THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

CIVIL SUIT NO 236 OF 2019

PRIME FINANCE COMPANY:: PLAINTIFF

VERSUS

OBADIA NTEBAKAINE ::DEFENDANT

BEFORE HON. JUSTICE MUSA SSEKAANA

JUDGMENT

BACKGROUND

The plaintiff filed this suit seeking for orders against the defendant to pay a sum of USD 3,071,681, a declaration that the defendant is in violation of the plaintiff's economic rights enshrined under Article 40 (2) of the Constitution of the Republic of Uganda, Special damages, General damages, Costs and Interest therein.

The parties entered into a loan agreement whereupon the defendant borrowed USD 200,000 (United States Dollars Two Hundred Thousand) for a period of two months and thereafter, the defendant issued a postdated cheque dated the 27th of November 2008 amounting to USD 211,062 (United States Dollars Two Hundred and Eleven Thousand Sixty Two cents) as repayment over the said loan period covering the principal and interest of the same. It was agreed that in the event that the defendant fails to pay the said loan within the agreed timelines, he was to continue

repaying the loan at am interest rate of 0.60% per week on the outstanding balance until the completion of the loan.

The defendant filed his Written Statement of Defence raising a preliminary point of law that the suit discloses no cause of action and bad in law under the Limitation Act. He further stated that he cleared his obligation under the loan agreement and prayed that the suit be dismissed with costs.

The plaintiff was represented by *Mr. Ssemambo Rashid* whereas the defendant was represented by *Ms Farida Ikimaana*.

The parties filed a joint scheduling memorandum wherein they proposed the following issues for determination by this court.

Whether the defendant breached the loan agreement.

Whether the suit is time barred.

What remedies are available to the parties.

The parties were ordered to file written submissions; and accordingly filed the same. This Court has considered the same in writing this Judgment.

DETERMINATION OF ISSUES

Issue 1

Whether the defendant breached the loan agreement.

Submissions

Counsel for the plaintiff submitted that the defendant was supposed to repay the said loan within eleven weeks from the date when the loan agreement was executed or continue repaying the outstanding monies at an interest rate of 0.60% per week until repayment in full. The defendant did not repay back the said loan within the agreed timelines and when the plaintiff subsequently presented the defendant's cheque No. 1349268 drawn on his Crane bank account for payment, the same was dishonoured for lack of sufficient funds. The defendant does not dispute these material

facts neither does he present any evidence of repayment. Counsel therefore submitted that this amounted to breach of the loan agreement *(see;* ***Nakawa Trading Co Ltd v Coffee Marketing Board HCCS 137/91****)*

Counsel therefore stated that the defendant cannot escape from his obligation to repay the loan at the agreed interest in light of the duly executed loan agreement and prayed that this court finds so.

Counsel for the defendant submitted that the defendant paid back the loan until 2012 when he made the last installment to clear up his indebtedness. The defendant testified that he never paid any cash as alleged by the plaintiff as there was no reason of paying the said money having completed his repayment in 2012, he further stated that he lost most of his documents including the ones relating to the transaction in question having changed his office.

It was submitted that the figures submitted by the plaintiff in court do not reflect the true and total amounts paid in that period which was a full settlement and agreed interest at the time but the plaintiff could only wait until 2019 as an afterthought to put up this sham claim for which it was counsel's prayer that the same be dismissed.

Counsel also stated that it is trite law that a contract can be terminated in various ways to include, performance, release agreement, set off and merger, prescription and supervening impossibility of performance *(see;* ***Boney Mwebesa Katatumba & 3 Ors v Shumuk Springs Development Ltd Civil Suit No. 126 of 2009****).*

Counsel therefore submitted that the defendant duly performed its part of the obligation by paying both the principal and interest charged and that the plaintiff failed to prove any debt outstanding on the defendant's account. He prayed that this issue be decided in the negative.

Counsel for the plaintiff in his submissions in rejoinder reiterated his earlier submissions and further stated that documents were attached to its

pleadings to show that the defendant is indeed indebted to it. that the defendant did not adduce any evidence to disprove this fact but asked court to adopt all the documents tendered by the plaintiff during scheduling which clearly show his indebtedness. The plaintiff therefore asked court to find this issue in affirmative as it proved its case.

Determination

It is in agreement that both parties entered into a loan agreement whereby the defendant was given a loan of USD 200,000 to be repaid within a period of two months, failure of which would entitle the applicant to an interest rate of 0.60% per week on the outstanding balance. Counsel for the plaintiff in his submission asserted that the plaintiff breached this agreement when it issued a cheque in respect of the said loan agreement that was later dishonoured for lack of sufficient funds on its account.

What is clear in the circumstances is that a contract was entered into, the payments were supposed to be made within a period of two months but these were not made as the defendant issued a cheque that was dishonoured by the bank for lack of insufficient funds. The defendant has not adduced any evidence whatsoever to controvert these statements and evidence brought by the plaintiff. It is however submitted for the defendant that his loan debt was paid up in 2012 but all documents lost upon change of office.

I concur with the submissions of counsel for the plaintiff in respect of court's duty in interpreting contracts made by the parties and not rewriting them for the parties "*A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of the contract unless coercion, fraud or undue influence are pleaded and proved*" See; ***National Bank of Kenya v Pipe Plastic Sankolit (K) Ltd & Anor [2001]***.

The parties entered into a loan agreement with specific terms where the defendant was supposed to repay the said amount within a specified

period. The plaintiff led evidence showing that the defendant failed to honour this agreement hence committing a breach to the said agreement. This was not rebutted in evidence by the defendant who claims to have settled the loan but does not adduce any evidence to show the same.

The **Evidence Act, Cap 6 under sec. 101** is very clear to the extent that whosever desires court to give judgement as to any legal right dependent on the existence of facts which he or she asserts must prove that those facts exist. In the circumstances, the plaintiff proved that indeed the defendant breached the said loan agreement thorough its evidence.

Section 33 (1) of the Contracts Act No. 07 of 2010 states that; **"The parties to a contract shall perform or offer to perform, their respective promises.."** This implies that both the Plaintiff and Defendant were duty bound to perform their respective bargains under the above loan agreement.

The main contention is who between the Plaintiff and the Defendant is telling the truth as to whether the loan was paid or was not paid. Both parties led oral evidence for and against the assertions but the plaintiff led documentary evidence to support the claim.

In **Ahmed Adel Abdallah v Sheikh Hamad Isa and Ali Khalifa (2019)EWHC 27**, the court laid down the guidance on how the court should approach acute conflicts of evidence among witnesses on the events that occurred. The Court noted in *para 20* that the guidance applied to both cases of fraud and cases where fraud is not alleged. Thus;

There were acute conflicts of evidence between the witnesses on numerous aspects of the events which occurred. It was common ground that the approach to be taken in resolving these conflicts was that commended by Robert Goff LJ in Armagas Ltd v Mundoga SA (The Ocean Frost) (1985) 1 Lloyd's Report. 1.57;

Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses always to test their veracity by reference to

the objective facts proved independent of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. ***It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents to the witnesses' motives and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth.***

Robert Goff LJ's approach is also reflected in more recent authority such as Custmen SGPS SA V Credit (UK) Ltd 2013 (EWHC 3560 at [15]-[23]. ***That approach is equally apposite in cases where fraud is not alleged****.*

The defendant contention that the loan was paid is unsatisfactory in many respects, is materially inconsistent with the admitted documentary evidence, and is irreconcilable with the inherent probabilities of having cleared the loan obligation.

Therefore my finding is that, there was a contract for loan repayment which was not honoured by the defendant within the stipulated time.

Accordingly issue 1 is answered in the affirmative.

Issue 2

Whether the suit is barred by limitation

Submissions

Counsel for the plaintiff submitted that the question of limitation is a question of fact that can only be resolved by a proper assessment of the evidence on record. Counsel stated that the defendant intermittently serviced his loan till the 5th day of March 2015. Counsel stated that under section 3 (1) of the Limitation Act, Cap 80, an action founded on a contract like the one at hand must be instituted within six years from the date on which the cause of action arose. Counsel further submitted that the burden

of proving laches is upon the defendant who wishes to rely on it as a defense to the plaintiff's claim and can only be supported by evidence.

Counsel stated that in proving this, the defense must establish elements that the plaintiff delayed asserting his claim for an unreasonable length of time, with full knowledge of the relevant facts resulting into substantial prejudice to the defendant that it would be inequitable for the court to grant relief *(see;* ***Fontana v Steenson 929 P.2d 336 (1996) court of Appeal of Oregon****.* Counsel stated that the plaintiff filed its claim within six years for breach of a loan agreement as it has been adduced that the claim arose on the 5th day of March 2015 when the defendant last serviced his loan. counsel therefore submitted that the defendant's claim is baseless, misconceived and frivolous since the plaintiff's claim against the defendant was filed within time and prayed that court resolves this issue in the negative.

Counsel for the defendant stated that a preliminary objection was raised as to the matter being barred in law by time. She submitted that the defendant obtained a loan in 2008 and serviced for a period of four years and that since the final installment in 2012, no demand notice of whatever nature was served on the defendant. Counsel stated that this suit was brought in June 2019 eight years after the defendant made his last deposit on clearing the loan sum.

Counsel noted that the provision of the law is a strict one in nature that bars any party from instituting a suit of a contract after the expiration of six years *(see;* ***Sec. 3 of the Limitation Act, Cap 80, Mohammad B. Kasasa v Jasper Buyonga Sirasi Bwogi CA No. 42 of 2008****).* Counsel therefore submitted that the matter before court was filed out of time since the defendant last payment of the loan sum was in 2012. The defendant denies having made its last deposit in 2015. It was therefore prayed that court finds this matter bad in law as it was brought in violation of the Limitation Act.

The plaintiff in its submissions in rejoinder reiterated its position as to this being a question of fact and stated that courts have held that limitation as being computed from the last uncontested date of the alleged cause of action. He stated that in the circumstances of this case, the last date is contested as the defendant denies having made his last deposit in 2015 but in 2012. However, this assertion is not supported by any evidence at all. It was stated that the defendant has a legal burden to prove that limitation applies but has failed to.

Determination

Both counsel rightly cited section 3 of the Limitation Act, Cap 80 that provides for time within which a cause of action founded on a contract can be brought being six years. The plaintiff submitted that this action is well within time since the defendant last serviced his loan in 2015 and further adduced evidence to prove the same. The defendant on the other hand, contended that it fulfilled its obligation in 2012 when it fully paid off the loan and the interest thereto.

It was further contended that the plaintiff frivolously brought this suit out of time since the cause of action last arose in 2012 when the plaintiff could have brought the claim. The defendant did not however produce any evidence to counter the assertions of the plaintiff and therefore did not satisfy this court that indeed he last paid off the loan in 2012 and not 2015.

The court, in determining when an action accrues, is concerned with the existence of the facts giving rise to the entitlement to commence proceedings. Neither the knowledge nor the belief of the applicant as to an entitlement to bring proceedings is relevant to the question of when a cause of action accrues. The cause of action usually accrues on the date that the injury to the applicant is sustained. The statute of limitation clock is intended to tick solely from the time of the wrongful act, not from the time harm is realised.

I therefore concur with the submissions of counsel that the Plaintiff brought this action is within the required time frame by the law since the cause of action last arose in 2015.

This issue is therefore answered in the affirmative.

Issue 3

What remedies are available to the parties?

The plaintiff in its pleadings prayed for recovery of USD 3,071,681 arising out of breach of a loan agreement, a declaration that the defendant is in violation of the plaintiff's economic rights as enshrined under Article 40 (2) of the Constitution, special damages, general damages and costs of the suit.

Counsel submitted it is evidently clear that the plaintiff is an aggrieved party which fulfilled its obligations in the loan agreement but the defendant refused to pay back the said borrowed money with interest as contracted. Counsel stated that the aim of the law is to ensure that an innocent receives his full due and that no rule or equity can compel him to take a loss no matter how minor it may be. He further stated that the only compensation for non-repayment of a debt is payment of a debt *(see; **Barclays Bank of Uganda Ltd v Howad M Bakojja HCSS No. 53 of 2011**).* He therefore prayed that court orders for the repayment of USD 3,071,681 by the defendant.

Counsel further prayed for special damages of UGX. 10,070,000/= incurred in trying to recover its money from the defendant which included prove of payment of instruction fees to demand the defendant, fuel for the plaintiff's employees to deliver demand notices to the defendant. The plaintiff also sought to be paid general damages for breach of contract, inconveniences and loss suffered in business.

As far as damages are concerned, it is trite law that general damages are awarded in the discretion of court. Damages are awarded to compensate the aggrieved, fairly for the inconveniences accrued as a result of the

actions of the defendant. It is the duty of the claimant to plead and prove that there were damages losses or injuries suffered as a result of the defendant's actions.

In respect of special damages, it is trite that special damages must not only be specifically pleaded but they must also be strictly proved **(see *Borham-Carter v. Hyde Park Hotel [1948] 64 TLR.***

The plaintiff is therefore entitled to recovery of loan amount advanced with interest as per the agreement of 0.6% per week computed at simple interest until the date of judgment (4-3-2020). The lump sum figure presented to court appears to have been computed at compound interest by the plaintiff. The parties should agree on the actual amount within 24hours and report back to court.

The plaintiff is awarded general damages of **UGX 12,000,000.**

The plaintiff is awarded interest at a rate of 8% on the decretal sum from the date of judgment the suit until payment in full.

Costs to the plaintiff.

I so order.

SSEKAANA MUSA
JUDGE
4th March 2020