THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT)

HIGH COURT CIVIL SUIT NO. 13 OF 1996

SAID TIBAZARWA…… PLAINTIFF

VERSUS

UGANDA COMMERCIAL BANK……. DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE JAMES OGOOLA

JUDGMENT

As to the facts of this case, Court can be quite brief. The Plaintiff, Mr. Tibazarwa was a customer of the Defendant Bank (UCB) at its Gaba Branch. This was in the early 1990s. His Account was No. 00770. In August 1994, a cheque that he issued for shs.47m/- drawn on his UCB Account was dishonoured for "insufficiency of funds" — notwithstanding, as he alleges, deposits of shs. 73. 8m/- in his Account at that time. If this was so, payment of that dishonoured cheque should have left him a balance of some shs.52m/-, for which he instituted the present suit.

During the hearing of the suit, Plaintiff applied for an order of Court requiring the Bank to produce for his inspection banker's books and other documents pertaining to his Account No. 00770. The application was made by Plaintiffs counsel Mr. Bakidde, on 8/10/99. On that date, learned counsel for Defendants (Mr. David Mulumba) said he had no objection to the application. He added that even though the Gaba Branch of UCB has been closed, yet

> "Plaintiffs' books were kept in safe custody, in the basement archives at UCB's Head Office, in Kampala. I have personally been to the Bank to assist in recovering the books. I have also been reliably told that the books will be handed over to the Applicant by end this week."

In the event, Court granted Applicants' prayer of that day (8/10/99)/ORDERING Defendants:

(i) to furnish Plaintiff with its bankers' books in respect of his Account No. 00770 of the UCB Gaba Branch; and

(ii) to furnish Plaintiff with copies of verified entries of the above Account in UCB's ledgers.

On 28/10/99, learned counsel for the Defendants (Mr. Mulumba) asked Court for more time for UCB to produce the bank's documents, as the Bank had suffered internal setbacks, including closure of the Gaba Branch, and the death of three successive Managers of the former Gaba Branch. At the next hearing of the matter (on 12/11/99), Mr. Mulumba communicated to Court his client's refusal to settle this matter out-of-court, and his instructions for Plaintiff to proceed with the litigation. Thereupon, learned counsel for the Plaintiff applied for striking out Defendant's Written Statement of Defence (WSD) pursuant to 0.10, r. 21 of the Civil Procedure Rules (CPR), on the grounds of the failure by the UCB to obey Court's orders to produce bankers' books/documents. Mr. Mulumba confirmed that UCB had, indeed, not supplied the documents previously ordered by Court. After a very protracted period of over one year, Defendants had still not produced the required documents. Accordingly, Plaintiff revived the application to strike out Defendants' WSD (see M.A. No. 29/2001). Before the hearing of that application, Defendants' counsel (Mr. Mulumba) applied to withdraw from the conduct of Defendants' case, on the grounds of Defendants' intransigence to produce the required documents. In the circumstances, Court had no option but to accede to learned counsel's withdrawal, as well as to note the damning effect that counsel's stand was bound to have on Defendants' case. Thereupon, I adjourned the matter to 19/02/01, in order to enable Defendants the opportunity to engage another lawyer — if they so wished. At the hearing of 19/02/01, Defendants were duly represented by Ms Syson Kekurutso, who opposed Plaintiffs application on the grounds that:

- the required documents are simply non-existent at UCB, having been either stolen or lost, or willfully destroyed;

- operations at the Gaba Branch were deeply infested with fraud including, most probably, Plaintiffs own alleged transactions: a factor that could have led to the loss/destruction of the required documents by the perpetrators of the fraud;

- except with Plaintiff's cooperation with the Bank (i.e. production of Plaintiff's own copies of the documents), the Bank could not reconstruct the necessary documentation previously ordered by the Court).

I find the long history of the Bank's failure to supply the documents extremely perplexing. At one extreme, the Defendants' own counsel (Mr. Mulumba) states quite categorically that Plaintiffs documents were kept in safe custody, in the basement archives at UCB's Head Office in Kampala. At the opposite extreme, however, another counsel of the same Defendants (Ms Kekurutso) vigorously asserted that the documents were non-existent (i.e. stolen, lost or even destroyed). I simply find that these two directly contradictory claims, proceeding from the same Defendant, cannot at all stand the Defendants' case in good stead. If it is true that the documents are now non-existent through being lost or stolen or destroyed, then this development must be relatively recent. In particular, it must be **subsequent** to Court's order of 8/10/99: when Mr. Mulumba made his above statement confirming the documents' "safe custody, in the basement archives at UCB's Head Office". Indeed, Mr. Mulumba in his above statement confirmed that he himself had "personally been to the Bank to assist in recovering the books." Why then did UCB not produce the documents at that time? Little wonder then that learned counsel found it imperative, in his conscience, to withdraw from his client's case.

If, on the other hand, the documents are indeed lost/stolen/destroyed, it stretches the imagination to suggest that the documents had no duplicates, triplicates, or even quadruplets, etc kept elsewhere in the Bank — except, of course, if even these were similarly lost, stolen, or destroyed. While this latter suggestion is of course theoretically possible, I find that it would have called for far too massive, too comprehensive, too precise and too surgical a procedure, to be a practical possibility at all. In the circumstances, of the two contradictory statements of Defendants different counsel, I find Mr. Mulumba's version to be the more believable one. Indeed, the Banks' documents existed and were in safe custody at all material times. But for reasons best known only to itself, the Bank has chosen not to produce them as ordered by Court. It is precisely this kind of disobedience that 0.10, r.21 of the CPR was designed to remedy. Accordingly, I have no qualms whatsoever in deciding to invoke, in this instant case, the remedy prescribed under 0.10, r.2 1 of this CPR.

As regards, Defendants' claims concerning massive frauds at the Gaba Branch of the Defendant Bank that may well be. Nonetheless, Plaintiff is entitled to ask: So what? What had he, an innocent customer of the Bank, to do with this purely internal matter for the Bank? Defendants' counsel did not even as much as attempt to insinuate that Defendant himself was, in any way, associated with the alleged fraud. Rather, learned counsel's submission in this regard was mere speculation that transactions involving Plaintiff's funds could somehow have been sucked into these frauds. Counsel did not specify how, by whom, and to what extent Plaintiffs funds might have been sucked into the fraud. Without specifying such particulars, counsel's statements become merely speculative. Obviously, this Court cannot proceed on sheer speculation. But, even if learned counsel had been right in her speculation, still this would have been of little, if any, benefit to Defendants' case, unless it was also proved that indeed Plaintiff himself perpetrated or otherwise participated in any such fraud. No. Defendant cannot plead its own internal deficiencies, or even its own internal misfortunes, against innocent customers/third parties not otherwise responsible for or involved in those internal shortcomings or misfortunes.

Defence counsel's third and final submission was basically a request for Plaintiff to cooperate with the Defendant Bank in producing Plaintiffs own copies of the documents, in order to assist Defendant reconstruct its documents. Plaintiff promptly cooperated by furnishing his own copies of these documents. But far from even attempting to reconstruct its own documentation, the Bank turned around and claimed instead that Plaintiffs deposits (recorded on the deposit slips tendered by Plaintiff) were backed by cheques drawn on the now-defunct banks; and that UCB cannot be sure that these cheques were honoured by these defunct banks. Here again, one meets, once more, with Defendants' speculative and stubborn intransigence. There is no proof whatsoever of any bounced cheques. Indeed, all these deposits were effected long before the closure of any of the alleged defunct banks. Why did UCB not take up the matter of bounced cheques, if any, at that time? In matters of bouncing cheques, time is of the essence. Indeed, under the rules and customs of the market place reconciliation of inter-bank payments by cheque in the Clearing House is a process lasting no more than 48 hours. Why did UCB wait for over two years to bring up these allegations of bounced cheques? Quite frankly, I find this argument of Defendants' — as with all the other arguments of Defendant — to be irrationally bankrupt of

any sense or logic. It was merely a stratagem (and a very transparent and naive one at that) to camouflage Defendants' lack of any valid defence to Plaintiff's application.

I have no hesitation whatsoever in granting Plaintiffs application to strike out Defendants' WSD (under 0.10, r. 21 of the CPR), on the grounds of Defendants' noncompliance with, nay sheer disobedience of, this Honourable Court's order of 8/10/99 for production of Defendants banker's books.

Pursuant to 0.10, r. 21 of the CPR, the effect of striking out a Defendant's WSD is to:

> "...Place the defendant in the same position as if he had not defended."

In the instant case, the Plaintiff having expressly abandoned his claim for general damages (originally specified in the plaint), the remaining claim became for shs.52m/- to a liquidated demand only, identical in all respects to a demand under 0.33 of the CPR. In view of that transformation of the claim; and in light of Section 101 of the Civil Procedure Act (Cap. 65) — enabling Court to make: "such orders as may be necessary for the ends of justice" —judgment is hereby entered for the Plaintiff:

(a) in the sum of shs.52,495,315/- (Fifty Two Million Four Hundred Ninety Five Thousand Three Hundred and Fifteen Shillings);

(b) interest on the above decretal amount at the rate of 22% p.a. from the filing of Civil Suit No. 13/96, to payment in full;

(c) costs in amount of shs.3, 000,000/- (Three Million Shillings only).

Ordered accordingly.

James Ogoola

JUDGE

02/03/01

DELIVERED IN OPEN COURT BEFORE:

Mr. Said Tibazarwa — Plaintiff

Mr. John Kiwuuwa Esq — Counsel for Plaintiff

Ms Syson Kekurutso Esq — Counsel for Defendants

Mr. J.M. Egetu - Court Clerk.

James Ogoola

JUDGE

02/03/01