THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT-00-CC-CS-0501-2001

GREENLAND BANK LTD
(IN LIQUIDATION) :::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

RICHARD SSEKIZIYIVU t/a
GLOBAL GENERAL AUCTIONEERS ::::::::::::::::::::::: DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

J U D G M E N T:

The plaintiff's claim against the defendant is for Shs.68, 069,457= being alleged outstanding balance on the principal sum and interest thereon. It is the plaintiff's case that the defendant while operating account No. 223383-081 with the plaintiff obtained overdraft facilities and at the closure of the bank he was still indebted. The defendant's reply thereto is that he has never operated the said account. That he operated account No. 223383-000 which had a credit balance of Shs.336, 078= on 28th February, 1999.

At the trial, the following facts were agreed:

1. That the defendant was a customer of the plaintiff.
2. That the defendant obtained overdraft facilities from the plaintiff.

The following issues were framed for Court's determination:

1. Whether the defendant is indebted to the plaintiff in the sum specified in the plaint or at all.
2. Whether the parties are entitled to the reliefs claimed.

Representations:
Mr. Godfrey Zziwa for the plaintiff.
Ms Sarah Kisubi for the defendant.

Before I delve into the assessment of the evidence presented by both parties, I consider it necessary to warn myself on the burden of proof in a case such as this. This being a civil matter, the standard of proof is on a balance of probabilities. A fact is said to be proved when the Court is satisfied as to its truth. The general rule is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. When that party adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof, that is, his allegation is presumed to be true, unless his opponent adduces evidence to rebut the presumption.

In the instant case, the plaintiff has alleged that the defendant owes it Shs.68, 069, 459=. The defendant has made a counter claim alleging that the plaintiff owes him Shs.33, 620,242=. The burden rests on each side to prove its claim.

As to whether the defendant is indebted to the plaintiff in the sum prayed for or at all, the plaintiff's case is based on the evidence of two witnesses: Mr. Paul Zziwa (PW1) and Mr. Ben Ssekabira (PW2). These two witnesses are involved in the liquidation process of the plaintiff bank. Their evidence is based on the records found on the plaintiff's files. It is not evidence based on their personal knowledge of the facts in issue.

The evidence of PW1 Zziwa is based on the defendant's Bank Account Statement and the statement of balance. They are on record as P. Exh. 1. His evidence is further based on waste cheques drawn on Account Number 0223383 by the defendant during the period in issue, and two letters of offer, one dated 22nd August, 1995 for Shs.18,000,000= and another dated 20th November, 1995 for an overdraft facility of Shs.60,000,000=. The defendant duly acknowledges the first facility of Shs.18m. He disputes the second one. The total sum on the waste cheques is far higher than the Shs.18m duly acknowledged by the defendant. The defendant case is that he settled the said credit facility. As the credit facility of Shs.18m by the plaintiff to the defendant is not disputed by the defendant, I harbour no doubt in my mind that the facility was indeed extended to the defendant. The problem is with the second facility of Shs.60m allegedly extended to the defendant by the plaintiff in their offer letter of November 20, 1995.

I have addressed my mind to the said letter offer, P. Exh. V1. It makes reference to the defendant's application for an overdraft of Shs.60m to buy and process coffee for sale. It also shows that the bank had approved the amount of Shs.60m and sets out the terms and conditions of offer. This document is said to have been found in the defendant's personal file with the plaintiff bank. However, as fate would have it, the liquidators appear not to have found any such application on record.

The letter also indicates that the intended offeree of the overdraft facility was required to sign the necessary security documents if the terms and conditions stipulated in the offer letter were acceptable to him. There is no evidence of the defendant accepting the terms and conditions of the loan. It is trite that the formation of a contract entails one party making an offer to the other, who must in turn accept the offer, thus formulating an agreement. The defendant denies ever applying for the said facility and/or receiving it. The burden rests on the plaintiff to prove that he did. The evidence on record is short of such proof. There is doubt that the loan was applied for and advanced to him. P. Exh. X1 makes the doubt stronger. It is a letter dated 30/5/1995 addressed to the defendant. It refers to an application by the defendant for extension of his overdraft facility of Shs.60m. It purports to grant extension of the same for six months to enable him to buy coffee, process it and sell it. As I have already indicated, the loan offer is dated 20/11/95. P. Exh. X1 implies that there was an extension of a loan five months before it was granted.

The defendant's witness, DW3 Sebagala, alluded to falsifications in the bank before it was closed. In my view, the records relied upon by the plaintiff in respect of the alleged loan support that view. Accordingly, Court is not satisfied that the defendant took out an overdraft of Shs.60m as alleged.

I have considered the fact of the defendant's continued withdrawals with no corresponding deposits. The law as I understand it is that drawing a cheque or accepting a bill payable at the banker's where there are no funds sufficient to meet its amounts to a request for an overdraft.

The proved overdrawals in this case beg an explanation. The defendant has offered one. He says that he was the plaintiff's customer as well as a service provider to it in the capacity of a debt collector. That when the volume of work was still low, he would use his own money to recover debts from loan defaulters and thereafter file a bill of costs to them for payment. That when the volume of work increased, he failed to raise the requisite funds. He testified:

"So I used to write to the customer to pay. Then I could approach the bank and advise them that with this type of recovery, I needed their (Bank) hand. They agreed."

He then says that after indicating to the bank what he needed to carry out the executions, he would be asked by the bank to make a cheque of such amount and take it to the manager of the bank to authorise payment. He would then receive cash to go and carry out the execution. After the recovery exercise, he would prepare a fresh bill, including his costs and fees. The amount he took in cash would remain on the account as an overdraft to him. This procedure as stated by the defendant finds favour in the evidence of DW2 Mawanda, an employee of the bank at the time in the capacity of Credit Officer and DW3 Sebagala, an Assistant Manager at the time. They impressed me as truthful witnesses in that regard. While the practice was open to abuse and had to be changed upon intervention of Bank of Uganda in exercise of its supervisory role, its existence has been sufficiently established. I have seen no reason to doubt the evidence of the two witnesses in that regard. It is evidence of former bank official based on their personal knowledge of the bank's practices at the time.

The learned author of Essays in African Banking, Grace P.T. Mukubwa, commenting on a related issue states (at p. 126):

"A bank is only entitled to fair and reasonable interest on an overdraft where the parties have not expressly or impliedly agreed to the rate of interest payable. However, where a person receives periodic statements on which it is shown that compound interest was charged on the amount of his overdraft and he does not dispute the accuracy of those statements he is deemed to have accepted that interest should be charged at the rate."

In the instant case, the defendant came out openly when the issue of interest on the payments was put to him long before the bank was closed. In a letter, P. Exh. V dated 31/12/97, he complained to the Credit Manager of the plaintiff bank as follows:

"Dear Sir,

Re: PAYING OFF LOAN ACCOUNT NO. 0223383.

I am happy to the fact that you off settled Shs.57, 000,000= million shillings from the above account.

It's unfortunate that when I was given some work to execute, I used to get some money from this Account to recover, which was debited on my account as a loan. Unfortunately, when I recovered, since 1995 it took time to pay me which caused this interest up to this year 1997 when you settled off some money from my account. Since then, the interest was Shs.25, 225,015= costs and fees Shs.45, 086,400= totaling to Shs.70, 311,425= causing Shs.13, 311,415= on the interest unsettled.

I request you kindly to take off this interest from this account and request you again kindly to give more work as to settle off the balance on my account. I have deposited Shs.1, 000,000= on my account.

Yours faithfully,

……..
Global General Auctioneers"

This letter, relied on by the plaintiff, is evidence that the defendant disputed imposition of interest on payments he had received from the plaintiff as facilitation in the debts recovery process. In my opinion, he cannot be deemed to have accepted that interest should be charged at the rate now claimed by the plaintiff or at all. It is significant to note that in the same letter the defendant did not dispute the plaintiff's entire claim against him. He only disputed the imposition of interest.

I have considered the evidence relating to the manner in which funds would be advanced to him (the defendant) and how he would eventually be paid for rendered services. This evidence is contained in the testimony of the defendant and that of his two witnesses, DW2 Mawanda and DW3 Sebagala. From their evidence, the issue of interest on money advanced to the defendant to carry out debt recoveries arose long before the plaintiff bank was closed. The top management found the system of debiting and crediting the defendant's account wanting and changed it.

Learned counsel for the defendant has argued that if the bank had honoured its obligation to pay the defendant for his services, his account would not have been in debit. Similarly, that if the bank had opted to credit the defendant's account upon his request for costs, with the amount that he was

genuinely entitled to, the defendant would not have overdrawn his account with the said monies and no interest would have accrued on them. For academic rather than practical purposes, I'm inclined to accept these arguments. But that's the furthest I shall go.

The plaintiff's claim is for special damages. The rule has long been established that special damages must be pleaded and proved by the party claiming them if they are to be awarded. From the evidence, other than the Shs.18m the defendant admits borrowing to finance his coffee business, on the balance of probabilities, he did not borrow any more. What is reflected on A/C No. 223383 – 081 as borrowed money resulted from the plaintiff's attempt to re-organise its records, and its failure to make a distinction between borrowed funds, as in the case of the Shs.18m overdraft, and funds advanced to the defendant as facilitation to him to carry out his work of debt collection. The result was that the accounts became so mixed up and confused that the bank failed to honour its obligation to settle the defendant's due claims, and the defendant failed to clear the debits on his account. In my view, neither party earns credit for the mess.

I would answer the first issue in the negative and I do so.

As to whether the parties are entitled to the reliefs sought, in view of my findings in the first issue, the plaintiff is not entitled to any of the reliefs prayed for in the plaint. The suit would be dismissed.

As regards the defendant's counter claim, the legal position is indeed that a counter claim is a cross-action. Being a claim for special damages, it too must be pleaded and strictly proved.

The defendant counter claims for the balance on the fixed deposits given to the bank while obtaining the over draft facility of Shs.18m. He also counter-claims for land comprised in Block 25 Plot 124. The plaintiff's case is that the fixed deposits were used to reduce the defendant's indebtedness.

I have already pointed out the fact that because of the defendant's dual role as the plaintiff's customer and a service provider to it in the capacity of a debt-collector, all transactions apparently being handled on the same account, the accounts became so mixed up and confused that it cannot be said with any degree of certainty that the defendant paid back the Shs.18m advanced to him together with interest thereon. No explanation has been given to Court as to why the security was realized during the pendancy of the suit or why the defendant, a knowledgeable High Court Bailiff, took no steps to halt the sale pending determination of the suit. The Court is cutely aware that two wrongs cannot make a right. However, it is the view of the Court that the bank's policy which allowed the

defendant to overdraw his account with no corresponding deposits was deplorable and unethical. Little wonder that it was closed.

It is argued that the defendant, as an innocent customer and service provider of the plaintiff should not be prejudiced and/or unfairly put to task to answer for the same.

I'm unable to accept this argument. The law as I understand it is that no claim arises from a base cause. This policy was well summarized by Lord Mansfield C.J. in the 18th Century when he declared:

> ***No Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If the cause of action appears to arise ex turpi causa …… the Court says he has no right to be assisted.***

Thus in **Thackwell –Vs- Barclays Bank plc [1986] 1 All E.R. 676** the plaintiff claimed damages from Barclays when the bank had wrongfully accredited a cheque for £44,227 to the wrong account after the bank had failed to notice that the endorsement on the cheque had been forged. The money in fact represented the dishonest proceeds of a fraud on a finance company. Against such an unedifying background the judge refused to allow Thackwell to recover a penny of the money because it was contrary to public policy to allow the plaintiff to use of moneys which had been obtained by fraud in the first place.

Applying the same principle to the facts of this case, the bank failed to honour its obligation to the defendant and the defendant failed to clear the debits on his account thanks to the defendant's conflict of interest. As a result of the said mess in its records, Court is now unable to determine with any degree of accuracy what rightfully belongs to either party under the arrangement. In these circumstances, it cannot be said that the defendant has himself proved his claim against the plaintiff. I consider this a fit and proper case where Court ought to order that the loss falls where it lies. Accordingly, the counter claimant is not entitled to the reliefs claimed in the counter-claim. The counter-claim would also be dismissed.

For the reasons I have endeavoured to give, both the suit and the counter-claim are dismissed for want of sufficient evidence to tilt the balance either way. Each side shall bear its own costs. Ordered accordingly.

Dated at Kampala this 6th day of September, 2007.

Yorokamu Bamwine

J U D G E