THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(CORAM: CHEBORION, MUSOTA AND MADRAMA, JJA)

CIVIL APPEAL NO 190 OF 2016

LANEX FOREX BUREAU LTD} .....APPELLANT

VERSUS

DAMUS MULANGWE} .....RESPONDENT

(Appeal from the judgment of the High Court of Uganda at Kampala delivered by Hon Mr Justice Geoffrey Kiryabwire on 10th of January 2011 in High Court Civil Suit No 358 of 2011)

JUDGMENT OF CHRISTOPHER MADRAMA, JA

The Respondent sued the appellant together with the 4 other persons jointly and severally for payment of US$160,000, being the unpaid deposit or advance the plaintiff made to the first defendant who is now the appellant in this appeal. The appellant further sought payment of US$12,000 being the contractual interest payable per month from October 2005 till final payment. Last but not least the appellant also sought general damages for breach of contract plus costs of the suit.

On the issues framed at the pre-trial conference, the first issue was whether the first defendant who is now the appellant could lawfully take deposits from the public. The learned trial judge found that a forex bureau may not take deposits from the public as it was specifically prohibited and therefore illegal. The second issue was whether the plaintiff did make a deposit with the first defendant of US$160,000 as alleged. The learned trial judge found that the plaintiff did deposit a sum of US$160,000 with the first defendant and answered the issue in the affirmative. On the third issue of whether the defendant or any of them is liable to pay the plaintiff the said sum with interest, the learned trial judge ordered the first defendant who is

the appellant to this appeal, to refund the sum of US$160,000 as money had and received. Secondly, the learned trial judge found that the sum of US$12,000 claimed by the plaintiff contravened Regulation 15 of the Exchange Control (Forex Bureau) Order 1991 which prohibits any business other than a spot transaction and disallowed it. He accordingly dismissed the suit against the second, third, fourth and fifth defendants. On the question of remedies, the learned trial judge allowed the claim of US$160,000 with each party to bear its own costs of the suit. The learned trial judge disallowed the claim for general damages.

The first defendant who is the appellant was aggrieved by the decision that was issued on 10th January, 2011 and filed this appeal on two grounds of appeal namely:

1. The learned trial judge erred in law in adjudicating the case and delivering judgment in the absence of any court record of the proceedings and of the evidence and three (3) years after the close of the case.
2. The learned trial judge erred in law and fact in holding that the appellant, the corporate entity, should refund an illegal deposit received by its employee dishonestly and outside the scope of his employment and outside the statutory mandate of the appellant.

The appellant prays that the judgment of the High Court is set aside and this court proceeds to determine that the illegal deposit is not recoverable from the appellant. Alternatively, the appellant prays that the matter is remitted to the High Court for retrial and the appellant is awarded the costs of the appeal.

At the hearing of the appeal, learned counsel G.S Lule S.C. assisted by learned counsel Yusuf Betunda represented the Respondent and learned Counsel Bwogi Kalibala represented the appellant. The Court directed counsel to address it in written submissions and judgment was reserved on notice.

Submissions of Counsel

Ground 1

1. **The learned trial judge erred in law in adjudicating the case and delivering judgment in the absence of any court record of the proceedings and of the evidence and three (3) years after the close of the case.**

Submissions of Appellant on ground 1

The appellants counsel submitted that it was not in contention that the tapes used to record the court proceedings turned out to be counterfeit and the whole record of proceedings were lost. Counsel for the parties provided court with their handwritten notes to guide the court and form the court record. Judgment was delivered on 10th of January 2011, a period of 3 years after the close of the case. He submitted that the respondent's final submissions were filed in August 2008. The record indicates that the High Court was unable to produce the proceedings in the suit before the High Court.

The appellant's counsel relied on **Boodhoo v Attorney General over Trinidad and Tobago [2004] 1 WLR 1689** for the holding that delay may have so adversely affected the quality of the decision that it cannot be allowed to stand. It may also be established that the judge's ability to deal properly with the issues has been compromised by the passage of time if his recollection of important matters is no longer sufficiently clear or notes have been mislaid. Counsel further relied on **Ephraim Mwesigwa Kamugwa v The Management Committee of Nyamirama Primary School; Civil Appeal Number 0101 of 2011** where it was held that where the record of the trial is incomplete in that records have been omitted or gone missing or the entire record goes missing, the appellate court has the power to either order a retrial or the reconstruction of the record of the trial court. Where it is impossible to reconstruct the record, a retrial may be ordered.

The appellant's counsel submitted that without the benefit of the typed proceedings and due to the passage of time, the learned trial judge's decision was adversely affected in relation to the impression of the

witnesses and particularly the credibility of PW1 Mr Roopash Solanki where the learned trial judge found that there was overwhelming evidence that the first defendant actually did take deposits from the public that is contrary to the handwritten notes where he had testified that he borrowed from the respondent because he wanted to grow the business so as to attain the monthly targets set for him. He noted that the testimony recorded by the appellants was inconsistent with the learned trial judge's findings of alleged overwhelming evidence that the first defendant who is now the appellant received the deposits from the public. In fact, it was PW1 who received the money from the respondent and Pearl Oils. He contended that all other claims against the appellant concerned TT's forged by PW1. The inconsistencies are aggravated by the absence of the trial courts proceedings with the result of being a prejudice to the appellant. Counsel submitted that through no fault of the trial court, the judgment in the circumstances is risky – and should not be allowed to stand. He prayed that ground 1 of the appeal is answered in the affirmative and the matter remitted to the High Court for retrial.

Submissions of the respondent in reply on ground 1

In reply, the respondent's counsel submitted that there is a record of the trial court. The record is defined by **Black's Law Dictionary Third Pocket Edition, 2006** page 598 as

> "a document or record of past events, usually designed to memorise those events. It is the official report of the proceedings in the case, including the filed papers, a verbatim transcript of the trial or hearing, if any, and tangible exhibits."

The learned trial judge noted that the court found itself in a dilemma when the tapes used to record the proceedings turned out to be counterfeit and the whole record of proceedings was lost. It took a very long time to resolve the matter until all the parties agreed that the lawyers provide court with their handwritten notes to guide the court and to constitute the courts record of proceedings. The respondent's counsel submitted that the parties and their advocates were alive to the misfortune that befell the trial court and towards finding a solution, it was by consensus of the parties and their

legal counsel that they agreed that the record of proceedings of the trial court should be reconstructed using the notes which were written by the parties' legal counsel.

At the trial court, the appellant was represented by the same legal counsel appearing before this court. It is the same legal counsel who participated in the reconstruction of the record for the trial court and who prepared the record of appeal from the reconstructed record. The same legal counsel confirmed by a certificate of correctness that the record which was reconstructed for the trial court is accurate.

The respondents counsel submitted that the law on construction of missing records was restated in the case of **Ephraim Mwesigwa Kamugwa v the management committee of Nyamirama Primary School; Court of Appeal Civil Appeal No 101 of 2011**. Further in **Mulewa & Another v Republic [2000] EA 482** at 492, the Court of Appeal of Kenya while dealing with the missing record held that the record could even have been reconstructed from the notes of the trial taken by counsel if such notes are available. Counsel submitted that in the premises it cannot be argued for the appellant by the same legal counsel that there is no record of the trial court. The respondents counsel further relied on the doctrine of estoppels barring counsel from denying the existence of the record of the trial court which he assisted the court to reconstruct. Further the conduct of the appellant and its legal counsel amounts to approbation and reprobation when subsequently faced with an unfavourable decision of the court. The respondent further submitted that the legal counsel of the appellant acquiesced to the reconstruction of the record.

The respondent's counsel relied on **Ddegeya Trading Stores (U) Ltd v Uganda Revenue Authority; Court of Appeal Civil Appeal Number 44 of 1996 [1997] KALR 388** at 389 for the proposition that a person cannot approbate and reprobate a decision of the court where a person takes benefit of the court's decision. That would amount to a waiver of that person's right of appeal at common law. He submitted that the decision of the trial court to reconstruct the record was within the legal premise and was done within

the legally permitted realms. Counsel further submitted that from the certificate of accuracy of record, the decision of the court was aided by an accurate record of what transpired at the hearing.

The respondents counsel further distinguished the case of **Boodhoo v Attorney General of Trinidad and Tobago** (supra) on the ground that the appellants counsel quoted the decision selectively. It however included the holding that *"it is only when the delay becomes so gross as to make a mockery of the parties right to courts adjudication that the infringement is established."* Further, the question of whether there has been an infringement has to be established on a case-by-case basis.

Further the respondent's counsel submitted that the plaintiff's counsel submitted his notes for the reconstruction of the court record on 26th April, 2010 and served it on the defendant's counsel on 1st November, 2010. The defendants counsel served his notes on the plaintiff's counsel on 13th of December 2010 and no record is there of when the defendants notes were filed on the court record. If time is reckoned from the date of service of the defendants notes on the plaintiff's counsel, the court reached its decision in less than a month after the last of the parties notes were made available. In the premises, the respondent's counsel submitted that no arguments have been made for the appellant to suggest that in arriving at his decision, the trial judge's recollection of important matters was no longer sufficiently clear that the record be relied upon was mislaid. Similarly, no context was laid for the appellant in the conditions for the judicial Administration system of Uganda to conclude that in the circumstances of this case, the time taken to deliver Judgment by the court was egregiously unreasonable for the decision to be a mockery of the appellant's rights to fair adjudication. In the premises the respondent's counsel prayed that the ground of appeal should fail.

Ground 2

2. **The learned trial judge erred in law and fact in holding that the appellant, a corporate entity, should refund an illegal deposit received**

by its employee dishonestly and outside the scope of his employment and outside the statutory mandate of the appellant.

Submissions of appellant on ground 2

On the second ground, the appellant's counsel submitted that a contract executed with the object of committing an illegal act is unenforceable. He contended that the court cannot enforce a contract which is expressly prohibited by law. He submitted that the learned trial judge rightly held that Regulation 15 of the **Exchange Control (Forex Bureau) Order Statutory Instrument Number 17 of 1991** expressly prohibits forex bureaus from taking deposits and the conduct of taking deposits was an illegality. He relied on **G.H. Treitel, The Law of Contract, 7th Edition** page 369 and the evidence on record. He submitted that the respondent was definitely aware that the appellant was not permitted to take deposits if not from his vast experience as an auditor, then through the bizarre interest rate of 90% per annum on the dollar he had allegedly agreed with the PW1. The respondent was in *pari delicto* with the plaintiff's witness number 1 who was willing to participate in the illegal scheme. Counsel further relied on **Halsbury's laws of England, 4th Edition Volume 9 Paragraph 883** for the proposition that a plaintiff cannot rely on an illegal contract to sue.

Further, the learned trial judge noted that he agreed that Mr Solanki appears to have been behind the whole mess. The illegal activities were perpetrated by an employee of the appellant in his individual capacity and not the appellant. The appellant should not be held liable for the illegal conduct of the appellant's business by Mr Solanki.

Further there was a lack of proof of the alleged deposit of US$160,000 having been received on 3rd October, 2005. Mr Solanki testified that the money deposited accumulated and by the time of his arrest had increased to US$160,000. On the other hand, the respondent testified that he did not have the original deposit certificate. He submitted that the testimony of the respondent was unbelievable save for the questionable US$160,000 deposit slip, the respondent was unable to produce any deposit slip for the multiple

deposit he allegedly made and was not even able to remember them. He could not provide the court with an account explaining how the deposits got to a sum of US$160,000.

In the premises, the respondents only corroboration would have come from Mr Solanki, a convicted felon who by his testimony was to blame for all the mess. He in turn had testified that the US$160,000 included interest which had accumulated. There was accordingly no proof of the alleged deposits.

Counsel prayed that the judgment of the High Court is set aside and in the alternative that the illegal deposit is not recoverable from the appellant.

Submissions in reply of respondent on ground 2

The respondents counsel supported the decision of the court on the 3 issues set for resolution of the suit namely:

Whether the first defendant (now the appellant) could lawfully take deposits from the public. Secondly, whether the plaintiff (now the respondent) did make a deposit with the appellant of US$160,000 as alleged. Thirdly, if issue number 2 is answered in the affirmative, whether the defendants or any of them is liable to pay the plaintiff the said sum with interest.

The respondents agreed that the court rightly found that the appellant could not lawfully take deposits from the public. In resolving issue number 2 the court found that the respondent had indeed made a deposit of US$160,000 with the appellant. In doing so the court relied on several documents. This included exhibit P9 letter by the appellant's counsel dated 21st November, 2005. Exhibit D6 which is a table entitled "Claims" considered for settlement with a list of 37 claimants who were seeking refund from the appellant. Exhibit 16 which is a deposit slip over US$60,000 indicating that interest will accrue thereon of US$4500 dated 19th of February 2004. Exhibit 1 which is the deed of acknowledgement of US$160,000 dated 3rd October, 2005. The court found that having established that money was deposited with the appellant, it treated the sums as money had and received.

The respondent's counsel submitted that in reaching a finding that US$160,000 should be refunded to the respondent, the court was alive to the facts of the case and the documents upon which the respondent premised his claim for the refund. This included exhibit 1 which is an acknowledgement of deposit of monies with the appellant company and not a contract since it does not have all the basic elements of a valid contract.

The respondent's counsel further submitted that even if exhibit 1 was sufficient to establish a contractual relationship, and it is argued that the parties are in *pari delicto,* the appellant could not keep the benefit and that the respondent should recover the deposit. This is pursuant to the cases of **Kiriri Cotton company Ltd versus Dewani [1960] 1 All E.R. 177**; **Shelley versus Paddock and Another [1980] 1 All ER 1010** and **Halsbury's laws of England, 4th Edition Volume 9 (1) pages 640** and Paragraph 883.

In response to the argument of the appellant's counsel that the respondent's testimony was contrary to what Exhibit 1 provided for, the respondent's counsel submitted that the provisions of sections 91 & 92 of the Evidence Act cap 6 expressly provides for how the court would deal with such testimonies that seek to modify, alter or add to a document and in this particular case, the court was alive to the facts and to the law. The court having considered the evidence and the submissions of the parties regarding this matter rightly found that it was not necessary to respond to or address the same since the testimony of the respondent in as much as it intended to modify the document exhibit 1 was redundant having regard to sections 91 and 92 of the Evidence Act which expressly prohibits such evidence.

Further it was submitted for the appellants that the illegal activities perpetrated by an employee of the appellant Mr Solanki was done in his individual capacity and were not that of the appellant. The respondent's counsel submitted that such an argument is untenable because counsel for the defendants (now the appellant) submitted and the court agreed with him that there is no liability that has been established beyond the first defendant that affects the second and fifth defendants. Counsel is simply reneging

from his position before the trial court and is appropriating and reprobating and the respondent's counsel reiterated submissions earlier made on that point. He prayed that the court be pleased to dismiss the appeal with costs in this court and in the court below.

Resolution of appeal

I have carefully considered the appellant's appeal and particularly the grounds of appeal, the record of appeal, the submissions of counsel and the law generally. The first ground of appeal is straightforward and faults the learned trial judge for adjudicating in a matter in the absence of the court record of proceedings and of the evidence taken 3 years before. The duty of this court in ordinary appeals is generally to reappraise the evidence and for sufficient reason to take additional evidence or direct that additional evidence may be taken. Rule 30 (1) of the rules of this court provides that on any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may reappraise the evidence and draw inferences of fact. None of the parties applied for the taking of additional evidence and therefore we can only reappraise the evidence on record and draw inferences of fact.

Ground 1 of the appeal is that:

The learned trial judge erred in law in adjudicating the case and delivering judgment in the absence of any court record of the proceedings and of the evidence and three (3) years after the close of the case.

The record shows that judgment was delivered on 10th of January 2011 by honourable Mr justice Geoffrey Kiryabwire, judge of the High Court as he then was. At page 2 of the judgment, he clearly states that before he addressed its mind on the issues in the suit which had been framed for adjudication, he found himself in a dilemma when the tapes used to record the proceedings turned out to be counterfeit and the proceedings were lost. Subsequently it took a very long time to resolve the matter until all the parties agreed that the lawyers provide the court with their handwritten notes to guide the court and form the court's record.

Obviously the first question is whether all the parties agreed that the learned trial judge would rely on the handwritten notes of the counsel for both parties as a substitute for the recorded court proceedings which were lost. Where such an agreement exists, the defendants counsel, who is now the appellant's counsel, cannot challenge the agreement by the doctrine of estoppels enshrined in this section 114 of the Evidence Act which provides that:

> 114. Estoppel.
>
> When one person has, by his or her declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he or she nor his or her representative shall be allowed, in any suit or proceeding between himself or herself and that person or his or her representative, to deny the truth of that thing.

For the doctrine of estoppels to apply, it should be established that the defendant or the defendant's counsel by his or her declaration, act or omission permitted the court and the plaintiff and his counsel to believe that it was true that the court would proceed on the basis of the written notes of both counsel as far as the recording of evidence is concerned because the court proceedings which were recorded in audio and was supposed to be transcribed, could not be transcribed because the audio recording was made on counterfeit tapes that could not be reproduced and the record was lost. The learned trial judge records such an agreement in his judgment and this has not been challenged in this appeal. I have further considered the record and it shows that the plaintiff's counsel submitted typed notes between pages 259 – 284. The defendants counsel submitted their written notes in typescript between pages 285 – 314. Possibly these notes were typed from the handwritten notes and as submitted by the respondent's counsel, the appellants counsel on 18th of August 2016 signed a certificate of correctness of the record of appeal in accordance with the rules and stated that it is accurate at page 396 of the record of appeal. Further the matter proceeded on the basis of written submissions of counsel that also referred to the evidence of the witnesses that had been filed without the

court transcribed tape recordings which were lost. The inference that can be drawn is that the plaintiff whose written final submissions were filed on court record on 26th of March 2008 and at page 301 of the record relied on their notes to prepare their written submissions. Similarly, the defendants written submissions were filed on court record on 15th of July 2008 and the inference that can be drawn is that the defendants had access to their own notes which were subsequently handed over to the court at the time of writing the judgment. The written submissions of the defendant's counsel who is now the appellant's counsel were filed at page 315 of the record of appeal.

In the written submissions, the defendants counsel referred to the testimony of PW1 and the controversy about the deposit of US$160,000 as to whether it was deposited at once or was a cumulative amount. Ground 1 of the appeal is not about the contents of the evidence on the credibility of witnesses but must be confined to whether the learned trial judge was within his rights to rely on the record of proceedings without the court transcript of the audio recording of proceedings.

In the appellants conferencing notes, it is written that it is not in dispute that the tapes used to record the court proceedings turned out to be counterfeit and the proceedings were lost. Secondly, that counsel for the parties provided court with their handwritten notes to guide the court and it formed the courts record of proceedings.

Having assisted the court to form the record, the appellant's counsel is estopped from challenging the judgment on the ground of not being based on the written record of proceedings of the court. Further the record indicates that the defendant's written notes of the record of proceedings were received by Katamba & company advocates on 13th of December 2010 from the defendant's counsel. I therefore accept the submissions of the respondent's counsel that judgment was delivered immediately thereafter on 10th January 2011. Pursuant to the agreement to reconstitute the record with the written notes of counsel, and given the fact that the defendant's counsel only served the plaintiff's counsel in December 2010, the judgment

delivered on 10th January 2011 was a timely judgment in the circumstances of the case. I do not need to refer to the submissions of counsel or the authorities on reconstruction of records. What is material being that both counsel agreed that the court will proceed on the basis of their written notes of the record of what transpired in court and the court timely issued judgment thereafter. Nothing stopped the appellant's counsel who was the defendants counsel in the lower court from asking the matter to proceed De Novo before another judge. The appellant is barred by the doctrine of estoppels from asserting another position that the court could not proceed on the basis of the written notes of the counsel as far as the record of proceedings is concerned. Ground 1 of the appeal has no merit and is disallowed.

Ground 2 of the appeal:

The learned trial judge erred in law and fact in holding that the appellant, the corporate entity, should refund an illegal deposit received by its employee dishonestly and outside the scope of his employment and outside the statutory mandate of the appellant.

Ground 2 of the appeal does not challenge the question of fact of deposit of the sum of US$160,000 but only asserts that it was an illegal deposit received by an employee dishonestly and outside the scope of his employment and the statutory mandate of the appellant. Rule 86 of the rules of this court provides as follows:

> 86. Contents of memorandum of appeal
>
> (1) A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the court to make.

So the ground of objection specified in the ground 2 of the appeal is clearly the holding that the appellant should refund an illegal deposit. It does not contest that the deposit was made. Further rule 102 (a) of the rules of this court clearly provides that:

> "No party shall, without the leave of the court, argue that the decision of the High Court should be reversed or varied except on a ground specified in the memorandum of appeal or in a notice of cross appeal, or support the decision of the High Court on any ground not relied on by that court or specified in a notice given...."

We therefore proceeded from the premises that there was a deposit of US$160,000 with the first defendant who is now the appellants to this appeal. The appellants counsel concedes that it was an illegal deposit. In the submissions however counsel submitted that the illegal activities were perpetrated by an employee of the appellant Mr Solanki in his individual capacity and not the appellant. He further submitted that Mr Solanki's testimony was ludicrous and unbelievable and that the deposit slip of US$160,000 was questionable. The contest to the deposit cannot proceed on the basis of the ground of appeal upon which the submission was made and I will not consider it. Further the decision of the learned trial judge at page 7 of the decision that the plaintiff did deposit the sum of US$160,000 with the first defendant (who is now the appellant) has not been appealed. The court will proceed from the premises that the issue is whether the deposit was an illegal deposit and if so whether it cannot be refunded by order of court.

The issue framed in the lower court from which ground 2 of the appeal emanates is "if issue number 2 above is affirmative, whether the defendants or any of them is liable to pay the plaintiff the said sum with interest."

A trial judge found that the issue was principally whether such a transaction is enforceable in law. This is what the learned trial judge found:

> The evidence also shows that even after closure by the Central Bank when the first defendant found a genuine case of money deposited with it, then the claimant was settled. In other words, that money deposited with the first defendant was treated as had and received. I see no reason to treat this case in a different way. The said deposit of US$160,000 is money had and received and shall be refunded. I so order that the first defendant repay it."

Further the learned trial judge found that the interest of US$12,000 per month also claimed by the plaintiff is not recoverable because it goes contrary to Regulation 15 of the Exchange Control (Forex Bureau) Order 1991 which prohibits any business other than a spot transaction. In the first issue framed for determination of the suit by the High Court of whether the first defendant could lawfully take deposits from the public, the trial judge considered Regulation 15 (supra) and agreed with the defendant's counsel that a forex bureau may not take deposits from the public. This is specifically prohibited and is thus illegal. **Regulation 14 of the Exchange Control (Forex Bureaux) Order, Statutory Instrument 171 – 20 (of the revised Order)** provides as follows:

> 14. A forex bureau shall, in carrying out of the business of a forex bureau, only engage in the sport transactions; and in particular, no officer or staff member of a forex bureau shall –
>
> (a) deposit or accept Uganda shillings with intent to obtain or supply the foreign currency equivalent either wholly or in part at a future date; or
>
> (b) deposit or accept foreign currency with the intent of obtaining or supplying the Ugandan shillings equivalent of it either wholly or in part at a future date; or
>
> (c) refuse to sell foreign currency to any customer if the foreign currency is available; or
>
> (d) fail or refuse to issue an accurate official receipt to cover any purchase or sale of foreign currency; or
>
> (e) issue any official forex bureau receipt for a purpose other than to cover an actual purchase of sale of foreign exchange.

It was submitted that the appellant issued an official forex bureau receipt for a purpose other than to cover an actual purchase or sale of foreign exchange. The document that the learned trial judge relied on issued by the appellant firm speaks for itself and is dated 3rd October 2005 and states as follows:

REF: US$160,000 Deposit

This is to confirm that we have received the sum of US$160,000 (One Hundred and Sixty Thousand Dollars) as fixed deposit from Mr Damas Mulangwe at an interest rate over US$12,000 (Twelve Thousand Dollars) only per month for 3 months automatically renewable.

Yours Faithfully

Roopesh Solanki

Manager

With reference to Regulation 14 (supra) the duty is on a forex bureau to engage only in spot transactions. Similarly, it provides that no officer or staff member of a forex bureau shall issue any official forex bureau receipt for a purpose other than to cover an actual purchase or sale of foreign exchange. The duty is on the servants of the appellant and not on members of the public. The consequences of breach of the regulation is stipulated in regulation 11 (3) of the **Exchange Control (Forex X) Order, Statutory Instrument 171 – 20** which provides that:

(3) Where a forex bureau is in breach of any provisions of this Order, the governor shall give written notice to that bureau requiring it to show cause within thirty days why the licence of the bureau should not be revoked.

This regulation is supplemented by regulation 34 which prescribes offences and penalties. Regulation 34 (1), (d) provides that a person who deals in foreign currency other than in a spot transaction or does any act contrary to paragraph 14 of this Order shall be deemed:

(l) not to have complied with the condition attached to the relevant exemption granted by this Order, relating to the obligation or prohibition prescribed by or under the Exchange Control Act to which the exemption relates;

(m) therefore to have rendered the exemption inapplicable to him or her in respect of the act or omission in question; and

(n) accordingly to have contravened the relevant obligation or prohibition prescribed by or under the Exchange Control Act.

(2) The person to whom subparagraph (l) of this paragraph applies may be proceeded against and punished under Part II or III of the Fifth Schedule to the

Exchange Control Act or, as the case may be, under any other written law relating thereto.

(3) in addition to any other penalty imposed in relation to the contravention in question, the forex bureau licence of any person to whom subparagraph (l) of this paragraph applies may be revoked under paragraph 11 of this Order.

Clearly, no penalty or offence is envisaged against a customer of the forex bureau and the Order deals with the officials of the forex bureau. The duty is on the officials of the forex period not to accept any fixed deposit or any deposit and to only carry out the business envisaged in the licence and in the Order. The learned trial judge held that the contract as relates to the enforcement of interest on a fixed deposit is not enforceable and no one has appealed against this decision. What is left is therefore the deposit of US$160,000. The defence of the appellant is that it was received by an official outside the scope of his employment and who was on the frolic of his own. That submission is not tenable because there is no appeal against the finding that the appellant received this deposit. The question is therefore whether the appellants should refund this money and not go on with the contract which is an illegality for being prohibited by statute. The learned trial judge found that this was money had and received which should be refunded. The deposit in question was made on 3rd October, 2005 before the enactment of section 54 of the Contracts Act 2010 which is a codification of the common law and provides for the obligation of the person who receives advantage under a void agreement or a contract that becomes void. For the appellant to retain the sum of US$160,000 would amount to unjust enrichment when it is prohibited from receiving such deposits for purposes of the business of fixed deposit accounts. Under section 54 (1) of the Contracts Act 2010, a person who receives any other advantage under an agreement or contract which is void is bound to restore it or to pay compensation for it to the person from whom he or she received the advantage. This law was not applicable in 2005 and the applicable law was the common law as imported into Uganda by the Contract Act cap 73 2000 laws of Uganda (repealed by the Contracts Act 2010). Section 2 which was applicable to the deposit provided that:

2. English law of contract to apply in Uganda.

(1) Except as may be provided by any written law for the time being in force and subject to the exception to section 1, the common law of England relating to contracts, as modified by—

(a) the doctrines of equity;

(b) the public general statutes in force in England on the 11th August, 1902; and

(c) the Acts of the Parliament of the United Kingdom mentioned in the Schedule to this Act (to the extent and subject to the modifications specified in that Schedule), shall extend and apply to Uganda.

According to **Halsbury's laws of England 4th Edition Volume 9 Paragraph 630** at page 434:

630. Common law. Any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money or, or some benefit derived from, another which is against the conscience that he should keep.

In **Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1942] 2 All ER 122 at 135**, HL, per Lord Wright:

The claim in the action was to recover a repayment of £1000 made on account of the price under a contract which had been frustrated. The claim was for money paid for a consideration which had failed.

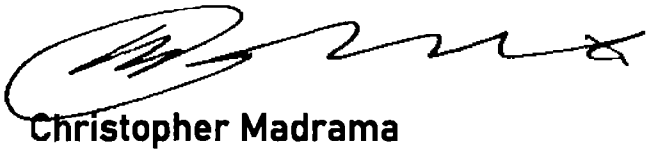
It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which is against conscience that he should keep. Such remedies in English law are generally different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi contract or restitution.

The above principle is applicable to the matter before this court in which the respondent deposited US$160,000 with the first defendant who is now the appellant, a forex bureau which is prohibited by statute and regulations from accepting deposits from its customers. Its officials were forbidden

from accepting such deposits and issuing receipts for them. The officials are culpable under the law but there is no sanction against the customer who innocently deposits money and the officials of the appellant, a forex bureau, accepted the deposit. In the circumstances, the licence of the appellant was liable to be revoked and the appellant was accountable to the Bank of Uganda. There is no obligation on the part of the respondent to the bank of Uganda. Having received that money as found by the learned trial judge, we cannot fault the learned trial judge for holding that the money deposited should be refunded as money had and received. It falls within the principle of restitution under the common law applicable to Uganda as stated above.

In the premises, I find no merit in ground 2 of the appeal for the reasons given above and I would disallow it. The appellant's appeal fails on both grounds and is hereby dismissed with costs.

Dated at Kampala the 18th day of ~~May~~ June 2021



Christopher Madrama

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Cheborion Barishaki, Stephen Musota & Christopher Madrama, JJA)

Civil Appeal No.190 of 2016

BETWEEN

Lanex Forex Bureau Ltd::Appellant

AND

Damus Mulangwe::Respondent

JUDGMENT OF CHEBORION BARISHAKI, JA

I have had the benefit of reading in draft the judgment of my learned brother Christopher Madrama, JA and I agree with him that this appeal ought to be dismissed for the reasons he has ably advanced and the order regarding costs.

Since Musota, JA also agrees, this appeal is dismissed with costs to the respondent.

It is so ordered.

Dated at Kampala this ....1st...... day of ...[illegible]................... 2021.

Cheborion Barishaki
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 190 OF 2016

LANEX FOREX BUREAU :::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

DAMUS MULANGWE :::::::::::::::::::::::::::::::::::: RESPONDENT

CORAM: HON. JUSTICE CHEBORION BARISHAKI, JA

HON. JUSTICE STEPHEN MUSOTA, JA

HON. JUSTICE CHRISTOPHER MADRAMA, JA

JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA

I have had the benefit of reading in draft the judgment of my brother Hon. Justice Christopher Madrama, JA.

I agree with his analysis, conclusions and orders he has proposed.

Dated this 1st day of June 2021

Stephen Musota

JUSTICE OF APPEAL