THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA

AT KAMPALA

Coram: Hon. S.G Engwau, JA
Hon. Amos Twinomujuni, JA
Hon. A. S Nshimye, JA

CIVIL APPEAL No.69 OF 2006

[ARISING OUT OF CIVIL SUIT No.1519 OF 1999]

TRADE IMPEX LTD ::APPELANT

VERSUS

1. CHRIS SSERUNKUMA
2. CHRISTINE OKOT CHONO } **:::::::::::::::::: RESPONDENTS**

JUDGEMENT OF JUSTICE A.S. NSHIMYE JA.

This appeal challenges the judgement of the High Court (Commercial Division) of 21/09/2005 by (Hon. M.S.Arach- Amoko JA) as she then was).

The learned judge awarded the appellant 5 million shillings as general damages, with interest at a rate of 15% p.a from the date of judgement till payment in full with costs. She found no fault with the order made by Justice Sebutinde J directing the appellant to deposit 50 million shillings with the respondents for purposes of furnishing security for costs.

BRIEF FACTS

Between 1989 and 1991, the appellant obtained a loan of ECU255.000 equivalent to about US$ 300.000 from Development Finance Company of Uganda Limited (DFCU). The loan was secured by a mortgage over the appellant's property comprised LRV 2432 Folio 6 plot No 8-11 situated along spring Close Kampala plus a debenture over the appellant's assets. Upon default, DFCU appointed the respondents as receivers. The receivers sold all the assets of the company including the mortgaged property. The mortgaged property was sold for US $ 670.000. Out of those proceeds, only a sum of US$ 24,414,19 was paid over to the appellant as balance after deductions of the loan and other expenses. The appellant questioned the accountability made by the respondents and filed a suit making several claims.

Justice M.S. Arach Amoko J heard the case and gave judgement in favour of the appellant only in terms as indicated earlier. She found that the appellant was entitled to the general damages and costs because, had the respondents made proper accountability, the suit would have been avoided.

She rejected other claims and did not find fault with the 50 million shillings taxed by Sebutinde J for purposes of furnishing security for costs. The appellant was aggrieved by the rejected claims and appealed on three grounds of appeal which, during conferencing were reduced to 3 agreed issues namely;

1. ***Whether the appellant could claim a refund from the respondent the amount claimed to have been expended as***

legal fees on the basis of a sum mentioned in order requiring the furnishing of security for costs.

2. ***Whether the Judge erred in law in not making any findings on the wrongly computed interest arising out of the sale of the mortgaged property when such interest was in issue.***

3. ***Whether the learned trial Judge erred in law in not making any finding on the figure of ECU46911.16 equivalent to US$ 56,997,72 illegally debited to the account of the appellant.***

At the hearing, Mr. Nangwala appeared for the appellant while Mr. Bwanika appeared for the respondent.

Mr. Nangwala argued the issues separately.

ISSUE 1

Whether the appellant could claim a refund from the respondent the amount claimed to have been expended as legal fees on the basis of a sum mentioned in order requiring the furnishing of security for costs.

Mr. Nangwala submitted that the first issue stemmed from the Page 138 of the record of appeal where it is indicated that US$ 51.535 was paid as legal fees. To him, the fees were excessive. The bill of costs in HCCS No.1113/1996 between the appellant and respondents and DFCU was paid without being taxed. His client therefore claimed for a refund of the said US$51.535. Counsel faulted the learned Judge for holding that the only course the

appellant could have taken about the bill of costs was to appeal or apply for review.

He cited **R.37 Advocates (Remuneration and Taxation of costs) Regulations** which states;

> **"A bill of costs incurred in contentious proceedings in the High Court ..... be taxable according to the rates prescribed in the sixth schedule of these regulations"**

Mr. Bwanika for the respondent argued that the said US$51.535 was rightly paid as the bill of costs was taxed. He said that the learned Judge (J. Sebutinde J) in her discretion assessed and fixed the amount. He cited Section 27 Civil Procedure Act which states

> ***" .....subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs and incidental to all suits shall be in the discretion of the court or judge and the court or judge shall have full powers to determine by whom and out of what property and to what extend those costs are to be paid, and to give all directions for the purpose aforesaid."***

The Record of Appeal, at page 153-156 shows that the bill of costs was taxed by Justice Sebutinde on the 6th May 1997. She in her discretion, awarded a sum of 50millions for purposes of furnishing security for costs.

In line with the above legal provisions, I find Mr. Bwanika's arguments more persuasive and find no reason to interfere with the holding of the learned trial Judge.

Mr. Nagwala further argued that the trial judge erred in finding that the appellant's remedy against the disputed sum lied either in appeal or review. According to him, instituting a fresh **HCCS No.1519/1999 (Trade Impex (U) Vs Chris Serunkuma & Christine Okot-Chono)** was sufficient. On page 224 of the Record of Appeal, the learned Judge said;

> ***"I am however of the view that the matter could have been raised by the way of an appeal or review under the relevant provisions of the law, if the bill appears excessive. It cannot be addressed in a claim of this nature because the bill will mostly be subjected to taxation.)***

Section 82 Civil Procedure Act provides that

"Any person considering himself/herself aggrieved..

(a)By a decree or order from which an appeal is allowed by this court from which no appeal has been preferred may apply for review of the judgement to the court which passed the decree or made the order....."

Section 66 Civil Procedure Act also provides that;

> ***"..... an appeal shall lie from the decree or any part of the decree and from order of the High Court to the Court of appeal."***

I would find that the appellant applied none of the above alternatives provided by the law. In my considered view, it would be wrong to rule that the best way for the appellant to seek a refund of the alleged excessive fees was through instituting a fresh suit against an

order passed by the same Court. I would therefore answer issue one in the negative.

ISSUE 2

> ***Whether the Judge erred in law in not making any findings on the wrongly computed interest arising out of the sale of the mortgaged property when such interest was in issue.***

Mr. Nangwala argued that on page 138 of the record, the respondents accounted for the money they had received but failed to account for the money they received as interest accruing from the agreement. He contended that, **the sum of US$50,000 and US$470.000 was to be paid with a fixed interest of 12% during the period of repayment**.

He pointed out that, on page 138 Record of Appeal, the respondents clearly indicated that the sum of US$35,925.07 was recovered between 14.8.1997 and 31.3.1998 and contended that the computation was wrong. He suggested that the computation of the interest should have run from 10.11.1996 because it is the date of execution of the Sale Agreement. He further suggested that the correct figure should have been US$ 83, 128, 32 making a difference of US$ 47,203.25.

Counsel drew our attention to the provisions of **Section 91 and 92 Evidence Act** which excludes oral evidence that contradicts a written contract. See also **Muwonge Vs Musah [2004]2 EA 187.**

In paragraph 3 of its plaint, the appellant claimed;

> ***"Payment of USD 280,906.67 interest thereon, General damages for breach of duty and for fraud, an order directing the defendants (now respondents) to account for their receivership and costs of this suit."***

When dealing with the issue of interest in the High Court, on page 98 of the record Mr. Nangwala stated:

> ***"The first attack is on the issue of interest. They got 670,000/= to be to be paid on execution. The outstanding amount was supposed to attract a fixed interest of 12% pa. The accountability gave interest of USD 35,925.07 as receivable from 14/8/97 to 31/3/98. There is a period omitted between the date of agreement i.e 10 November 1996 to 14/8/97. Had that period been included the whole interest could have been USD 83, 128,32. I am calculating from the 15th November 1996 to 31/3/98 minus the 35,925.07 which they under declared, as balance which they must pay is 47,203.25."***

The appellant contended that the interest started to run from the date of execution of the Sale Agreement. The 1st respondent Mr. Christopher Sserunkuma in re- examination said that the interest started to run on the 14.08.1997 when the transfer of the mortgaged property was effected by the Registrar of Titles and not on the execution of the Sale Agreement.

I draw an inference from the witness' testimony that the transfer was delayed by the court proceedings which were instituted by the

appellant restraining any transfer of the suit property to Beg Mohamed Ltd and that the interest started to ran after the transfer of the suit property to Beg Mohamed was effected.

The learned trail judge fully and sufficiently dealt with this issue of the interest and I concur that it was not proved. This issue would also be answered in the negative.

ISSUE 3

> ***Whether the learned Judge erred in not making any finding on a figure of ECU 46911.16 equivalent to US$56.997.72 illegally debited to the account of the appellant as indicated on page 135 of the record of appeal.***

On this issue, Mr. Nangwala argued that the ECU 46,911,16 was illegally debited from the appellant's account and was never explained.

Mr. Bwanika argued that the trial Judge looked at the evidence as a whole and said that Mr. Nangwala's allegations were unfounded.

The learned Judge went to greater heights to compel the respondents to produce a detailed statement of accountability and all financial statements.

Exh. P.18 on page 137 of record of appeal clearly spelt out all receipts and expenses. However a sum of ECU 46, 911, 16 that appears to have been withdrawn from the appellant's account was not accounted for specifically.

In his submissions Mr. Nangwala noted that Clause 12 of the Debenture Exh. P1 clearly provides that any receiver appointed was an agent of the company. He asserted that a receiver must account to the company for all receipts and payments.

He cited the case of **Gomba Holdings (UK) Ltd Vs Homan [1986]3 ALL ER 94 at 97** where court held that the receiver's duty to provide accounts or other information to a debtor company was not restricted to his statutory obligations. In his view, providing accounts means providing particulars of all money (every single shilling, or dollar or money in any currency recovered) including interest accrued on any sale of any property placed under receivership.

Mr. Bwanika argued that the appellant should provide proof of the claim. He cited **Uganda Commercial Bank Vs Kigozi [2002] EA 305 and Frank Makumbi Vs Kigezi African Bus Co. Ltd. [1986] HCB 69** where court held that as there was no evidence to prove special damages this claim would be disallowed.

I find that neither in the memorandum of appeal nor in submissions of Mr. Nangwala, there was a prayer for specific damages which Mr. Bwanika contends should have been proved. Mr. Nangwala only prayed for accountability of the ECU 46,911,16 equivalent to US$ 56,997,72 debited on the appellant's account.

As already discussed above, it's the duty of the receiver to account for all the money recovered from a property under receivership.

Exbt AC2 a letter dated 3rd January 1997 gave what appears to be the latest accountability of USD 190,000 being proceeds collected from the sale. It was as at 3rd January 1997. This letter appears on page 144 of the record and I find it convenient to reproduce it here for any one reading this judgment to appreciate the financial state of the affairs as it was, without, the task of first referring to the voluminous record of proceedings.

" **AC2**

TRADE IMPEX LIMITED IN RECEIVERSHIP

% P.O.B0X 2767
Kampala
Tel: 041- 256125/232212
Fax: 041-259435
3rd January, 1997

Our Ref: JRS/AD/TRAD/1

The General Manager
Development Finance Company of Uganda Ltd
P.O.B0X 2767
Kampala

RE: PAYMENTS OUT OF USD 190,000 RECEIVED

Reference is made to your letter appointing us to the joint receivers of Trade impex Ltd.

This is to notify you that we have deposited with DFCU USD 45,000/= in addition to the shs 120,000,000/- already remitted as payment out of the proceeds of US 190,000 so far collected .

Accordingly the following priority costs have been settled as summarised below.

1. ***URA Sales Tax Shs 4, 485, 941.***
2. ***DFCU expenses incurred on behalf of receivers shs 19,486,728.***
3. ***Security services for December, 1996 shs. 1,496,685.***
4. ***Joint receiver's fees from date of appointment to 31/12/96: 1% of collections = USD 1,900.***

We have also retained $ 3000 to cater for the following:

(1) Staff salaries up to the date the company was placed in receivership. shs. 819,000/=

(2) The minimum balance required to keep the account running.

We shall advise you of any new developments.

Yours faithfully,

CHRIS SSERUNKUMA ***CHRISTINE OKOT-CHONO***

JOINT RECEIVER ***JOINT RECEIVER*** ***"***

It is very clear from the above letter that the debit item of ECU 46,911,16 complained of by the appellant appearing on the ledger Card of DFCU as of 30.4.1998 was not explained.

However, much as this debit entry looks suspicious for having been made 1 year 3 months and 27 days, this ledger was annexed to EXPT 11 which was a report of anon qualified person which was rejected and abandoned by Mr. Nangwala as indicated earlier in this judgment.

The trial judge cannot therefore be faulted for not awarding the claim. This unfortunately to the appellant appears suspicious and would have probably been allowed if the appellant had found any other way of introducing the ledger card in evidence and made it part of the record. This item of appeal would also in my view, fail.

In the result, I would dismiss the appeal. As regards to costs, I endorse the finding of the trial judge that had the respondent initially given a detailed accountability, the protracted Court suit would have been avoided. I have also observed in my judgment, that had the appellant not fallen victim of engaging and relying on unqualified person who prepared Exhibit 11, he would have succeeded in his claim for the un explained debit entry of USD ECU 46,911.16.

With the above background in mind, I would deny the respondents costs and order that each party do bear its own costs here and in the Court below.

Dated at Kampala this …**19th** …day …**November**…of **2012**.

A.S NSHIMYE
JUSTICE OF APPEAL

JUDGMENT OF TWINOMUJUNI, JA

I have had the benefit of reading judgment, in draft, of his Lordship Hon.Justice A.S.Nshimye, JA. I agree with his conclusion and the orders made therein and I have nothing useful to add.

Dated Kampala this ...**19th** ...day of ...**November**...**2012**

A.TWINOMUJUNI
JUSTICE OF APPEAL