A just and reasonable interest rate, in my view, is one that would keep the awarded interest amount cushioned against the ever rising inflation and drastic depreciation of the currency. A plaintiff ought to be entitled to such a rate of interest as would not neglect the prevailing economic value of money, but at the same time one which would insulate him or her against any economic vagaries and the inflation and depreciation of the currency in the event that the money awarded is not promptly paid when it falls due***"

The plaintiff is awarded an interest of 12.5% on the decretal award from the date of filing this suit until payment in full. General damages shall attract an interest of 10% from the date of judgment.

Costs

The plaintiff is awarded costs of the suit.

SSEKAANA MUSA
JUDGE
7th/12/2018