NYASHA MATSIKA

and

RUFARO MATSIKA

versus

THOMAS MATANO

and

CAROLINE MURANZI

HIGH COURT OF ZIMBABWE

MTSHIYA J

HARARE, 16 July, 23 July, 24 July 2012

and 12 December 2012

*S Zvinavakobvu*, for the plaintiffs

*P Mukono*, for the defendants

MTSHIYA J: On 28 May 2010 the plaintiffs, who are husband and wife, issued summons against the defendants who are also husband and wife. The claim in the summons was for the following relief:

“a) That the defendant be ordered to pay the plaintiffs, jointly and severally

one paying the other to be absolved the sum of USD17 888.00 together

with interest thereon calculated at the rate of 5.5% from the 8th of

December 2008 to the date of full and final payment.

b) That the defendants’ motor vehicle being a Mercedes Benz ML 320

Registration number 807 – 543N be ordered to be specially executable in favour of the plaintiffs who shall be entitled to sell the said motor vehicle and recover the full sum of defendants’ indebtedness to the plaintiffs”.

The plaintiffs alleged that the above claim arose from the fact that in September 2008 they entered into an investment agreement with the defendants. The agreement was that the plaintiffs would invest money into the business of the defendants for the purchase of stock. The money would be repaid in full with interest at the rate of 5.5% per week for the amount(s) advanced to the defendants. It was further alleged that as at 8 December 2008 the total amount advanced by the plaintiffs to the defendants was US$17 800-00 and the said amount was due and payable on 18 December 2008. The defendants failed to pay the amount as agreed and hence this action.

In their pleas the defendants denied the plaintiffs’ claim and in the process the first defendant also filed a counter claim. The counter claim was for:

“a) Return and vindication of the motor vehicle, Mercedes Benz ML320 Reg

No. 807-543N.

b) Payment of holding over damages at the rate of US220.00 per day

reckoned from the 27th of May 2010 to date of return and delivery, both

dates inclusive.

c) Payment of the cost of service and replacement of damaged parts and

accessories, such cost to be determined by a reputable Mercedes Benz

dealer, to be appointed by this court.

d) Costs of suit on the legal practitioner-client scale”.

It was alleged that the above counter claim arose from the fact that on 27 May 2010 the plaintiffs unlawfully took away from the first defendant his motor vehicle, namely a Mercedes Benz ML 320 Registration number 807-543N. The plaintiffs denied the counter claim arguing that the motor vehicle was voluntarily surrendered as security for the moneys owed to them.

In addition to the counter claim, the record shows that on 22 June 2010 both the defendants filed special pleas indicating that the second defendant had been mis-joined to the proceedings.

Furthermore the second defendant also excepted to the plaintiff’s summons and declaration arguing that they were vague and embarrassing. He averred that there were no details of the amounts advanced to the defendants and the currency in which advances were made.

The special pleas and exception were, however, abandoned. This was confirmed by the Legal Practitioners at the commencement of the trial.

Both plaintiffs gave evidence in support of their claim. They also called one Phibeon Busangabanye (“Phibeon) as their witness.

The first witness, Nyasha Matsika (Nyasha) told the court that he is married to Rufaro Matsika, the second plaintiff. Nyasha said the second defendant called his wife inviting her to invest in the defendants’ commodity broking business. He had expressed interest and the parties eventually met at the defendants’ residence in Gunhill, Harare. He said the defendants wanted an injection of US$20 000-00 into their business but they (“the plaintiffs”) were only able to offer US$10 000-00 as an initial injection. The arrangement, he said, was that the money would be paid back with interest at that rate of 5.5% per week. Nyasha said as time proceeded they handed in another sum of US$6500-00 to the defendants and also made some drawings of interest already accrued. He said when they wanted to disinvest from the defendants’ business it became necessary for a reconciliation statement to be produced. That, he said, was done by the second plaintiff and the second defendant (ie the wives of the first plaintiff and the first defendant) The agreed amount due to the plaintiffs, upon reconciliation, he said, was US$17800-00 and the defendants had agreed to settle the amount.

Nyasha said notwithstanding several family meetings held with the defendants the amount was not paid. He said some of the meetings were attended by Phibeon. He said despite the first defendant’s promise that full payment would be made in December 2009 no such payment was ever made. It was Nyasha’s evidence that all the money they advanced to the defendants was from their free funds acquired through employment and business in South Africa. He said, his passport, which he was ready to produce in court, proved his status in South Africa.

Nyasha said it was the second defendant’s suggestion that the plaintiffs could take possession of the defendants’ motor vehicle pending payment in full. This he said, was finally done in 2010 when the defendants handed in their vehicle at Auto Services along Seke road in Harare. He denied that the plaintiffs’ had despoiled the defendants because the defendants had willingly handed over the motor vehicle to them (i.e plaintiffs).

The second plaintiff was the next person to give evidence.

Rufaro Matsika (“Rufaro”) said in 2008, while she and her husband, (the first plaintiff), were working in South Africa, the second defendant approached them with a request for them to invest in their (defendants’) business venture which they were running here in Zimbabwe. The business venture required foreign currency namely, United States Dollars. She said the plaintiffs were earning foreign currency in South Africa and therefore had free funds to invest. She and her husband, the first plaintiff, had agreed to the proposal.

She said in September 2008 they (the plaintiffs), at the residence of the defendants, then gave the defendants an initial sum of US$10 000-00. She said they later gave the defendants another sum of US$6500-00. She said the agreed interest rate on the sums advanced to the defendants was 5.5% per week. She described the transaction as “a family to family transaction” where all were involved.

Rufaro said that until December 2008 they were receiving their returns on the investment as agreed. However, during that month the plaintiffs decided to disinvest in the business of the defendants and upon reconciling the figures it was agreed that the defendants owed the plaintiffs US$17800-00 as at 8 December 2008. The parties, represented by the second plaintiff and the second defendant, signed a statement confirming the amount due to the plaintiffs.

Rufaro said the defendants then kept on promising that they would pay the money but they never paid.

In May 2010 the defendants then pledged their motor vehicle as a commitment to pay the debt. She said the motor vehicle was voluntarily surrendered to them at Premier Auto Services, along Seke road, Harare. Rufaro said there was, however, disagreement between the defendants. She said the first defendant, in whose name the motor vehicle is registered, was telling the second defendant that she should have surrendered her own vehicle. She said the argument only arose after the vehicle had already been voluntarily surrendered to them (“the plaintiffs”).

Rufaro said as from September 2008 up to December 2008 the parties had worked together harmoniously. The problem only arose when the defendants could not pay the US$17800-00 which they had signed for in exhibit 1, which she herself had prepared. She also confirmed that the reconciliation statement was signed by herself and the second defendant on behalf of their husbands. She further stated that the money they lent to the defendants were part of their free funds acquired through legitimate work in South Africa.

Rufaro said she was surprised by the first defendant’s attitude relating to the surrender of the motor vehicle because that had been agreed to amongst the parties. She said after the surrender of the motor vehicle the first defendant then started denying that he was married to the second defendant. She said it was also at that stage that the first defendant started trying to distance himself from the transaction. She and the first plaintiff had then deemed it necessary to resort to this court action.

The plaintiffs then called in Phibeon as their third and last witness. Phibeon said in 2009 the first plaintiff had asked him to accompany him to a meeting with the defendants. He said he was owed money by the first plaintiff and therefore wanted to be paid from payments by the defendant. Phibeon said the first defendant had promised to pay but had asked for a period of three months because he had viable projects in Kwekwe and Kadoma.The projects, he said, would yield money in December 2009.

Phibeon said the meeting did not involve the second plaintiff and the second defendant. He said, despite asking for time to pay, the first defendant had denied liability and involvement in the transaction.

Phibeon said he was exerting pressure on the first plaintiff so that he could be paid his money. He also said although there were no minutes for the meetings, the meetings had been secretly recorded.

After the plaintiffs’ case, Thomas Mutano (“Mutano”), the first defendant gave evidence for the defence. He said he only knew the plaintiffs through social circles and had no business with them. He said he did know anything about the amount of US$17800-00 that the plaintiffs were demanding. He admitted, though, that his wife Caroline was a friend of Rufaro (“the second plaintiff”). He himself had no relationship with the first plaintiff (“Nyasha”)

Mutano, however, testified that he was aware of foreign currency dealings that were taking place between Caroline (“the second defendant”) and Rufaro (“the second plaintiff”). He, however, was not aware of the September/December dealings which led to the plaintiffs’ claim for US$17800-00. He was running a liquor outlet and the second defendant was not involved in that business, which traded under the name Pyvet. He said Pyvet, his registered company, had never dealt in food stuffs and was run by his brother.

He denied ever pledging his motor vehicle for the debt of US$17 800-00 but, however, admitted being visited by Nyasha and Phibeon in respect of the debt. He said they were trying to force him to pay on behalf of his wife. He said they had presented to him an acknowledgment of debt which he had refused to sign because he did not know anything about the debt. Mutano confirmed being customarily married to Caroline (the second defendant).

Mutano said on the day the motor vehicle was forcibly taken away from him, he had gone to Premier Auto Services to look for spare parts for his motor vehicle. He said Auto Services is wholly owned by relatives of the plaintiffs and a brother of the first plaintiff works at that company.

Mutano said upon arrival at Auto Services he parked his motor vehicle and left the keys on the ignition. He said his wife remained in the car as he proceeded to go and inquire about the spare parts for his motor vehicle. He did not get the spare parts. Mutano said upon his return to the place where he had parked his car his wife told him that the second plaintiff had run away with the car keys. He had then approached the first plaintiff who refused to surrender the car keys saying they (plaintiffs) wanted their money. He said he was then surrounded by many people who were at the scene. He then reported the matter to two policemen who were nearby.

Mutano said after initially refusing to go with the police, the first plaintiff was later handcuffed and taken to Braeside Police station where he was locked up for a whole day. In the meantime, he said, the second plaintiff had disappeared with the car keys.

Mutano went on to say that, on the orders of his superiors, the member-in-charge at Braeside Police Station released the first plaintiff. He said all efforts to get assistance from the police failed and as a result he did not recover his car.

Mutano said he then approached this court and an order for the release of his car was granted. However, he went on, up to now the plaintiffs were still holding onto his car.

Mutano said, he used the car for his family business and for ferrying his children to school. Mutano said before buying another car he used to hire a car and was paying US$250-00 per day. He believed the plaintiffs were using his car.

Under cross examination, Mutano said his wife was a foreign exchange dealer. His own company was into liquor selling. He went further to say when the first plaintiff and Phibeon first visited his home they alleged that the money they wanted from his wife was for the late Army Commander, General Mujuru. This, he said, was a way of intimidating him so that he could pay the money on behalf of his wife. He said he did not know why he was in court because he had nothing to do with his wife’s business deals. He said he had no joint business with his wife and had never seen the investment agreement (i.e exh 1).

The second witness for the defence was Caroline Muranzi (“Muranzi”). She said she knew the plaintiffs through her friends namely Barbara Rwodzi (“Rwodzi”) and Ruth Chigubu (“Chigubu”). She testified that Rwodzi had asked her to help the second plaintiff with foreign currency for shopping in China. She confirmed that she was dealing in foreign exchange i.e buying and selling foreign currency. She had dealt with the second plaintiff but had never received any foreign currency from her. She said her husband, Mutano, had nothing to do with her business.

She denied that there was an investment agreement between her and the plaintiffs. She told the court that the plaintiffs, had, through Rwodzi, begged her for foreign currency, a fact which Rwodzi could confirm. She said she did not know if Rwodzi could agree to testify.

Muranzi said her first transaction with the second plaintiff was supposed to be for US$10000-00 but due to the fluctuating exchange rates, she had only managed to give the second plaintiff a sum of US$6000-00. She said she had on numerous occasions transacted with the second plaintiff. The transactions, she said, took place at different places and at times at their residences. She said she had only met the first plaintiff at her house when he accompanied the second plaintiff who was now demanding money from her.

Muranzi denied knowledge of the claimed sum of US$17 800-00. She also denied that she had signed exh1, and had only seen it in the court for the first time. She said the signature on exhibit 1 was not hers and she had never pledged her car for the debt. She, however, like the first defendant, testified that when the car was taken, she and Mutano had gone to Premier Auto Services for spares for their Range Rover. She denied giving the car keys to the plaintiffs. She maintained that she and her husband ran separate businesses.

Muranzi said she was not aware that the first plaintiff was working in South Africa and did not believe so because she frequently transacted business with her here in Zimbabwe.

The issues for determination as listed in the joint pre-trial conference minute are the following:-

“1. Whether or not the defendants or the second defendant owe the plaintiffs

the sum of US$17800-00.

2. Whether or not the plaintiffs are entitled to interest on the capital sum at the rate of 5.5.% from 08 December 2008 to date of full and final payment.

3. Whether or not the plaintiff’s cause arises out of an illegality and if so whether or not they are entitled to the relief claimed.

4. Whether or not the first defendant is entitled to an order in terms of this counter claim.”

As already indicated in this judgment, the parties confirmed that the issues of a special plea and exception were abandoned at the pre-trial conference.

In his closing submissions, Mr *Zvinavakobvu*, for the plaintiff submitted that in terms of s 3(a) of the Exchange Control Regulations, 1996 (“the Regulations”) the plaintiffs, as holders of South African work and business permits, had legally entered into an investment agreement with the defendants using their free funds. The said s 3 (a) provides as follows:-

“ 3 Subsections (1) and (2) shall not apply to-

1. The acquisitions of foreign currency outside Zimbabwe by an individual who is a Zimbabwean resident, where the foreign currency is acquired with free funds which were available to him at the time of the acquisition.”

Mr *Zvinavakobvu* submitted that the defendants had failed to disprove the fact that the plaintiffs worked and had businesses in South Africa and hence their access to free funds.

I must hasten, however, to point out that the work and business permits referred to above were never placed before me.

He said both the defendants had lied to the court and did not therefore deserve to be believed. He pointed out that:

“2.3 The defendants lied to the court that they do not collectively run business but upon cross examination the second defendant admitted that she tells colleagues that she is a director of Pyvet Investments, a company which is co-owned and co-directed by the first defendant. It shows that the defendants were simply out to mislead the court. This makes their evidence unworthy of belief by the court.

2.4 The evidence of the defendants is most misleading, unbelievable, impossible and improbable and impossible to the extent they say that they do not collectively run business when at the same time they treat their assets as collective assets. The way the defendants sought to mislead the court in alleging that each of them has absolutely nothing to do with each other’s business makes their evidence unbelievable.”

Mr *Zvinavakobvu* said the investment agreement was entered into on a family to family basis and to that end the second plaintiff and the second defendant as wives of the first plaintiff and the second defendant respectively, had signed the agreement, (i.e exh 1) on behalf of their families. The agreement was a confirmation that as at 8 December 2008, the defendants owed the plaintiffs a sum of US$17800-00 inclusive of interest at the rate of 5.5% per week. That amount, he said, was still outstanding and to that end the defendants had freely pledged their Mercedes Benz ML 320 for the debt.

Furthermore, he went on, the first defendant had admitted running business under a company called Pyvet Investments, dealing in commodity broking and liquor. The second defendant had told friends that she was a director in that company. To that end, he argued, the defendants jointly sought funds for their family company and hence their joint liability.

Mr *Zvinavakobvu* said there was clear evidence that the parties had held several meetings in connection with the debt. That fact he said, had also been confirmed by the second defendant and Phibeon. He went on to say the second defendant had also lied that he had suffered damages to the tune of US$250-00 per day with respect to charges incurred when he hired a car to ferry his children to school and also to use the same car to conduct family business. He argued that there was no proof for such damages. (i.e in the form of supporting documents).

In the main Mr *Zvinavakobvu*’s submission was that the plaintiffs had established that the defendants received the money but were merely denying the fact.

On the issue of the possibility that the contract or transaction(s) were illegal, Mr *Zvinavakobvu* urged the court to use its discretion and order the defendants to pay back what they received from the plaintiffs (see *Jackson Muguti & Ors* v *Uboxit* (*Pvt*) *Ltd* HH 05-10).

Mr *Mukono* for the defendants submitted that the plaintiffs’ evidence in court was a departure from their plea. He said in court the plaintiffs testified that the second defendant had approached them yet in their plea they referred to the specific request of the defendants.

He proceeded to say the plaintiffs had not explained why they chose to deal with individuals yet there was a registered company of the defendants. He said the plaintiffs had also failed to link the first defendant to the transactions. He believed the plaintiffs were lying to the court and that the purported investment agreement was a mere schedule of alleged payments without support. There was, in his view, no investment agreement signed between the parties. The defendants had denied knowledge of exh 1 and had also denied signing it. The plaintiffs, he went on, had failed to prove that it was the second defendant who signed the document together with the second plaintiff. The onus, he said, was on the plaintiffs’ to prove that fact. I agree.

On the issue of the argument being illegal for lack of authorisation from the foreign exchange authorities, Mr *Mukono* submitted that the plaintiffs had failed to produce documentation to prove their access to free funds. It was therefore his submission that the transactions, as explained by the second defendant, were in violation of s 4 (1) and 4 (2) of the Regulations which provide as follows:

“(1) Subject to subsection (3), unless permitted to do so by an exchange control

authority;-

1. no person shall, in Zimbabwe;-
2. buy any foreign currency or sell any

foreign currency to any person than an authorized dealer or

1. borrow any foreign currency from, lend any foreign currency to or exchange any foreign currency with any person other than an authorized dealer;
2. no Zimbabwean resident shall, outside Zimbabwe-
3. buy or borrow any foreign currency from any person if the transaction results in or is likely to result in a debt payable in or from Zimbabwe; or
4. sell or lend any foreign currency to any person if the foreign currency originated from Zimbabwe or is the proceeds of any trade, business or other gainful occupation or activity carried on by him in Zimbabwe; or
5. exchange any foreign currency with any person if-
6. the transaction results in or is likely to result in a debt payable in or from Zimbabwe; or
7. except in the case of a travelers cheque, the foreign currency originated from Zimbabwe or is the proceeds of any trade, business or other gainful occupation or activity carried on by him in Zimbabwe.

(2) Subject to subs (3) where-

(a) any person buys, borrows or otherwise obtains any foreign currency in

Zimbabwe; or

1. any Zimbabwean Resident buys, borrows or otherwise obtains foreign currency outside Zimbabwe;

he shall comply with any conditions that any exchange control authority may give him from time to time in regard to the use to which the foreign currency may be put or the period for which it may be retained. “

In view of the above provisions of the law, Mr *Mukono* made the following submission:

“In cases where illegal contracts are involved two rules are generally applied.

Where the contract has not been performed the counts will not compel performance by either party to the contract. This rule is absolute and admits of no exceptions. Where the parties are equally in the wrong the loss will lie where it falls unless, in its discretion, the court is of the view that one party will thereby be enriched at the expense of the other. In such cases, the courts will relax the in *pari* *delicto potior est conditio possidentis* rule to do simple justice between parties. See *Jackson Muguti* v *Uboxit Worldwide* (*Pvt*) *Ltd & Ors* HH 05-10*.*

In the matter in *casu* as was in the *Mugut*i case (supra), the contract to transact on the illegal foreign currency market was performed in part. The second defendant had been making various payments both in cash and in kind to the second plaintiff. She is not seeking to reap where she did not sow. In no manner has she been enriched by the transactions she entered into with the second plaintiff. On the last transaction the Reserve Bank of Zimbabwe authorities froze all Real Time Gross Settlement (RTGS) transactions when the second plaintiff’s money was in the second defendant’s account and therefore was eroded by inflation since it could not be withdrawn as a lump-sum. Therefore to make the loss lie where it falls would not enrich the second defendant in any manner. It is therefore submitted that the present matter does not call for the relaxation of the rule operating against the contract.”

On the issue of the counter claim, Mr *Mukono*, said the plaintiff should not lay any claim to the motor vehicle and this court had already granted a spoliation order in favour of the defendants. That being the case, he submitted, the motor vehicle ought to be returned to the defendants as prayed for. This submission was, however, being made without reference to the fact that the plaintiffs had appealed against the spoliation order.

Mr *Mukono* also asked the court to assess holding over damages in favour of the defendants who claimed, without documentary evidence, that they were forced to hire a vehicle for US$250-00 a day as a result of the plaintiffs’ continuing to hold onto their vehicle.

I think I am faced with a situation where relations between two families have collapsed as from November 2008 when their dealings in foreign exchange were dealt a blow by the exchange control authorities. That situation has led to litigation.

The evidence before me clearly suggests that as from September 2008 the parties were involved in foreign exchange dealings with each other without authorization from exchange control authorities. According to the evidence of the second defendant, foreign exchange dealings became unprofitable when the exchange control authorities introduced new measures on the market. At that point the parties, particularly the second plaintiff and the second defendant, had transactions already in the process. There was therefore need to account to each other on the balances. As far as the plaintiffs are concerned, the outstanding balance payable to them in US dollars as at 8 December 2008 was US17800-00. The plaintiffs said they advanced that amount to the defendants in varying amounts. That led to the agreement of 8 December 2008 were the defendant would pay the amount in full by 18 December 2008. That did not happen and hence this action.

The defendants on their part, particularly the second defendant, testified that she was sourcing foreign currency for a number of clients including the plaintiffs. She testified that she would receive Zimbabwe dollars from clients for the purchase of foreign currency, particularly United States Dollars. She said she would conclude each deal at the end of the day on the basis of the prevailing black market rate on each day. That, to me, sounded true.

Indeed if that is true, it would then mean that the plaintiffs were pouring Zimbabwe Dollars into the hands of the second defendant, who obviously enjoyed the support of her husband, the first defendant. The plaintiffs’ claim, in my view, is therefore based on a possible conversion of the Zimbabwe Dollars into United States Dollars at a rate determined by them. The claim would, in that case, be the equivalent of the Zimbabwe Dollars ‘advanced’ to the defendants.

The plaintiffs, however, maintain that they advanced free funds to the defendants in terms of an investment agreement which is in the form of exh 1.

I would, however, tend to agree that there is no investment agreement that was ever properly agreed to, but, a schedule of what the plaintiffs call advances to the defendants in United States dollars.

Exhibit 1 has no details about the purported investment agreement. Furthermore that document was prepared after November 2008 when new measures from the exchange control authorities had dealt a blow to the operations of the parties. The defendants’ position was that in November 2008, the Reserve Bank of Zimbabwe froze all Real Time Gross Settlements (RTGS) transactions. The second defendant could not therefore release from her account the second plaintiffs’ money. That is what brought the problem.

Given the immediate problem that arose, one would have expected a better document than the ‘investment agreement’ placed before me as exh 1. A better document would have been an acknowledgement of debt by the second defendant or proper agreement witnessed by one or more witnesses. That agreement or acknowledgement of debt would also have dealt with the issue of security for the debt. If that had happened it would have been easy for the plaintiffs to prove the intentions of the parties. I am here emphasizing the point that there is simply no investment agreement to rely on for my judgment. I also notice that the amount purportedly signed for under exh 1 is simply indicated as 15 506. There is no dollar sign. An amount of “$17 800-00” is then indicated below or outside the signatures – what a confusion!

Furthermore, in *casu*, no effort was ever made to prove that it was indeed the second defendant’s signature that appears on exh 1. The second defendant denied signing the document. I believe the onus was on the plaintiffs to prove that the signature was indeed hers (See *Donkin* v *Chiadzwa* 1987 91) ZLR 102 (HC).

My inability to accept exh 1 means that the court can never know the true amounts of money that exchanged hands between the parties. The plaintiffs’ claim is anchored on that document but unfortunately there is no evidence that the document was ever agreed to between the parties. I am therefore unable to establish the existence of a valid investment agreement.

Apart from having said it looks more probable that it was the second defendant who was sourcing foreign currency for the plaintiffs, there is also the issue of whether or not the plaintiffs themselves had any free funds which they were advancing to the defendants. The defendants have correctly submitted that there was no proof that the plaintiffs had South African work or business permits. I was actually surprised as to why such evidence was not placed before me. The plaintiffs could have also placed before the court payslips or bank statements since they claimed to have been working and running business in South Africa. All I heard was that work permits were endorsed in passports. However, no passports or relevant pages of passports endorsed with the work and business permits were ever produced in court. In the absence of such evidence, the only conclusion I can make is that the plaintiffs had no free funds and therefore, as admitted by the defendants, the transactions were a violation of the exchange control regulations and therefore illegal.

The above brings me to the issue of whether or not the question of unjust enrichment arises. I would indeed have said so but there is no evidence before me of the actual amount that went into the hands of the defendants. The rejection of exh 1 and the plaintiffs’ evidence on same means that the basis of the claim has fallen away. There was, in my finding no other independent evidence to prove that the plaintiffs advanced to the defendants’ US$17800-00 (including interest) or the equivalent in Zimbabwe dollars. Whilst accepting that money indeed changed hands, this court cannot come up with its own figures which are not supported by evidence. The court is therefore not in a position to grant the plaintiffs the relief they seek.

As for the counter claim, I am totally surprised that it should be raised in this action when this court has already ruled in favour of the defendants by granting a spoliation order. The defendants should await the outcome of the plaintiffs’ appeal or apply for execution pending appeal. This therefore means the issue of damages also falls away.

Accordingly the prayer in the counter claim is misplaced.

Given the finding that the transactions were illegal, I think it will be fair for each party to bear its own costs.

In view of the foregoing I make the following order:

It is ordered that:-

1. The plaintiffs’ claim is dismissed
2. The defendants’ counter claim is dismissed; and
3. Each party shall bear its own costs.

*Mutamangira & Associates*, plaintiff’s legal practitioners

*Muringi Kamdefwre* legal practitioners, defendants’ legal practitioners