THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

CIVIL SUIT NO. 0386 OF 2018

KCB BANK UGANDA LIMITED :::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

1. **KUTI INVESTMENT LIMITED]**
2. **STEPHEN KUTEESA]**
3. **SOCVIA NAMALA] :::::::::::::::::::: DEFENDANT**

AND

KUTI INVESTMENT LIMITED ::::::::::::::::: COUNTER CLAIMANT

VERSUS

1. **KCB BANK UGANDA LIMITED]**
2. **PHOENIX OF UGANDA ASSURANCE CO. LTD] :::: COUNTER DEFENDANTS**

AND

PHOENIX OF UGANDA ASSURANCE CO. LTD :::::::::: PLAINTIFF

VERSUS

1. **KUTI INVESTMENT LIMITED**
2. **KCB BANK UGANDA LIMITED] ::::::: COUNTER DEFENDANTS**

Before Hon. Lady Justice Patricia Kahigi Asiimwe

Judgment

Introduction

1. The Plaintiff, herein after referred to as KCB Bank, initiated this suit under Summary Procedure against the Defendants—Kuti Investment Limited, Stephen Kuteesa, and Scovia Namala—seeking the recovery of UGX 184,010,997 plus the costs of the suit. In response, the 1st Defendant herein, after referred to as Kuti Investment Ltd, filed a counterclaim against both the Plaintiff and Phoenix of Uganda Assurance Co. Ltd (hereinafter referred to as Phoenix Assurance). Subsequently, Phoenix Assurance filed a counterclaim against both the 1st Defendant and the Plaintiff.

2. The Plaintiff's case is that KCB Bank extended a loan facility of UGX 227,083,500 to Kuti Investments Limited (the 1st Defendant), repayable over 36 months. This facility was secured by a 340 HP Frankun Dump Truck, a fixed and floating debenture over the company's assets, and the personal guarantees of the 2nd and 3rd Defendants. To date, the 1st Defendant has paid a total of UGX 43,072,503, leaving an outstanding balance of UGX 184,010,997, which the Plaintiff now seeks to recover.

3. The Defendants contend that the loan was specifically obtained to purchase a commercial truck (Registration No. UAW 826G) from Cooper Motor Corporation, which was registered jointly in the names of the Plaintiff and the 1st Defendant. In addition to the truck serving as security, the 1st Defendant maintained a comprehensive insurance policy with Phoenix of Uganda Assurance Company Ltd. The premiums for this policy were paid by the Plaintiff using funds deducted directly from the 1st Defendant's account.

4. Following an accident involving the vehicle, Phoenix of Uganda Assurance Company Ltd issued a partial payment; however, the Defendants maintain that this sum was insufficient to cover the total damage. Furthermore, the Defendants argue that the Plaintiff unlawfully impounded the vehicle from J.K. Ssekandi Enterprise garage. They assert that by failing to follow the legal procedures for realizing a debenture, the Plaintiff directly frustrated the 1st Defendant's ability to utilize the truck and settle the outstanding loan.

5. The 1st Counter-Claimant/1st Defendant (Kuti Investments Limited) brought an action against the Counter-Defendants, seeking orders and a declaration that the 1st Counter-Defendant (KCB Bank) frustrated its efforts to fulfill its loan obligations. The 1st Defendant further alleges that the bank breached the terms of the debenture agreement and that the 2nd Counter-Defendant (the Insurer) breached the comprehensive insurance policy. Consequently, the 1st Defendant seeks general damages, interest, and costs.

6. The 2nd Counter-Defendant (Phoenix Assurance) denies liability, asserting that it was not privy to the financing contracts between the 1st Defendant and the Bank. It maintains that the insurance policy was issued to the Counter-Claimant with the Bank named as a "loss payee" at the Counter-Claimant's request. The Insurer argues that its liability was limited strictly to damages occasioned by the accident, and it asserts that all verified losses arising from reported incidents were duly paid.

7. The Insurer further states that while the first accident (January 2015) was compensated, the claim for the second accident (August 2015) involved the submission of forged documents, was still paid. They contend that any subsequent damage or "vandalism" occurred while the vehicle was left unattended by the

Counter-Claimant. Therefore, any consequential loss or theft of parts resulted from the Counter-Claimant's own negligence and breach of policy obligations. The Insurer also states that the 1st Counter-Defendant (KCB Bank) demanded the balance of the claim to facilitate repairs—a demand to which the Counter-Claimant consented.

<u>Representation</u>

8. KCB Bank was represented by M/S Katongole, Yiga & Masane Advocates, and the Defendants were represented by M/S Signature Advocates, and the Phoenix Assurance was represented by M/S Nakiranda & Co. Advocates. All the parties filed submissions, which have been considered in resolving this matter.

<u>Issues</u>

9. The issues for resolution are as follows:

I. Whether there was a breach of the loan agreement between KCB Bank and Kuti Investment Ltd, and if so, which party is liable.
II. Whether there was a breach of the Insurance policy by the counterdefendants (KCB Bank & Phoenix Assurance).
III. Whether the Counter-Defendants' (KCB Bank & Kuti Investments) accident claim was fraudulent.
IV. Whether the insurance compensation payments to the Counter-Defendants by the 2nd Counter-Claimant were erroneous.
V. What remedies are available to the parties?

Evidence

10. At the hearing, the KCB Bank called one witness, Timothy Nabaala, the Senior Recoveries & Collections Manager (PW1). The Defendants/ Counter Claimants called only one witness, Stephen Kuteesa, DW1. Phoenix Assurance called 2 witnesses: Leuben Sajjabi, DW2, the Claims Manager, and John Bosco Tumwesige (DW3), a loss assessor. I will refer to their testimony as relevant.

Resolution

Issue I: Whether there was a breach of the loan agreement between KCB Bank and Kuti Investment Ltd, and if so, which party is liable.

11. *The Black's Law Dictionary, 12th Edition,* on page 232, defines breach of contract to mean violation of a contractual obligation by failing to perform one's own promise.

12. Under section 32(1) of the Contracts Act Cap 284, parties to a contract are required to perform their respective promises unless dispensed with by law. In the case of **William Kasozi v DFCU Bank Ltd, High Court Civil Suit No. 1326 of 2000**, it was held that "Once a contract is valid, it creates reciprocal rights and obligations between the parties to it...It is the law that when a document containing contractual terms is signed, then in the absence of fraud or misrepresentation the party signing it is bound by its terms".

13. Further, in the case of **Nakana Trading Co. Ltd v Coffee Marketing Board Civil Suit No. 137** of **1991** court defined breach of contract to mean where one or both parties fail to fulfil the obligations imposed by the terms of the contract.

14. KCB Bank averred that Kuti Investments Ltd breached the loan facility agreement by refusing to pay the loan sums.

15. The purpose of the loan was for the purchase of a motor vehicle, which was purchased. As security for the loan, Kuti Investments Ltd, entered into a debenture agreement (P.E 3) with KCB Bank in respect to the same vehicle and also signed a Chattels Mortgage Agreement (P. E 2).

16. Under the loan agreement, Kuti Investments Ltd was required to make monthly payments of UGX. 9,500,000.

17. Under clause 2 a) of the Chattels Mortgage Agreement, and clause 2.1 of the Debenture Agreement, Kuti Investments Ltd undertook to pay KCB Bank the principal and interest and other charges on the loan as set out in the facility letter.

18. It is not in dispute that Kuti Investments defaulted on the loan payments. DW 2- Steven Kutesa admitted in his testimony that the loan was still outstanding. Therefore, Kuti Investments breached the loan agreement.

19. Mr. Steven Kutesa (DW 1) testified that he stopped making payments because the vehicle used to generate his income was out of service. Without the vehicle being restored by the insurance company, he lacked the financial means to satisfy the bank loan.

20. Counsel for Kuti Investments Ltd submitted that KCB Bank breached the contract by unlawfully impounding the vehicle, which frustrated the company's performance under the contract. Counsel submitted that the vehicle was impounded without notice contrary to sections 43 (4) and 46 (2) of the Security Interest in Movable Property Act, Cap 293. Counsel for KCB Bank

submitted that the vehicle was impounded before the coming into force of the Security Interest in Movable Property Act and is therefore not applicable.

21. The Security Interest in Movable Property Act came into force on 31st May 2019. No evidence was adduced regarding the date when the vehicle was impounded. However, this suit was filed on 18th May 2018, and from the evidence on record, it was filed after the vehicle was impounded. Therefore, the Security Interest in Movable Property Act came into force after the vehicle was impounded and is therefore not applicable.

22. The law in force at the time was the Chattel's Securities Act of 2014. The Act provided for the taking of possession of security once there is a default. It was, however, silent on the need to give notice before taking possession of security.

23. Clause 4 of the Chattel's Mortgage Agreement gives KCB Bank powers to enforce the security without notice in the event of default. Under clause 4 (i) of the same agreement, KCB Bank was given powers to take possession of the vehicle. As already found above, there was a default of the loan agreement by Kuti Investments Ltd. In the circumstances, I find that the impoundment of the vehicle was lawful.

24. Counsel for Kuti Investments Ltd submitted that the bank breached the loan facility agreement by failing to apply the insurance funds for repairs and by impounding the vehicle, which frustrated the 1st Defendant's performance.

25. Under the Insurance policy document DE 9, KCB Bank was indicated as the loss payee under the policy.

26. According to **The Black's Law Dictionary, 12th Edition,** at page 1134, a loss payee is a person or entity named in an insurance policy (under a loss-payable clause) to be paid if the insured property suffers a loss.

27. The Supreme Court in the United Kingdom in the case of **Aspen Underwriting Ltd and others v Credit Europe Bank NV [2020] UKSC 11**, held that a loss payee is an equitable assignee who has the rights to receive insurance proceeds.

28. Section I- clause 1 of the Insurance Policy states as follows:

    The Company will indemnify the Insured against loss or damage to the Motor Vehicle and its accessories and spare parts whilst thereon

    a)By accidental collisions or overturning consequent upon mechanical breakdown or consequent upon wear and tear.

29. Clause 2 is as follows:

    At its own option the Company may, in cash, the amount of the loss or damage or may repair, reinstate, or replace the motor vehicle or any part thereof, or its accessories or spare parts...

30. Under these provisions, the insurance policy was designed to indemnify the insured against loss or damage. In the event of such a loss, Phoenix Assurance committed to either repairing the vehicle or providing Kuti Investments Ltd with a cash settlement for the repair costs.

31. Leuben Sajjabi DW2 from Phoenix Assurance testified that the accidental loss was assessed at UGX. 24,051,260. Of this UGX. 10,000,000 was paid to Kuti Investment Ltd's garage, and the balance of UGX. 14,051,260 was paid to KCB Bank.

32. Phoenix Assurance adduced in evidence a cheque of UGX. 14,051,260, indicating that the money was paid to KCB Bank (D E 13). PW also confirmed in his testimony that KCB Bank received the payment.

33. Under clause 6.1 (g) of the Debenture Agreement under which Kuti Investments Ltd undertook to insure the vehicle, and it was agreed as follows:

> (g) *insure and keep insured with an insurance office or underwriters to be approved by the Bank from time to time, and if so required by the Bank in names of itself and the Bank, ... (v)* <u>*apply all money which may at any time be received, receivable under any such insurance in replacing, restoring or reinstating property or asset destroyed or damaged unless the Bank agrees otherwise*</u>.
> (Emphasis added)

34. In the case of **Aspen Underwriting Ltd and others v Credit Europe Bank NV** (supra), the Supreme Court held that "an assignee cannot assert its claim under a contract in a way which is inconsistent with the terms of the contract."

35. It should be noted that in a letter dated 30th March 2017, (D.E 19) KCB Bank wrote to Phoenix Assurance and requested that the balance of UGX. 11,070,260 be paid to them as the loss payees to allow completion of the repairs. KCB Bank was therefore also well aware of the purpose for which the compensation was made.

36. As seen above, any compensation in the event of an accident was supposed to be applied to the repair of the vehicle. KCB Bank was silent on what the money was used for.

37. I find that KCB Bank did not have the authority to use the compensation for any other reason other than the repair of the vehicle, as was provided for under the policy. There is no evidence on record to prove that the money was applied towards the repair of the vehicle.

38. KCB Bank breached the contractual terms by failing to apply the money received from Phoenix Assurance for repairs of the vehicle.

39. In conclusion, there was a breach of contract by Kuti Investments Ltd due to failure to pay the loan. KCB Bank breached the contract by failing to apply the money received from Phoenix Assurance to repair the vehicle.

Issue II: *Whether there was a breach of the Insurance policy by the counterdefendants (KCB & Phoenix Assurance).*

40. Kuti Investments Ltd contends that KCB breached its fiduciary duty by recommending an insurer (Phoenix Assurance) that provided inadequate compensation. Counsel for Kuti Investments Ltd also submitted that the Bank's failure to intervene following Phoenix Assurance's underpayment was a breach of its duty of good faith. KCB Bank submitted that the relationship between the insurer (Phoenix Assurance) and the client (Kuti Investments Ltd) was independent of the Bank.

41. Kuti Investments Ltd contends that Phoenix Assurance breached the insurance policy by failing to pay the entire claim of UGX. 104,470,400. Counsel relied on an invoice from J.K Ssekandi Enterprises to support the claim that the repairs required a total of UGX. 104,470,400. The invoice was, however, only marked as an identification document and was not admitted into evidence.

Such documents do not carry evidential value and therefore cannot be relied on by the court to make a decision (See **Syanywana Kasereak and Ano. v The Registrar of Titles and Ano. HCT -01-LD-CS-0021-2013, Cargo Solutions v Ibrahim Kyabaggu Civil Appeal 0034-2023**)

42. The accident assessment report on record (DE 10) indicates that the damage to the vehicle was assessed at UGX. 21,070,260.

43. The report further indicates that some parts of the vehicle had been damaged and others were missing. The total value of both missing and damaged parts was assessed at UGX. 99,192,400, and the damaged parts alone were assessed at UGX. 21,070,260. The report also states that the vehicle was allegedly vandalized.

44. Counsel for Phoenix Assurance submitted that under the policy, consequential losses were not covered. Counsel further submitted that Kuti Investments Ltd failed to take reasonable precautions to protect the vehicle from being vandalised and wear and tear after the accident. Counsel cited Condition 3 of the Policy, which stated that the insured shall take all reasonable steps to safeguard the motor vehicle from loss or damage and that in the event of an accident, the vehicle shall not be left unattended without proper precautions being taken to prevent further loss or damage.

45. Counsel for Kuti Investments Ltd argued that condition 3 of the Policy document that counsel for the Phoenix Assurance cited was alien to them. The policy document was entered in evidence as DE 9. The gist of counsel for Kuti Investments Ltd's submission is that the document was not part of the insurance contract.

46. DW 2 testified that an insurance contract has sections that is the Policy Schedule (D.E 8) and a Policy wording (DE 9) which form an insurance contract.

47. I have reviewed the two documents, and I note that the 1st part, which was marked as DE 8, is titled Motor Policy Schedule. According to **The Black's Law Dictionary 12th Edition at page 1612**, a schedule is a statement that is attached to a document, and that gives a detailed showing of the matters referred to in the document.

48. I note that under the schedule on page 2, it is stated as follows:
Important note: Please examine the policy document for complete details, and any discrepancies should be brought to our notice immediately, not later than 15 days from the date of receipt of this policy.

49. From the above, it is clear that the schedule is not the complete contract and that the details were provided for in another document referred to as a policy document. DE 9, which is contested by Kuti Investments Ltd, is titled "Motor Vehicle Policy". I am persuaded that the policy document referred to in the Schedule (DE 8) is DE 9 and that, therefore, DE 9 was part of the insurance contract entered into by the parties.

50. Under the Exceptions to Section I, paragraph a) of the policy, it is stated that any consequential losses are not covered.

51. DW1 admitted that the vehicle was not towed immediately following the accident; he testified that it remained at the scene for two days. Although he stated that he employed individuals to guard the vehicle during this period, he acknowledged that the accident—which occurred on 2nd August 2015—was not reported until 4th August 2015. He testified that the delay was because

the driver ran away after the accident. Under the policy terms, the insured bore the responsibility to safeguard the vehicle (Condition 3); consequently, any loss resulting from the delay in towing the vehicle remains his liability.

52. Counsel for Kuti Investment Ltd also submitted that the Insurance Company breached the insurance policy by not paying the towing fees incurred. DW 1 testified that Kuti Investment Ltd incurred costs of UGX. 20,000,000 for towing the vehicle from the accident scene to Kampala. He did not provide any documentary evidence to that effect.

53. However, DE 22, which is a document signed by DW 1, indicates that the towing charges amounted to UGX. 2,900,000. DW 2 testified that the towing fees of UGX 1,000,100 were paid to KCB Bank and that under the policy, that was the limit. I note that DE 8 indicates that the protection and towing fees are UGX 1,000,100.

54. From the evidence on record, the damage resulting from the accident was assessed at UGX. 21,070,260. The Garage handling the repairs was paid UGX. 10,000,000. KCB Bank was paid the balance and an extra UGX. 1,900,000 following a further assessment and the towing fees, the total amounting to UGX. 14,051,260.

55. I, therefore, find that Phoenix Assurance did not underpay Kuti Investments Ltd. Consequently, there was no breach by the KCB Bank of its duty of good faith to its customer, Kuti Investments Ltd.

Issue III: Whether the transactions were tainted with fraud or erroneous payments

Issue IV: Whether the insurance compensation payments to the Counter-Defendants by the 2nd Counter-Claimant were erroneous

56. Phoenix Assurance's case in the 2nd counterclaim is that the accident in issue did not take place, and the claim was fraudulent. Counsel for the Phoenix Assurance admitted in the submissions that the evidence on record was not sufficient to prove that indeed the transactions were tainted by fraud.

57. Fraud was defined by the Supreme Court of Uganda in ***Fredrick J. K. Zaabwe v Orient Bank Ltd. and Others Civil Appeal No. 04 of 2006,*** where Hon. Justice Bart Katureebe cited the definition of fraud as:

    Intentional perversion of truth for the purposes of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Anything calculated to deceive, whether by a single act or combination, or by suppression of truth, or suggestion of what is false... A generic term, embracing all multifarious means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth...

58. The burden of pleading and proving fraud lies on the party alleging it, and the standard of proof is beyond a balance of probabilities required in ordinary civil cases, though not beyond

a reasonable doubt as in criminal cases (**See Kampala Bottlers v Domanico, CA No 22 of 1992**).

59. Phoenix Assurance's claim for fraud is based on the fact that the dates on which the accident happened are inconsistent. DW 1 testified that the accident happened on 2nd August 2015, the police report and sketch map indicated that it happened on 4th August 2015. DW1 informed the Police that the accident happened on 2nd August 2015, but he reported the accident on 4th August 2015 because the driver ran away from the accident scene. Phoenix Assurance's witness DW 3 testified that while there were inconsistencies regarding the date of the accident, there was an accident.

60. In the absence of any evidence to the contrary, I find that there was no fraud. Issues III and IV are answered in the negative.

Issue V: What remedies are available to the parties?

61. Kuti Investments Ltd breached the loan agreement and is therefore liable to pay the outstanding loan amounts of UGX 184,010,997.

62. Kuti Investments Ltd prayed for general damages. Section 61(1) of the Contracts Act provides that "where there is a breach of contract, the party who suffers the breach is entitled to receive from the party who breaches the contract, compensation for any loss or damage caused to him or her."

63. In the case of **Progressive Group of Schools Ltd & 2 others versus Barclays Bank of Uganda Ltd T/A Absa Bank (U) Ltd & Luyanzi Academic Foundation [Civil Appeal No. 349 of 2020]**, the Court of Appeal held that, "It is trite law that general damages are awarded at the discretion of Court. They are awarded to

compensate the aggrieved, fairly for the inconveniences accrued as a result of the actions of the respondent."

64. As found under issue I above, KCB Bank did not use the compensation money from Phoenix Assurance for the repair of the vehicle. I find that failure by the Bank to pass on the money for the repair of the vehicle contributed to the failure to get the truck back on the road, and consequently make payments towards paying off the loan.

65. The outstanding balance is UGX. 184,010,997, and the amount that KCB Bank received was UGX. 14,051,260. The total amount required put the vehicle back on the road was UGX. 99,192,400 Of this UGX. 10,000,000 was paid to the company carrying the repairs, and UGX 14,051,260 was paid to KCB Bank, and the balance was attributed to consequential losses.

66. I am therefore mindful of the fact that even if KCB Bank had paid the UGX. 14,051,260 towards the repairs of the vehicle that was not enough to put the vehicle on the road. Nonetheless, KCB Bank's failure to apply the money towards the repair of the vehicle amounts to a breach of the contract.

67. I note that KCB Bank has held onto this money since February 2017 and has therefore held on to that money for almost 9 years. In the circumstances, I will award Kuti Investments Ltd damages of UGX. 25,000,000. Therefore, Kuti Investments is entitled to payment of UGX. 39,051,260.

68. Phoenix of Uganda was not successful in the counterclaim against the other parties and is therefore not entitled to any remedies.

69. In conclusion:

a) Judgment is entered for the Plaintiff against the 1st, 2nd, and 3rd Defendants jointly and severally for the payment of UGX. 184,010,997 with interest at the rate of 18% on form the date of judgment until payment in full;

b) Judgment is entered for the 1st Defendant against the Plaintiff for payment of UGX. 39,051,260 with interest at the rate of 18% on form the date of judgment until payment in full;

c) Each party shall bear its own costs.

Dated this 29th day of January 2026.

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Patricia Kahigi Asiimwe

Judge

Delivered on ECCMIS