

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

COMMERCIAL COURT DIVISION

HCT-00-CC-CS-0158-2005

Edmond Mbalekwire t/a Edmond Mbale Stores

Plaintiff

Versus

Centenary Rural Development Bank Ltd

Defendant

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

JUDGMENT

1. The plaintiff, Edmond Mbalekwire, is seeking to recover from the defendant, Centenary Rural Development Bank Ltd, special and general damages, arising out of bank/customer relationship. It is alleged that the plaintiff had an account with the defendant at its Mbale branch, in which the plaintiff deposited monies, received from Care International on account of supplying that organisation with medical equipment. As of 13th June 2000, the plaintiff had Shs26,041,200.00 in that account.
2. The plaintiff attempted to withdraw the said sum of money, and the defendant declined to pay the same, asserting that it had been obtained fraudulently, and that the plaintiff's account had been closed. The plaintiff contends that the defendant acted negligently and recklessly in closing the account aforesaid. The plaintiff therefore claims from the defendant the said sum of money, plus interest of Shs4,000,000.00 as at the time of filing this suit, and further interest at 4% per annum from filing of this action till judgment is entered. The plaintiff further claims general damages for breach of duty of care, interest on the special and general damages, and costs of the this suit.

3. The defendant opposed this action, asserting that the plaintiff had, in June 2000, deposited 4 cheques worth Shs53,531,200.00 on his account from Care International that had been fraudulently altered in the names of the payee from DMO Mbale to EDMOND MBALE STORES. The plaintiff then withdrew fraudulently Shs27,500,000.00 from the said account. Care International raised a complaint, and the defendant blocked the account. The defendant investigated the matter and concluded that the plaintiff had fraudulently obtained the said cheques. The defendant closed the plaintiff's account, and remitted the balance thereof, Shs26,041,200.00, back to Care International who had an account with the defendant's branch in Mbale, from which the said cheques had been drawn. Subsequently it also remitted to Care International the sum of Shs27,500,000.00, which had been withdrawn from the plaintiff's account.
4. The defendant counterclaimed for the sum of Shs27,500,000.00 that the plaintiff had withdrawn from his account, general damages for fraud, interest and costs of the counterclaim, in addition to the dismissal of the plaintiff's suit with costs. In reply to the counter claim the plaintiff denied that he had acted fraudulently and he asserted that the money he had withdrawn was his money.
5. At scheduling stage the parties agreed upon the following facts. The plaintiff had an account number 008859 with the defendant at Mbale. Defendant's four cheques were issued by Care International to the tune of shs53,531,200.00. The cheques were drawn against Care International's account No. 03355 with the defendant's Mbale branch. On the 1st June 2000 the plaintiff withdrew shs27,500,000.00 leaving a balance of shs26,041,200.00. The defendant first blocked and subsequently closed the account. The defendant passed over the balance of shs26,041,200.00 to Care International.

6. The plaintiff testified in support of his case. He was the only witness. He stated that he is health consultant who used to supply medical equipment to Care International for which he was paid the 4 cheques in question. He did not know any names of any person in Care International. He recalls dealing with the purchasing officer. The equipment he remembers to have supplied was beds only and cannot recall the other items.
7. He had been in business since 1999 using the name Edmond Mbale Stores but only registered the business name only on 29th May 2000. He withdrew Shs27,500,000.00 and then he fell sick. He did not return to bank until about a year later, on return from Kenya where he had been receiving medical treatment. When he attempted to withdraw the balance he was refused and notified that his account had been closed. Following that he brought this action, after consulting with his lawyers. He now claims the balance that was on his account, interest and costs of the suit. He denied having fraudulently altered the cheques.
8. The defendant called 4 witnesses. DW1 was Ezati Samuel, a forensic examiner of questioned documents, employed by the Uganda Police Force. He is the holder of a certificate of Forensic Examination of handwriting from the home office in the United Kingdom obtained in 1996. He is also the holder of a post graduate diploma in examination of questioned documents from the National Institute of Criminology, Delhi, India, obtained in 2000. He has ten years of experience as a document examiner.
9. He received the four cheques, in question in this case, marked them exhibit 1,2,3 and 4, (now exhibits D5, D6, D7 and D8 respectively) and then examined them. He produced a report which was admitted in evidence as exhibit D9. In the report he sets out the nature of examination that he carried out, his findings and conclusion. He reached the

conclusion that the original payee on the cheques must have been DMO whatever this stands for. It was subsequently altered to read EDMOND. DW1 was never cross examined by the plaintiff.

10. DW2 was Richard Nalera, who was the branch manager of the defendant's branch in Mbale in May/June 2000 when these events occurred. He recalls that the plaintiff opened an account with them, and then deposited four cheques totalling to Shs53,000,000.00. The cheques were drawn by Care International on their account in the same bank. The plaintiff wished to withdraw Shs50,000,000.00 but the branch did not have the cash. The plaintiff was paid half as we made arrangements to pay the balance. In the meantime the witness called Care International and requested that in future they should advise the bank if they were to issue cheques that had to be paid in cash of such as the cheques issued to the plaintiff. Sandra of Care International responded that she does recall issuing any cheques to the plaintiff. They agreed that this should be reported to the police as internal investigations were carried out.
11. The police was alerted as well as the bank security personnel to be on the look out for the plaintiff. The plaintiff never came back to the bank to collect the balance. The plaintiff was never found. The witness received instructions from the bank headquarters to debit Edmond Mbale Stores with the Sum of shs26,000,000.00 and credit it to headquarters. The witness subsequently left the bank for other employment.
12. DW3 was Sandra Leslie Erikson, a public health consultant. In 2000 she was employed by Care International as a project director of Uganda Family Healthy Project. She stated that she was a signatory to exhibits D5, D6, D7 and D8 which were cheques Care International had issued to DMO Mbale for training of health workers. Arising out of

conversation between a project staff and a bank official, the project accountant, Mr. Andrew Lowton, went to the bank to investigate the issue.

13. It was discovered that the 4 cheques went missing, having been picked by a person who was not the intended recipient. Care International wrote to the bank stopping payment in a letter dated 2nd June 2000. Care International had never dealt with the plaintiff in anyway. Care International had never ordered any equipment from the plaintiff. Neither had the plaintiff ever supplied any equipment to Care International during the project period.

14. DW4 was Dr. Wilbroad Oketcho who in May 2000 was working with the defendant as general manager, supervision. He received a report about the plaintiff having deposited on his account four cheques from Care International that were stolen. Investigation were carried out, and the management of the bank after advice from its lawyers decided to pay Care International Shs50,490,200. Payment for the said sum was effected and the payment voucher in respect thereof was admitted into evidence as exhibit D12. He instructed Mbale branch to debit the plaintiffs account with the sum of shs26,031,000.00, and credit it to headquarters. That was the close of the case for the defence.

15. At the scheduling conference the following issues were agreed upon by the parties. 1. Whether the defendant was justified to close the plaintiff's account and pass over the balance to Care International; 2. What remedies if any is the plaintiff entitled to; 3. Whether the plaintiff stole, fraudulently altered and converted the proceeds of those cheques; 4. Whether the defendant is entitled to succeed on the counter claim.

16. I shall start with the first issue, and that is whether the defendant was justified to close the plaintiff's account and pass over the balance to Care International. The relationship

between a customer and a bank is a contractual relationship, and it is now fairly well established that a bank will not close a customer's account without notice unless the account is the subject of unlawful activities. See Paragraph 865 of Encyclopaedia of Banking Law by Cresswell et al, page C 464 (Butterworths) and Paget's Law of Banking, 12th Edition, page 122. Essays in African Banking Law and Practice by Grace Patrick Mukubwa et al, page 340 states,

'Where the customer is using the account for illegal transactions, the bank is under no obligation to give reasonable notice to such customer before the closure of his or her account. The bank's duty not to aid illegality is superior.'

17. I have examined all evidence in this case as adduced by each party. It is not in dispute that the plaintiff opened this account, in his own words, to be able to bank the cheques that he 'received' from Care International. He received 4 cheques, all from Care International. There was no other business transacted on this account save for the deposit of those cheques and the subsequent attempts to withdraw all the money on the account. According to the testimony of DW2 the attempt to withdraw all the money did not succeed, initially on account of the bank not having the necessary cash. However, subsequently Care International complained that those cheques were being paid to an unauthorised payee, Edmond Mbale Stores, instead of DMO Mbale.
18. Care International not only complained to the bank as soon as it learnt of the payments, but the project manager (DW2) testified here in this court, and stated that actually Care International had no business with the plaintiff and the plaintiff was not the original payee. The evidence of DW1, the questioned document examiner, corroborates the testimony of DW2, in so far as it asserts that DMO was altered to read EDMOND after DMO had been written.

19. Against this testimony is the testimony of the plaintiff who claimed the cheques were written to him by Care International on account of medical equipment supplied to it by the plaintiff. The plaintiff cannot recall the names of a single person or anyone he dealt with or the nature of medical equipment that he supplied, save for beds. This is medical equipment worth shs50,000,000.00. The plaintiff has no records of any sort to back up his claim. When the alleged forgery was discovered, he disappeared for more than year.
20. Given the two versions I am satisfied that the version by the defendant is more credible and more probable than the version by the plaintiff. It would appear to me this account was opened for the sole purpose of receiving and cashing the four cheques exhibits D5, D6, D7 and D8 from Care International. These cheques got into the hands of the plaintiff without the authorisation of the drawer, Care International. These cheques were subsequently altered, fraudulently, changing the identity of the payee into the names of the plaintiff's firm. This plaintiff had no business with Care International, and had no reason to receive these payments. This was a fraudulent scheme, in which the plaintiff was a principal participant, setting up the vehicle for the scam in the form of registration of the business name and opening an account in its name, with the defendant's branch in Mbale, where the account for Care International was.
21. On learning of the true facts, I am satisfied that the defendant had no alternative but to close the plaintiff's account, and arrange to remit the fruits of this fraudulent scheme back to the true owner thereof. Secondly, under Section 63 (1) of the Bills of Exchange Act, these 4 cheques had been avoided, and thus invalidated by virtue of the alterations. It states,

‘(1) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided, except as

against a party who has himself or herself made, authorised, or assented to the alteration, and subsequent endorser; except that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, the holder may avail himself or herself of the bill as it had not been altered and may enforce payment of it according to original tenor.'

22. The plaintiff is not a holder in due course. This cheque was not endorsed to him. It was

altered to him, instead of the payee, without the consent of Care International. This, in my view, amounted to a material alteration, within the meaning of the provisions referred to above. *In Mair v Bank of Nova Scotia, [1980-1984]LRC (Comm) 28*, a decision of the Court of Appeal of Eastern Caribbean States, on appeal from a decision of the High Court of Antigua and Barbuda, the equivalent of the above provisions were considered. A payee in respect of a cheque of \$6,000 drawn on the respondent bank altered and added the word, 'Associates' to the names of the payee, 'Barbara Hill' and endorsed the addition. The drawer of the cheque sued for reimbursement on account that the alteration was material and had avoided the cheque. He lost in the High Court, and on appeal, the Court of Appeal found that the addition without the consent of the drawer, of the word, 'Associate' to the name of the payee was a material alteration which avoided the cheque. However, as the drawer had not proved that he had suffered any damage he would only be entitled to nominal damages

23. Turning back to the facts of this case, it is clear that the cheques were altered, as to the identity of the payee, without the consent of the drawer, Care International. This was a material alteration which avoided the 4 cheques. Avoidance did not depend on the alteration being apparent on the face of the bill as the new payee was not the holder of a bill of exchange in due course. In the circumstances, since the cheques were invalidated by the alteration in accordance with Section 63 (1) of the Bills of Exchange Act, the value

thereof, could not accrue to the plaintiff's account with the defendant. The defendant was entitled to recover the proceeds that were still on the plaintiff's account.

24. In answer to issue number 1 I am therefore satisfied that the defendant was right to close the account of the plaintiff and to pass over the balance on the account to Care International. In this regard the plaintiff is not entitled to any remedies.

25. Having answered issue number 1 in the manner that I have done, the findings of fact thereto address, in my view, issue number 3. This is whether the plaintiff stole, fraudulently altered and converted the proceeds of the cheques in question. Whereas it is may be debateable whether the plaintiff stole the cheques in question from Care International as no direct evidence has been led on this matter of stealing the cheques, it is not in question that these cheques, once they got into the hands of the plaintiff and he presented them to the bank, they had been fraudulently altered, to read the plaintiff, who was not the original and intended payee. The plaintiff proceeded to convert the proceeds thus illegally obtained and this suit is another step, in seeking to retain, this ill gotten proceeds from the said cheque. The plaintiff was never entitled to these proceeds.

26. As the plaintiff was never entitled to the proceeds of these cheques, the defendants counter-claim, of sums wrongly paid to the plaintiff are recoverable from him. The defendant's counter-claim in the result succeeds. The plaintiff is ordered to pay the defendant Shs27,500,000.00.

27. In the counter claim there is a further claim for general damages for fraud. The action here is based on contract. Damages must be proved. No direct evidence was led in proof of damages. I am satisfied though that the defendant must have been greatly inconvenienced, and put to some cost. For instance it engaged into investigations into this

matter arising out of the plaintiff's conduct. It effected payment to Care International money that had been paid to the plaintiff. All these are expenses that it would otherwise not have incurred but for the conduct of the plaintiff. In the premises the defendant is entitled to some general damages, which I assess at shs5,000,000.00.

28. The defendant claimed interest on the Shs27,500,000.00. It did not specify in its pleadings the rate of interest claimed. Nor did it indicate for what period. In its evidence, interest was never addressed. In the result I will order interest on the decretal sum at court rate from date of judgment till realisation in full.

Dated, signed, delivered at Kampala this 22nd day of December 2005

FMS Egonda-Ntende
Judge