

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**COMMERCIAL DIVISION**  
**HCT-00-CC-CS-232-2006**

**GREENLAND BANK LTD (IN LIQUIDATION) =====PLAINTIFF**  
**VERSUS**  
**EXPRESS SPORTS CLUB LTD=====DEFENDANT**

**BEFORE: HON. JUSTICE LAMECK.N. MUKASA**

**RULING.**

The Plaintiff, Greenland Bank Ltd (in liquidation) brought Civil Suit No. 232 of 2006 against Express Sports Club Ltd, the Defendant to recover Ug. Shs. 7,374,982/=, interest thereon at the rate of 25% per annum from 31<sup>st</sup> March 2003 until payment in full and costs of the suit. The sum of Shs. 7,374,982/= was an amount over drawn on account No. 01-523693 operated with the Plaintiff bank.

At the scheduling conference Mr. Peter Kauma, counsel for the Defendant, raised a preliminary objection and prayed that the plaint should be rejected under Order 7 rule 11 (a) of the Civil Procedure Rules for non-disclosure of a cause of action. Counsel cited the authority of **Auto Garage & Others Vs. Motokov (No. 3) [1971] EA 514** where it was held that the provision that a plaint “shall be rejected” is mandatory. Secondly that where a plaint fails to disclose a cause of action, it is not a plaint at all and you cannot amend a nullity. And thirdly that a cause of action is disclosed if the plaint shows that the plaintiff enjoyed a right, that the right has been violated and that the Defendant is liable. If any of those essentials is missing, no cause of action has been shown, the plaint is a nullity and no amendment is permissible. Therefore must be rejected.

Annexed to the Defendant’s Written Statement of Defence is a Certificate of Incorporation and a copy of a Memorandum and Articles of Association which show that the Defendant Company was incorporated on 30<sup>th</sup> November 1999. Annexure ‘A’ to the plaint is a Certificate of balances dated 31<sup>st</sup> March 2003 which shows that the holder of account No. 523693 was Express Sports Club and the movement on the account was detailed as follows:

<b>Date</b>	<b>Account No.</b>	<b>Details</b>	<b>Amount Dr/Cr.</b>
31/3/99	523693	Closure balance	3,686,229/=
31/3/03		Account Interest	3,688,753/=
31/3/03		Outstanding bal.	7,374,982/=

Counsel for the Defendant argued that the Plaintiff’s claim arises out of a transaction which was before the incorporation of the Defendant Company. The closure balance of Shs. 3,686,220/= was on 31<sup>st</sup> March 1999 and the Defendant Company was incorporated on 30<sup>th</sup> November 1999. Counsel cited **Chitty on Contracts 23<sup>rd</sup> Ed Vol. 1 para 481 page 218** where it is stated that a company is under no liability, either at law or in equity, to pay for benefits rendered to it prior to its incorporation. He submitted that the Defendant Company was not liable for debts incurred prior to its incorporation.

Mr. Moses Adriko raised a number of interesting points. First he observed that the pre-incorporation promoters of Express Football Club are the same promoters and indeed the current officials of Express Football Clubs Ltd, the Defendant, which was incorporated in 1999. That there is a substantial coincidence between the officers the activities, and the postal address of the pre-incorporation club and the incorporated Club.

In **Salomon Vs. Solomon & Co Ltd [1897] AC 22 HL**, Lord Macnaghten noted:

*“When the memorandum is duly signed and registered, the subscribers are a body corporate. The company is at law a different person altogether from the subscribers to the memorandum and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers and the same hands*

*receive the profits, the company is not in law the agent of the subscribers or trustee for them.”*

On incorporation, the company becomes a separate legal entity distinct and separate from its promoters and/or shareholders. That is much the law now as it was in 1897. In **Sentamu Vs. Uganda Commercial Bank & Anor (1983) HCB 61** Justice Benjamin Odoki (as he then was) held that a limited liability Company is a separate legal entity from its directors, shareholders and other members that individual members of the Company are not liable for the Company’s debts. In **The New Vision Printing & Publishing Co. Ltd & Other Vs. Peter Kaggwa HCT-00-CC-MA-0127-2006** I held that equally a limited liability company is not liable for the personal debts of its individual members. The pre-incorporation Express Football Club had no corporate entity and its promoters had personal liability for its debts.

Secondly Mr. Adriko argued that the position that a Company is not liable on pre-incorporation contracts has changed in England since the coming into force of the EEC Council Directive 68/151 of 9<sup>th</sup> March 1968 which gave rise to the European Communities Act, 1972 in England. Counsel sought to rely on the decision of Lord Denning in **Phonogram Ltd Vs. Lane [1981] 3 All ER 182** While agreeing that both the European Economic Treaties and the European Communities Act was not applicable in Uganda counsel urged me to take Lord Denning’s holding in the above case as persuasive and probably take a pro-active stand and find that the law in Uganda has been thereby altered.

I have found myself unable to be persuaded. That put aside I have studied the judgment in the above English case and found that their Lordships therein were considering section 9(2) of the European Communities Act 1972, which says:-

*“Where a contract purports to be made by a Company, or by a person as agent for a Company, at a time when the Company has not been formed, then subject to any agreement to the contrary the contract shall have effect as a contract entered into by the person purporting to act for the company or as agent for it, and he shall be personally liable on the contract accordingly.”*

Lord Denning MR in his lead judgment stated:-

*“---In my opinion the destination has been obliterated by S. 9 (2) of the European Communities Act 1972. We now have the clear words, ‘Where a contract purports to be made by a company or by a person as agent for a Company, at the time when the company has not been formed’. That applies whatever formula is adopted. The person who purports to contract for the Company is personally liable”.*

He went on further to hold that the words subject to any agreement to the contrary’ means ‘unless otherwise agreed’. That if there was an express agreement that the man who was signing was not liable, the section would not apply. But unless there is a clear exclusion of personal liability S. 9 (2) should be given its full effect. It means that in all cases where a person purports to contract on behalf of a Company not yet formed, then however he expresses his signature he himself is personally liable to the contract. I have not found any change of the law in the above judgment with regard to liability of a company for pre-incorporation agreements.

Mr. Adriko referring to paragraph 3 (a) of the Defendant Company’s memorandum of association argued that by virtue of that provision the Defendant Company had ratified the loan facilities to Express Sports Club. The paragraph states:-

*“3. The objects for which the company is established are:-*

- (a) To acquire and under take the properties and liabilities and to effectuate and carry into execution the powers, obligation, duties and general object of the present Express Sports Clubs.”*

In Response Mr. Kauma submitted that the Plaintiff had not pleaded ratification of the loan agreement in its plaint. Further that for a Company to be bound by agreements entered into before its incorporation there must be a new agreement of ratification. That the provisions of a memorandum and articles of association of a Company are not such agreement. The objects are provisions of what a company may lawfully do when incorporated.

Section 21 (1) of the Companies Act provides that the memorandum and articles shall when registered, bind the company and the members of the company to the same extent as if they respectively had been signed and sealed by each member and contained covenants on the part of each member to the memorandum and of the articles. The memorandum and articles create a contractual relationship between a company and its members and regulate the rights of its members inter se. This contractual relationship between a company and its members is limited to the members' rights and liabilities as a shareholder. The memorandum and articles do not in any circumstances, as between the company and a person who is not a member; constitute a contract of which that person can take advantage. See **Halsbury's Laws of England 3<sup>rd</sup> Ed Vol. 6 Para 270 page 129.**

There was no resolution, whether of the Company or of its directors to the effect that the Defendant Company had taken over the pre-incorporation loan granted by the Plaintiff bank to Express Sports Club. Even if it was there it would not have created a loan agreement between the Plaintiff and the defendant. The **Laws of England 3<sup>rd</sup> Edition Vol. 6 Para 825** at page 426 states:-

*“In order that the Company may be bound by agreements entered into before its incorporation, there must be a new contract to the effect of the previous agreement.”*

In the instant case the Plaintiff did not plead ratification of the pre incorporation loan agreement. Secondly there was no agreement between the Plaintiff and the Defendant Company ratifying the loan agreement. The memorandum and articles of association of the Defendant Company were not an agreement between the Defendant and the Plaintiff and therefore could not ratify a pre-incorporation agreement with the Plaintiff. Lastly there were no pleadings to show that the Defendant Company had continued to operate the pre-incorporation Express Sports Club's account and/or to enjoy benefits of the loan facility.

Considering all the above I find that the Plaintiff's pleadings have failed to show that the Defendant, Express Sports Club Ltd, is liable to pay monies overdrawn on account No. 01-523693 operated with the Plaintiff bank by Express Sports Club prior to the Defendant Company's incorporation. The preliminary objection is therefore upheld and the Plaintiff's

plaint is rejected under Order 7 rule 11 (a) of the Civil Procedure Rules, with costs to the defendant.

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Lameck N. Mukasa

**JUDGE**

1/06/2007