

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

CIVIL SUIT NO 572 OF 2016

IRENE NAMUSOKE ===== PLAINTIFF/COUNTERCLAIM DEFENDANT

VERSUS

CENTENARY RURAL

DEVELOPMENT BANK LTD ===== DEFENDANT/ COUNTERCLAIMANT

BEFORE HON. JUSTICE SSEKAANA MUSA

JUDGMENT

On the **4th** day of **July 2012**, the counterclaimant advanced a loan facility of Ug. Shs. **90,000,000/= (Uganda shillings Ninety Million)** to the counterclaim defendant repayable within twenty four monthly (**24**) installments of **Ug. Shs. 4,939,965/=**. The Counterclaim-defendant pledged the certificate of Title for land comprised in **Block 161 Plot 2393 situate at Singo Bamunaniika** in Mityana to act as security for repayment of the loan advanced.

The counterclaim-defendant failed to pay the loan instalment as and when they fell due prompted the Counterclaimant to recall the entire loan. **On the 7th day of Feb 2013**, the Counterclaimant instructed **M/S Banu Auctioneer** to recover **Ug.shs.87,180,817/=** from counterclaimant defendant. The Auctioneers advertised and valued the mortgage security but foreclosure was stopped by the interim Order that was granted in the counterclaim-defendant's favor on the **25th day of March 2013**.

The Counterclaim-defendant's suit was dismissed and the mortgage security was for the second time advertised on the **31st day of August 2018** and valued on the 25th September 2018. On the 3rd day of October 2018, the mortgage security was sold to a one Hajji Sserwadda Muhammed at a consideration of Ug. Shs 90,000,000. However, prior

to the crediting of the monies from the sale towards repayment of the loan, as at the 15th day of October 2018, the outstanding loan balance due from the counterclaim defendant was Ug Shs. 137,258,615/=. As is clear from the demand deposit statement and upon the deposit of the proceeds of the sale on the counterclaim-defendant's Account, several deductions including commission on transaction (**Ug.Shs.10,000/=**) Tax on commission excise duty (**Ug.Shs.1,500/=**), cost of advertising the mortgage security for two time (**Ug.Shs.2,340,000/=**), Debt recovery /Auctioneers fees (**Ug.Shs.8,870,000/=**) and a standing order for payment of the loan (**Ug.Shs.3,008,500/=**) were deducted and the remainder from the proceeds of sale in the amount of (**Ug.Shs.75,000,000/=**) was applied towards settling of the same loan.

The Counterclaimant seeks for recovery of the loan monies that remained outstanding after the application of the sale proceeds towards payments of the counterclaim-defendant's obligations.

On the 7th day of February 2019, court allowed the counterclaimant to proceed *ex parte* since the counterclaim- defendant had not filed a reply to the counterclaim. However, on the 25th day of September 2019, Mubiru Juma Ali's witness statement was sworn in on behalf of the counterclaimant's and admitted as the counterclaimant's testimony in chief together with the documents in the counterclaimant's trial bundle.

ISSUES

1. Whether there are any outstanding sums due from the counterclaim-defendant to the counterclaimant.
2. What remedies are available for the counterclaimant?

DETERMINATION

- 1. Whether there are any outstanding sums due from the counterclaim-defendant to the counterclaimant.**

Counsel for the counterclaimant submitted that under paragraph 16 of **Mubiru Juma Ali's** witness statement sworn on behalf of the counterclaimant Bank that prior to the sale of mortgage security, the overdue balance from the plaintiff/counterclaim Defendant was (**Ug.Shs.137,258,615/=**). In paragraph 17 of Mubiru Juma Ali's witness statement, he stated that upon deduction of the expenses incurred by the counterclaimant in foreclosing on the mortgage security, **Ug.Shs.75,000,000/=** was

applied towards repayment of the counterclaim-defendant's loan leaving an outstanding balance of **Ug.Shs.62,258,615/=**. This outstanding sum that excludes interest is clearly reflected in the **SME Loan Account statement that appears at page 48-49 of the counterclaimant's Trial Bundle**

The counterclaimant's counsel further submitted that **MUBIRU JUMA ALI's** further testimony in paragraph 18 that since on the recovery of the **Ug.Shs. 75,000,000/=** from the sale of the mortgage security on 15th October 2018, the counterclaim-defendant has not made any payments towards clearing her loan and the total interest that has since accrued is **Ug.Shs.15,426,588/= (Uganda Shillings Fifteen Million Four Hundred Twenty Six Thousand Five Hundred Eight)**. In paragraph 19, Mr. Mubiru Juma Ali stated that the outstanding sum that is now due from the plaintiff /counterclaim-defendant is now **Ug.Shs.77,685,203/=**. In the case of **Altica Sea Carriers Corporation vs. Ferrostoal Poseidon bank Reederei GMBH[1976] I LLOYDS Rep.250** quoted with approval in the case of **Barclays Bank of Uganda Limited -VS- Howard M. Bakojja HCCDCS No. 53 of 2011**, it was emphasized by Lord Denning that "*the aim of law is to ensure that an innocent party receives his full due and that no rule or equity can compel him to take a loss no matter how minute it may be.*" He stated that an "innocent part should be adequately compensated. The only compensation for non-payment of a debt is payment of the debt.

Counsel submitted that **Mr Mubiru Juma Ali**, testimony on behalf of the counterclaimant was not challenged by way of cross-examination because the counterclaim-defendant chose not to contest the counterclaim. In the case of **Muyimbwa Paul -vs- Ndejje University, Labour Dispute Reference NO.222 of 2015**, it was noted that it is trite law evidence not challenged in cross examination is taken to have been admitted by the opposite party and prayed that court be pleased to answer issue one (1) in affirmative and that sum of **Ug.Shs.77,685,203/=(Uganda Shillings Seventy Seven Million, Six Hundred Eighty Five Thousand Three)** is still due from counterclaim-defendant to the counterclaimant.

I have carefully and perused the evidence and counterclaim submissions and I agree with counsel for the counterclaimant that the evidence was not challenged by the counterclaim defendant, however, according to **Lady Justice A.E Mpagi- Bahigine JA** (as she then was) stated in the case of **Management Committee of Rubaga Girls School vs. Bwogi Kanyerezi (Civil Application Number 34 of 1999)** that;

“..... That failure to file an affidavit in reply by the respondent means acceptance of the applicants' averments is a curious proposition. It is well stated that it is always for the applicant to make out his case and if he does not, his opponent need not file an affidavit at all....”

According to the evidence adduced by the counterclaimant which evidence was unchallenged, there were outstanding sums due from the counterclaim- defendant to the counterclaimant.

Issue 1 is resolved in the affirmative.

2. What remedies are available for the counterclaimant?

Counsel for the counterclaimant submitted that at page 4 of the defendant's Written statement of the defence and counterclaimant, the counterclaimant prayed for the plaintiff to be ordered to pay **Ug.Shs.87,372,311/=**. However , in paragraph 19 of **Mubiru Ali Juma's** witness statement, he stated that the outstanding sum inclusive of interest that is now due from the plaintiff / counterclaim-defendant is now **Ug.Shs.77,685,203/=(Uganda Shillings Seventy Seven Millions Six Hundred Eight Five Thousand Two Hundred Three)**. Having proved in issue 1 how the above stated sums arise, it is our prayer that the court orders the counterclaim-defendant to pay to the counterclaimant a sum of , **Ug.Shs.77,685,203/= (Uganda Shillings seventy seven Million, six hundred Eighty five thousand Two Hundred Three)**.

Counsel further submitted that at **pages 1-12 of the counterclaim's Trial Bundle is the Banking facility** agreement executed between the counterclaimant and the counterclaimant-defendant. **At page 2** thereof, the parties agreed under **clause 10 and section E(iii)** That a default interest of 0.5% per month will be charged on all overdue installment of principal and interest on the and all other charges not payed when due.

Counsel relied on the case of **Uganda Commercial Bank -vs- Kigozi [2002]1 EA 305** quoted with approval in the case of **Stanbic Bank Limited -vs- Hajji Yahaya Sekalega T/A Sekalega Enterprises Civil Suit No. 185 of 2009**, it was held that a plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been if he or she had not suffered the wrong. In paragraph 22 of the **Mubiru Ali Juma's** witness statement, he stated that as a result of the counterclaim-defendant's default and or refusal to pay the monies that are still outstanding the

counterclaimant has been denied use and enjoyment of its money and caused to suffer financial loss and damage for which it holds the counterclaim-defendant liable.

According on the **Demand Notices that appear at page 18-20 of the counterclaimant's Trail Bundle**, the counterclaim-defendant started defaulting on 13th December 2012 the loan was supposed to be repaid by the 4th day of July 2014. To date, the loan has not been fully repaid and outstanding sum that is now due to plaintiff/ counterclaim-defendant is now **Ug.Shs.77,685,203/=**. In the case of **Southern Engineering Company -- vs Mutia [1985]KLR 730** quoted with approval in case of Hajji Yahaya Sekalega(supra) it was held that in assessment of the quantum of damages, courts are mainly guided by the of subject matter, the economic inconvenience that at party may have been through and nature and extent of breach or injury suffered. Considering that the counterclaimant is a financial institution that makes money through lending out money that must be repaid back with the interest from which it benefits. The refusal by counterclaim-defendant to repay back the money advanced definitely hampers its business because the money it lent out has not been paid back. They prayed for general damages in the amount of **Ug.Shs.35,000,000/=(Uganda Shillings Thirty Five Million)** as general to compensate for the financial loss and damage it has been put through due to the counterclaim-defendant's default.

In regards to costs counsel submitted that it is an established principle of law under **Section 27(2) of the Civil Procedure Act** that costs of any action, cause or matter shall follow the event unless court for good cause orders otherwise. We pray that costs of the plaintiff's suit and the counterclaim be granted to the Defendant/Counterclaimant.

Having decided issue 1 in the affirmative, I thereby order the plaintiff to pay **Ug.Shs.87,372,311/=** to the counterclaimant, general damages of **Ug. Shs. 10,000,000/=** at 15%per annum on decretal sum from the date of filing the suit until payment in full.

The counterclaim- defendant to pay costs for the counterclaim.

I so order.

SSEKAANA MUSA
JUDGE
18th December 2020