

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL COURT DIVISION)**  
**HIGH COURT CIVIL SUIT NO.398 OF 2002**

**THE COOPERATIVE BANK LTD**  
**(IN LIQUIDATION) .....PLAINTIFF**

**VERSUS**

<b>1. CHRISTOPHER KISEMBO</b>	} .DEFENDANTS
<b>2. PROVIA KISEMBO T/A ISHAKA .....</b>	
<b>GENERAL HARDWARE</b>	

**BEFORE; HON JUSTICE GEOFFREY KIRYABWIRE**

**JUDGMENT**

The plaintiff, Co-operative Bank Limited, a limited liability company in liquidation brought this suit against the first defendant Christopher Kisembo and his wife the second Defendant Provvia Kisembo, both trading as Ishaka General Hardwares, by way of a summary suit seeking payment of Ug.Shs.149, 263, 069 /= (One hundred forty nine million two hundred sixty three thousand sixty nine Uganda shillings) with interest of 21% p.a from 26<sup>th</sup> July 2001 until payment in full and costs of the suit.

The brief facts of the case are that the plaintiff and the defendants had a banker-customer relationship before the plaintiff bank went into liquidation. The defendants operated three Bank Accounts at Ishaka branch with the plaintiff namely, account No. 879, account No.003 and account NF12.

The plaintiff avers that several times, upon the defendants' request and instance, the defendants were allowed to obtain credit by overdrawing their account. The Counsel further avers that as at 26<sup>th</sup> July

2001, the defendants, according to the bank records were indebted to them to a sum of Ug. Shs 149,263,069/=. The plaintiff further avers that the said debt balance attracted interest at a rate of 21% p.a and that the defendants have failed, neglected and refused to pay the debt despite numerous demands made.

The defendants in their Written Statement of Defence however deny any indebtedness to the plaintiff and they aver that on the 16<sup>th</sup> of April 1999, the loans committee of the plaintiff bank approved the renewal of an over draft facility of Ug.Shs.40, 000,000 /= (forty million Uganda shillings) which was to be effected after the necessary documentation was finalized which was not done as the bank was subsequently closed.

The defendants further aver that by the time the bank was closed they were not indebted to the plaintiff as they could not have overdrawn and operated their accounts as at 26<sup>th</sup> July 2001 when the plaintiff bank was closed on the 19<sup>th</sup> May 1999 and that the said alleged balance based on the bank's certificate of balance was speculative and not reflective of the operations of the defendants' overdraft accounts. The defendants further aver that at the time of the closure of the bank, their indebtedness to the plaintiff bank was not Ug.Shs.149,263,096/= (One hundred forty nine million two hundred sixty three thousand sixty nine Uganda shillings) as claimed, for the records indicate that by the 30<sup>th</sup> September 1998 the overdraft account balance was at Ug.Shs.23,150,167/= (Uganda shillings twenty three million one hundred fifty thousand one hundred and sixty seven shillings) which was substantially reduced by the date of the closure of the bank on 19<sup>th</sup> May 1999.

The issues for trial were as follows-

1. Whether the defendants are indebted to the plaintiff?
2. What remedies are available to the parties?

Mr. SSekatawa appeared for the plaintiff while Mr. Abaine appeared for the defendants.

It is important to clarify that both counsel for the plaintiff and defendant at the beginning of the hearing agreed that the suit be consolidated with that of High Court Civil Suit No. 336 of 2006.

However, the defendants in their written submissions stated that the suit was never consolidated and that there is a record to show that the said suit was stayed pending disposal of this suit. The defendants counsel did not object to the suit being treated as consolidated during the proceedings. Indeed the court record shows that both counsel agreed to consolidation by consent reported so on the 2<sup>nd</sup> July 2007 as part of the pre trial hearings.

The suit is thereby consolidated.

**Issue No.1: Whether the defendants are indebted to the plaintiff**

Counsel for the plaintiff submitted that the defendants were indebted to the plaintiff and relied heavily on the testimony of Mr. Benedict Sekabira (PW1) a banker by profession who testified that the defendants borrowed money from the plaintiff and that several properties were mortgaged to the bank as security for the loan. He testified that the legal mortgages were registered on the titles to the lands comprised in Block 39, Plot number 1224, Block 39 Plot 1030, LRV 1519, Folio 12 Liberations Road Bushenyi, Block 39 Plot 1022 Igara and Block 39 Plot number 1036 Igara as well as the original Log Book to a Mitsubishi vehicle which is alleged to have had an accident that was never in the possession of the plaintiff bank.

He further testified that at the time of closure of the bank on 19<sup>th</sup> May 1999 the three (3) accounts being operated by the defendants had outstanding loan obligations as per exhibit P1.

1. Account No.879 had an outstanding balance Ug. Shs 41,396,105/= (Forty one million, three hundred ninety six thousand, one hundred and five Uganda shillings.)
2. Account No.003 had an outstanding balance of Ug. Shs 40,610,754/=(Forty million six hundred ten thousand seven hundred fifty four Uganda shillings)

the above two accounts were overdraft accounts which allowed the borrower to draw funds in excess of the credit balance on his account or over and above what he deposited on the account

3. Account No.NF12 had an outstanding balance of Ug. Shs 19,449,444/= (Nineteen million four hundred forty nine thousand four hundred and forty four Uganda shillings) and was an installment loan account

All the accounts together had a total of Ug.shs 101,456,303/= (One hundred one million four hundred fifty six thousand three hundred three Uganda shillings)

It was Mr. Benedict Sekabira's testimony that the plaintiff had sold one of the securities being the land comprised in Block 39, Plot number 1224, which is land in Ishaka for a sum of Ug. Shs 22,000,000/= (twenty two million Uganda shillings) and the title was transferred into the names of the third party. However the sale of another parcel of land comprised in Block 39 Plot 1030, to another third party, was set-aside by my Brother **Hon. Justice Yorokamu Bamwine in High Court Civil Suit No. 336 of 2006** and that title is still held by the plaintiff.

Mr. Benedict Sekabira further testified that at the date of closure of the bank, the defendants were indebted to it and that as at 29<sup>th</sup> February 2008, a total sum of Ug.Shs.261,847,490/= inclusive of interest, other charges and costs was still owed by the defendants to the plaintiff.

The Counsel for the plaintiff on this issue therefore submitted that the defendants did not adduce any proof of ever having paid any of the sums owed to the bank and neither did the defendants adduce evidence to rebut the testimony of Mr. Benedict Sekabira (PW1). Counsel referred me to the case of **SOUZA FIGUERIDO CO, LIMITED V MOORINGS HOTEL CO, LIMITED (1959) EA 425** where court held;

*“That where the defence put up is a mere sham or where the bonafide are in doubt the court should proceed and enter judgment for the plaintiff.”*

Counsel for the defendants on the other hand submitted that the defendants were not indebted to the bank and that the plaintiff has failed to prove its case against them as no cogent evidence has been adduced against them by the plaintiff in proof of their case, since no loan or overdraft agreements, ledgers and cheques paid to the defendant were adduced.

Counsel for the defendants solely relied on the testimony of Mr. Kiseembo (DW1). Mrs. Provia Kiseembo (DW2) did not testify as her evidence was not going to be substantially different from that of Mr. Kiseembo (DW1) her husband.

Mr. Kisembo during examination in chief testified that at the closure of the bank they were not indebted to the bank. He stated that plaintiff did not present any evidence to court to support their claim. He further testified that the bank as was its practice could not have renewed his over draft before he had cleared the old one and he insisted that he had completed payment of his loans by 31<sup>st</sup> March 1999.

Mr. Kisembo referred the court to Exhibit P3, a letter he wrote asking the bank to renew his overdraft. In this letter to the bank, he requested the bank to step up his overdraft, a fact the defendant and plaintiff agree upon. It is the defendants' testimony that the letter Exhibit P3 that he wrote to the bank was to inform the bank before the expiry of that facility, of the accident that the lorry was involved in and was also requesting the bank to step up the overdraft since the old one would expire on 31<sup>st</sup> march 1999. However the defendant claims that he never received a reply to this letter not until the 19<sup>th</sup> April 1999, after the expiry of the overdraft period when the plaintiff bank offered a renewal of the overdraft. Mr. Sekabira on this point in his testimony testified that the said letter was not a new facility but a restructure of an existing facility. As evidence of this, he produced the letters of restructure and renewal that the bank sent to the defendants. Mr. Kisembo, in court however denied having received the said letters of restructuring.

In the instant case, the plaintiff has alleged that the defendant owes it Ug.Shs.149,263,069/= (One hundred forty nine million two hundred sixty three thousand sixty nine Uganda shillings). The plaintiff in support of its claim adduced evidence to show that the defendants held three (3) Accounts in the plaintiff bank which accounts combined had an outstanding balance of Ug.Shs.101,456,303/= as at 1<sup>st</sup> May 1999. The defendant, on the other had, totally denies owing the plaintiff this amount of money and claims to hold only two accounts with the plaintiff bank namely Account No.879 and No.003.

The question therefore for the court to establish is whether on a balance of probabilities the evidence available before the court shows the defendants were and are still indebted to the plaintiff in the sums claimed.

During cross examination Mr. Kisembo (DW1) was referred to an affidavit sworn on the 27<sup>th</sup> August 2004 marked Exhibit D.2 where he admitted being indebted to the respondent to a tune of Ug.Shs.78,000,000/=. Mr. Kisembo testified that the affidavit was sworn by him after he had been

evicted from his house. He however claimed that he was not indebted to the plaintiff and that the affidavit was a falsehood. Of course this creates inconsistency in his evidence on the question of indebtedness to the plaintiff bank four years after it was closed.

On the other hand, during the examination of Mr. Benedict Sekabira (PW1) reference was made to a letter of renewal of the Overdraft marked Exhibit P4. Mr. Sekabira acknowledged the existence of the letter of renewal of the overdraft facilities for the petrol station account for 12 months and he read out the paragraph in letter of renewal of the Overdraft (Exhibit P4) in relation to acceptance of terms and conditions. However, he said that he did not see where the defendant should have signed. Mr. Kitembo DW1 testified that on the 29<sup>th</sup> May 1999 when he was to accept the terms and conditions of the renewal of the overdraft, the bank had already been closed. He therefore did not sign the necessary documents much as he had deposited securities before the loans committee subject to the revision of his renewal application.

I have addressed my mind to the said letter of renewal of the Overdraft, Exhibit P.4. It makes reference to the defendants' application for renewal of an overdraft of Ug.Shs.40,000,000/= for the petrol station. It also shows that the Loan Committee had approved the amount of Ug.Shs.40,000,000/= and sets out the terms and conditions of offer. 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 however no evidence of the defendant accepting the terms and conditions of the loan.

It is trite law 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 does not deny ever applying for the said facility and receiving the letter of renewal of the overdraft facility. However, he denies ever signing the necessary documents or receiving this overdraft. Mr. Kitembo further testified that according to his understanding the plaintiff bank would not have renewed his overdraft if he had not cleared the old one and that as 31<sup>st</sup> March 1999, he had completed the payment of his loans.

The burden in this instance thus rests on the plaintiff to prove that at the time of closure of the bank that the defendants had not completed the payment of their loan. The evidence on record that is the bank statement Exhibit P.1 which clearly shows that as at 21<sup>st</sup> May 1999 a combination of all three

accounts had an outstanding balance of Ug.Shs.101,456,303/= (One hundred one million four hundred fifty six thousand three hundred three Uganda shillings). Further, in relation to the overdraft facility of Ug.Shs.40,000,000/= that the defendants claimed to have paid, the plaintiff has adduced documentary evidence that is, a Restructure letter dated 19<sup>th</sup> May 1999 and marked Exhibit P.5, to show that the overdraft facility had been restructured into an installment loan of Ug.shs.20,000,000/= to run for a period of fifteen (15) months and an over draft limit of Ug.shs.20,000,000/= to run for a period of twelve (12) months with an interest rate of 21% p.a and the security was to be land and property on Plot 1030 Block 39 Igara Bushenyi, Plot 1224 Block 39 Igara, plot 36 LRV 1519 Folio 12 Bushenyi, Plot 1022 Block 39 Igara, Plot 1036 Block 39 Igara Ankole and Motor Vehicle Reg No. 214 UCS Mitsubishi Fuso. The plaintiffs also relied on an affidavit sworn on the 27<sup>th</sup> August 2004 marked Exhibit D.2 where the defendant admitted being indebted to the plaintiff to a tune of Ug.Shs.78,000,000/=. Mr. Kisembo corroborated this evidence by testifying that the affidavit was sworn by him after he had been evicted from his house. He however later on changed his testimony and said that he was not indebted to the plaintiff and that the affidavit was a falsehood.

Apart from admitting to court on oath that his affidavit dated 27<sup>th</sup> August 2004 showing that he was indebted to the bank was a falsehood, Mr. Kisembo presented nothing not even a copy of his own bank statements to show that he had paid all his pre-existing indebtedness to the bank before it was closed on the 19<sup>th</sup> May 1999. This is significant as the bank has shown court a statement showing the defendants' indebtedness as at 19<sup>th</sup> May 1999, before the bank was closed as standing at Ug.Shs.101,456,303/=. There is nothing to show that this amount was cleared before the bank was actually closed.

Mr. Kisembo also further denied having ever received the restructure letter as it was wrongly addressed .I do not find that credible as it was Mr. Kisembo who was pursuing the restructuring personally (see exhibit P3).

It would therefore appear to me that despite the defendants' claim that he was not indebted to the bank by the time of its closure, the evidence before court clearly shows to the contrary that the defendants were and are still indebted to the bank. The testimony of Mr. Kisembo that the defendants are not indebted I am afraid is inconsistent and not credible.

In the submissions on issue No.1, an issue with regard to the property that was mortgaged to the bank and was later sold by the plaintiff was raised by both counsel for the plaintiff and defendant.

It was the testimony of Mr. Benedict Sekabira (PW1) that the defendants borrowed money from the plaintiff and that several properties were mortgaged to the bank as security for the loan. He testified that the legal mortgages were registered on the titles to the lands comprised in; Plot 1030 Block 39 Igara which is an undeveloped piece of land which was sold but the sale was cancelled by court order. The plaintiff had realized 4.2million Uganda shillings and handed the title deed to the buyer however after the court cancelled the sale the property was transferred back into the names of Christopher Kitembo and Provia Kitembo.

He further testified that Plot 1224 Block39 at Ishaka Ankole which was developed with a residential house was sold and the title transferred and registered in the names of Papada Holdings Limited. It was sold at Ug.Shs.22,000,000/= (twenty two million Uganda shillings) and the net proceeds of the sale being Ug.Shs.19,888,570/= (Nineteen million eight hundred and eighty eight thousand five hundred and seventy thousand Ugandan shillings) were credited onto the consolidated account of the defendants and are reflected on the bank statements marked as exhibit P1.

The other properties that were mortgaged included Plot 36 LRV 1519 Folio 12 Bushenyi which has commercial residential block on 0.75-0.072 hectares of land and is still held by the bank; Plot 1022 Block39 Igara 0.4 hectares undeveloped land and is still held by the bank; Plots 1036 Block 39 Bushenyi. This title was retained by the Registrar of Lands in Mbarara, because the registered proprietor Mr. Elly Rugasira had applied for and obtained a special certificate of title because his cousin Provia, the second defendant, had lost the title deed. It was subdivided into Plots 1351 and 1352 of Block 39. Plot 1351 was sold while Plot 1352 of Block 39 remained in the names of Mr. Elly Rugasira; and a Motor vehicle No.214 UCS Mitsubishi Fuso which was involved in an accident and the plaintiff is not in possession of the logbook. He further testified that the documents of title in respect to these securities were deposited with the bank.

Counsel for the defendants on this issue submitted that the said properties were not mortgaged but merely deposited in consideration in the application of the renewal facility. Counsel submitted that the plaintiff bank only lodged caveats on the certificates of titles and therefore an equitable interest but not



a legal mortgage was created in the property. He further submitted that the bank closed before a binding relationship had been created between the plaintiff and the defendants and that no recall of the facility had been done by the bank before its closure. Counsel therefore prayed that the defendants' properties still in the hands of the plaintiff be ordered released to the defendants and that the land and the house that is Block 39 Plot 1224 which was sold in execution and the execution be set aside. The defendant also prayed that the entry of the third party on the certificate of title to wit M/s Papada Holdings Ltd be cancelled as the sale was a nullity.

It is trite law that where a customer deposits securities with a banker, a banker's lien is created on the customer's securities deposited with that bank, unless there is an express contract or circumstances that show an implied contract or circumstances in consistent with such a lien – see the case of **Re London and Globe Finance Corporation (1902) 2 Ch 416**.

A lien, according to the book **Branch Banking Law and Practice third edition 1993 page 94** is defined as a right of a creditor in possession of property of the debtor to retain the property and in some case to sell it as a means of enforcing payment. This right may be particular that is 'restricted' to property from which the debt has arisen or 'general' that is applicable to all property of the debtor in possession of the creditor regardless of its connection if any with the relevant debt or debts. The author goes on to state that a banker's lien is general in nature.

In the case of **Brandao .v. Barnett (1846) 12 CL & FIN 789 Lord Campbell** held that:

*“Bankers most doubtedly have a general lien on all securities deposited with them as bankers by a customer, unless there is an express contract, or circumstance that show an implied contract, inconsistent with the lien.”*

As to what is a bankers lien, **Halsbury's Laws of England 4<sup>th</sup> Edition reissue 1989 vol.3(1) para 191** explains that:

*“A lien connotes the right of a banker to retain the subject matter of the lien until an indebtedness of the customer is paid or discharged. It attaches to all securities deposited with a banker by a customer, or by a third party on a customer's account, to instruments paid in for collection, and to money held to the account of*

*a customer, unless there is an express or implied contract between the banker and the customer which is inconsistent with the lien.”*

Equally succinct is the expression of the law on this point pronounced by **Millet LJ** in the recent case of **RE Cosslett (Contractors) Ltd [1998] Ch 495, CA 508G** to the effect that:

*“A pledge and a contractual lien both depend on delivery of possession to the creditor. The difference between them is that in the case of a pledge the owner delivers possession to the creditor as security, whereas in the case of a lien the creditor retains possession of the goods previously delivered to him for some other purpose.”*

I am satisfied that the circumstances of the instant case do satisfy the requirements of all the above quoted legal positions. The defendants’ titles were left with the plaintiff bank as security. The defendants however failed to pay the money that was lent to them by the plaintiff. That being the position, the plaintiff bank was at liberty to perfect the security and fall back on it in the event of non payment. I therefore find that the bank had lien over the property as well as a right of possession until the indebtedness of the defendants is paid or discharged.

In the premises, as regards the first issue, this court finds that the defendants were indebted to the plaintiff in the sum claimed.

## **ISSUE NO 2: What remedies are available to the parties**

The plaintiff has prayed for the payment of Ug.Shs.149, 263,069 /= (One hundred forty nine million two hundred and sixty nine thousand sixty nine Uganda shillings) with interest of 21% p.a and costs of the suit .The defendants pray that the suit be dismissed and yet they still owe the bank money. Apart from breach of the banker customer relationship a dismissal would amount to unjust enrichment in favour of the defendant.

**LORD WRIGHT** in the case of **Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe** {1943} AC 32 held that it is clear that any civilized 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 from another which is against conscience that he should keep.

In **Smith v Versanyi**, 25 Alberta law reports (3d) 381 Justice Andrekson of the Court of Queen's Bench adopted these words:

*"The doctrine of unjust enrichment is an equitable concept created to remedy injustices that occur where one person makes a substantial contribution to the property of another person without compensation."*

The principle of unjust enrichment presupposes three things: first, that the defendant has been enriched by the receipt of a benefit; secondly, that he has been so enriched at the plaintiff's expense; and thirdly, that it would be unjust to allow him retain the benefit.

In light of my findings under issue number one that the defendants are indebted to the plaintiff, I also find that the defendant has been unjustly enriched at the expense of plaintiff and the law therefore requires that restitution be made to plaintiff. I therefore award the plaintiff the sum of Ug.Shs.149, 263,069 /= (One hundred forty nine million two hundred and sixty nine thousand sixty nine Uganda shillings) which is the total amount of money that the defendants were indebted to the plaintiff as at 26<sup>th</sup> July 2001.

The plaintiff also prays for interest on the amount at a rate of 21% per annum from 26<sup>th</sup> July 2001 until payment in full and costs for the suit.

In **Harbutt's Plasticine Ltd .v. Wyne Tank & Pump Co. Ltd** [1970] 1 QB 447 lord Denning held that,

*"An award of interest is discretionary. It seems to me that the basis of an award of interest is that the defendant has kept the plaintiff out of his money; and the defendant has had the use of it himself. So he ought to compensate the plaintiff accordingly."*

This suit is along drawn out case. The plaintiff bank is in liquidation and is therefore no longer trading .I see no justification in that regard to charge commercial interest as prayed. I therefore award 8% p.a from 26<sup>th</sup> July 2001 until payment in full.

I also award the plaintiff the costs of the suit.

The plaintiff is not awarded general damages as they did not pray for them.

The court enters judgment in favour of the plaintiff.

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**Geoffrey Kiryabwire**  
**JUDGE**

**Date**                **26/08/09**

26/08/09

9:45am

**Judgment read and signed in Court in the presence of;**

- J. Abaine for Defendant
- Masembe Kanyerezi Plaintiff

**In Court**

- The Defendant
- Rachael – Court Clerk

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**Geoffrey Kiryabwire**

**JUDGE**

**Date: 26/08/09**