THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT-00-CC-CS-0152-2007

BANK OF AFRICA – UGANDA :::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

1. **CLIVE MUTISO**
2. **CENTRE HOTELS LIMITED**
3. **SIR HENRY MORGAN &ASSOCIATES LIMITED ::DE FENDANTS**
4. **ORGANIC FOREST HONEY LIMITED**
5. **MUKASA MULEMA RICHARD**

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

JUDGMENT

The plaintiff's claim against the defendants is for recovery of a liquidated sum of US$389,791.71 being payment made by the plaintiff to the 1st and 2nd defendants against a forged Bank Draft, including foreign and other bank charges of US$3877.10; recovery of a liquidated amount of US$385,914.61 payable by the 1st and 2nd defendants to the plaintiff for money had and received by the said defendants for use of the plaintiff; damages suffered by the plaintiff due to the 1st and 2nd defendant's fraud and misrepresentation; an order to lift the veil of the 2nd, 3rd and 4th defendants, and make them jointly and severally liable with the 1st and 5th defendant; a permanent injunction restraining the 2nd, 3rd, and 4th defendants from selling off or in any way disposing of their properties; interest and costs of the suit.

It was such a long drawn out legal battle that at the conferencing the only admitted fact was that the 1st and 2nd defendants presented a Bank Draft to the plaintiff. Everything else is denied.

The issues for determination are:

1. Whether the 1st and 2nd defendants are liable for money had and received by them for use of the plaintiff.
2. Whether the 1st, 2nd and 5th defendants or any of them acted fraudulently in obtaining money from the plaintiff.
3. Whether the 3rd and 4th defendants' veil of incorporation should be lifted to be found liable for the alleged fraud of the 1st defendant.
4. Whether the parties are entitled to the remedies sought.

Mr. Faisal Mukasa for the plaintiff.
Mr. Augustine Musoke Kibuuka for the 1st, 2nd, 3rd and 4th defendants.
Mr. David Sempala for the 5th defendant.

The defendants have hyped up the alleged non-dishonour of the Bank Draft in their submissions. However, as the 4 issues framed for determination clearly show, this is not one of the framed issues. True they pleaded it. However, it is trite that a party is expected and bound to prove the case as alleged by him and as covered in the issues framed: ***Interfreight Forwarders (U) Ltd vs East African Development Bank [1994 – 95] HCB 54***. Given that the dishonour or otherwise of the impugned Bank Draft is at the very core of this suit, I find it necessary to first make a finding of fact in respect thereof and thereafter proceed to make determination of the framed issues.

From the plaint and the evidence of PW1 Buhumuro, the plaintiff's Branch Manager, by November 2006, the 1st defendant, Clive Mutiso, was their customer. The plaintiff Bank was formerly known as Allied Bank International (U) Ltd. He operated a shilling account in the names of the 2nd defendant, Centre Hotels Limited. It is his evidence that the 1st defendant went to him on or about 9/11/2006 with a Bank Draft in foreign currency, to wit Unites States dollars. It was Draft No. 1665727120 in the sum of US$400,000, indicated as having been issued by HSBC Bank, Los Angeles, on account of M/s Bluefield Associates Inc. and in favour of the 2nd defendant. The Manager (PW1) allowed receiving and processing of the Draft on condition that the 2nd defendant opened a dollar account. This much is not denied by the 1st defendant.

The plaintiff's case is that the Draft in question was forwarded to its correspondent Bank, Deutsche Bank, for onward transmission to HSBC Bank; that on November 16, 2006 Deutsche Bank in accordance with ordinary banking procedures credited the plaintiff's account with its face value with recourse, that is, conditioned on final payment/honour by the issuing bank, HSBC Bank; that on 4th January, 2007 the plaintiff got communication from Deutsche Bank that the Draft had been dishonoured for being a counterfeit; and, that on account of that dishonour Deutsche Bank debited the plaintiff's account with them to the tune of US$400,000, being the value of the Draft.

The 1st defendant does not agree. According to him, while he was in prison over the same matter he received information from a Bank official that the Draft was actually never presented to HSBC Bank in the USA and therefore it has never been dishonoured; that the plaintiff was negligent in conducting the transaction with the second defendant the way it did; and, that the plaintiff is estopped from claiming the money under Section 114 of the Evidence Act.

Now these are indeed very strong arguments. I have already expressed surprise as to why the parties did not deem it necessary to get out of them an issue for determination. Be that as it may, I have looked at Exh. P2, a Deposit slip dated 9/11/06. The 1st defendant makes admission of the deposit. The Draft is indicated as No. 1665727120. There is also Exh. P13, a DHL Shipment Airway bill and a Deutsche Bank remittance advice slip. The amount indicated thereon is US$400,000.

There is also Exh. P6, a swift message from Deutsche Bank to the plaintiff. The former was advising the latter that the Bank Draft in question had been returned unpaid on account of being a counterfeit. Its date of receipt is indicated as 04/01/2007. In my view, Exh. P6 and Exh. P13 do sufficiently corroborate PW1 Buhumuro's evidence that the Draft in question was sent to the would be issuing bank, HSBC Bank; that it was not paid; and, that on the basis of dishonour the plaintiff's account was debited to the tune of US$400,000. The 1st defendant did not lead evidence of the source of information to him while in prison that the Draft was never sent for collection. The law is clear that he who alleges must prove; DW1 Mutiso's evidence is short of proof in that regard.

The defence feeling that the Draft may not have been sent for collection is also based on two other pieces of inconsequential evidence. The first is non-return to the 2nd defendant of the dishonoured Draft and the second, how it could have taken the issuing bank up to January 2007 to communicate to the parties the alleged dishonour.

I have addressed my mind to Exh. P1, a copy of the impugned Dollar Draft. According to the plaintiff, United States Law does not permit release of a forged bill to the collecting bank. This much appears as Notice attached to the Draft, Exh. P1. It shows that with the implementation of the Cheque (USA – CHECK) clearing for the 21st Century Act, banks may replace an original cheque with a substitute cheque. All banks in the USA are required to accept these substitute cheques just as they accept original paper cheques. The substitute cheque is to them a legal copy of the cheque. I am satisfied that Exh. P1 is a substitute cheque in the context of the American Law. HSBC Bank replaced the original Draft with Exh. P1. Banks in the USA are required to accept such substitute cheques and use them in courts of law in the place of the originals. Given that the impugned Bank Draft was a foreign bill, and given the information from Deutsche Bank that the dishonour was on account of the same being counterfeit, court is satisfied, on the basis of the available evidence regarding the movements of the impugned Bank Draft right from the time it was deposited with the plaintiff on 9/11/06 till a notice of dishonour was received by them on 4/01/07, as to why the original Draft was not returned to the plaintiff. This in itself cannot be ground for the court not administering American Law to hold that the bill was not dishonoured. As regards the argument that the period between 9/11/06 and 4/01/07 was too long, PW1 Buhumuro testified:

> ***"……Normally we normally give 21 working days. It is not a guarantee and this is why I said with recourse. What we have seen as a practice in banking, even after five or six years should there be an underlying (sic). Even after a long period of time five, six, seven years, should there be an underlying fraudulent transaction for the money you received; the paying bank will always debit your account without even referring to you and for that matter we also pay out monies with recourse, because we would not hold the money forever."***

I have seen no reason to fault PW1's evidence on this point, the same way the trial Judge didn't in ***Obed Tashobya vs DFCU Bank Ltd, HCT-00-CC-CS-742-2004*** (unreported).

I have already observed that the plaintiff has put before the court proof of its account with Deutsche Bank being debited with US$400,000, the value of the impugned Draft. I consider it highly unlikely that after communicating the notice of dishonour to the plaintiff, the same bank could at the same time have credited the plaintiff's account with the same amount. I have therefore accepted the plaintiff's evidence of the debit to be truthful. Although the usual practice is to return the dishonoured bill to the customer together with a notice of dishonour, where such a bill is not available, as in the instant case, other credible evidence can be relied upon as proof of dishonour. I have found the swift message, Exh. P6, and the copy of the dishonoured bill, Exh. P1, sufficient evidence of dishonour of the impugned draft. I accordingly make a finding of fact that on the balance of probabilities the 2nd defendant's Bank Draft was dishonoured.

I shall now turn to the other issues.

1. ***Whether the 1st and 2nd defendants are liable for money had and received by them for the use of the plaintiff.***

It is not disputed that the 1st defendant deposited with the plaintiff Bank the impugned Draft. He filled and signed Exh. P2. He thereby represented to the plaintiff that the draft was genuine, that it was issued by HSBC to the 2nd defendant, his own undisputed company. By so doing, it is clear to me that both defendants undertook liability for the said bill in the event of any loss arising out of its dishonour. As fate would have it, it has been dishonoured. From the evidence also, between 30/11/06 and 22/12/06, the 1st defendant acting on behalf of the 2nd defendant asked the plaintiff to advance him funds against the uncleared effects on the Draft. Waste cheques have been tendered in evidence amounting to US$385,914.61 in a period of less than one month. The 1st defendant does not deny any of the withdrawals.

The plaintiff's case consistently has been that the payment of the proceeds of the impugned Draft was conditional upon clearance of the Draft; that once the same was

dishonoured they are obliged to make good the loss occasioned to the Bank. I have already set out the defence arguments on this point.

The 1st defendant claims that he was verbally informed by an officer of the Bank that the collection of the draft would take 21 days, implying that beyond that period he would be free to assume that the money was unquestionably the 2nd defendant's. His claim is discredited by his own letter, Exh. P5, in which he requested to be allowed to make withdrawals against uncleared effects. He did not name the officer who gave him such assurance. Given that he wrote the letter on 30/11/06, 21 days following the said deposit of the draft, and still requested for withdrawals against uncleared effects, I harbour no doubt in my mind that he knew that the draft had not been cleared for payment.

My understanding of the law is that money which is paid by one person which rightfully belongs to another, as where money is paid by X to Y on a consideration which has wholly failed, is said to be money had and received by Y to the use of X. Such money is recoverable through an action by X.

The payment creates a quasi-contract, an obligation not arising by, but similar to contract. It is rooted in a quasi-contract on the footing of an implied promise to pay it back. In such an action, liability is based on unjust benefit or enrichment. It is applicable whenever the defendant has received money, as in the instant case, which in justice and equity, belongs to the plaintiff under circumstances which render the receipt of it by the defendant a receipt to the use of the plaintiff.

See: ***Dr. James Kashugyera Tumwine & Anor vs Sr. Willie Magara & Anor HCCS No. 576 of 2004*** *(Commercial court – unreported).*

Relating the above principle to the instant case, the 1st and 2nd defendants undertook, directly or indirectly, liability to the plaintiff against loss that could result out of the dishonour of the Draft. It was not Bank money but depositors' money. On account of the 1st defendant not being a stranger, in the sense that he had rendered some services to the Bank prior to all this and he had been a Director in a similar Bank, Orient bank, funds were advanced to him and the 2nd defendant. The consideration for which he had been

advanced the money wholly failed when the Draft was dishonoured. It is immaterial that the plaintiff could have been negligent to a certain degree to allow such a hefty sum of money to be withdrawn against uncleared effects. The fact remains that they received money which in justice and equity belonged to the plaintiff. The plaintiff is not in any way precluded from recovering the amount from them as money had and received.

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

2. ***Whether the 1st, 2nd and 5th defendants or any of them acted fraudulently in obtaining money from the plaintiff***.

Fraud is the obtaining of a material advantage by unfair or wrongful means. It involves obliquity, a state of crooked out look, if you may. It involves the making of a false representation knowingly, or without belief in its truth, or recklessly.

It is well established that fraud must be specifically pleaded. Particulars of the fraud must be stated on the face of the pleading. In the end, whether or not the defendants acted fraudulently becomes a conclusion of law.

In the instant case, the particulars of the alleged fraud are set out in paragraph 12 of the plaint. I will start with the 1st and 2nd defendants.

One of the instances of fraud alleged against them is purporting to lease land which they knew they had no interest and legal right to lease. From the 1st defendant's own evidence at the hearing, he had been involved in the purchase of land at Kiziba from NPART. He bought it in the names of a company known as Sir Henry Morgan Associates Ltd, whose incorporation he was also involved in. He admits that he did not have the capacity to make the purchase personally. So he combined forces with other people who included one Dominic Symes and one Eric Vanderboom. He testified (p. 37 of proceedings, Tapes 4 – 6).

> ***"And at that time I transferred the company Sir Henry Morgan Associates to them although a small number of shares were retained by me and vested in the names of various children whom I wish to have the benefit of the shares."***

From the company resolution of 16th February, 2004, TD Exh. 1, the Directors are:

(i). William Timothy Dominic Symes.

(ii). Eric Joseph Vanderboom

(iii). Kipchi Lowen Arap Tallan.

Mr. Symes and Mr. Vanderboom hold 18,865 shares each and Clive Mutiso 2450 shares. He is simply a minority shareholder. The evidence of DW2 Symes is to the same effect. According to DW2 Symes, he one time put the land on the market for sale. The people he detailed to look for potential buyer included Mr. Mutiso. He was very categorical, however, that he never authorized anybody, including Mr. Mutiso, to sell the land or lease it out; nor did he have knowledge of one Ian Bailey, the alleged originator of the impugned Bank Draft according to Mr. Mutiso. I have seen no reason to doubt Mr. Symes' evidence in this regard. He sounded a rather truthful witness. In spite of that clear evidence of ownership of the Kiziba Estates Land, Mr. Mutiso claimed in Exh. P4, the Lease Agreement, that the 2nd defendant is the equitable and unregistered owner thereof. He had been asked to justify the source of funds in accordance with anti-money laundering procedures and he did not hesitate to tell a lie that the 2nd defendant owned land comprised in Block 491 Plot 2 at Kiziba having bought the same from Kiziba Estate Ltd, the former owners. The plaintiff parted with the money partly on the basis of this document. The defendants argue that since it was produced on or about 29th November, 2006, it was not the basis for the release of the money to them. This argument does not find favour in the credible evidence of PW1 Buhumuro that right from the out set the bank requested the 1st defendant to produce evidence to justify the source of funds in accordance with anti-laundering procedures and that he did not produce it earlier than 29/11/06 because he had said that he would be out of the country.

I have accepted that evidence.

It is clear to me that the first defendant made a false representation about ownership of the land and the source of the funds, knowingly and/or without belief of its truth. He acted fraudulently in obtaining money from the plaintiff. His fraud extended to the 2nd defendant of which he was its mind and soul.

I so hold.

I now turn to the 5th defendant, Mukasa Mulema Richard, an Advocate.

According to him, he had known the 1st defendant prior to all this in connection with the work he had done for the plaintiff Bank. So one time he (Mr. Mutiso) approached him in connection with this transaction. He was in the company of a white man who was introduced to him as Ian Bailey. The two had had some discussions on what they wanted so all they needed was a formal Lease Agreement which he drafted for them. Later, Mr. Bailey requested him to act as his Attorney and sign on his behalf, which he also did. As it turned out, the Lease Agreement is now a questionable document. A fraudulent intent is in my view akin to malice aforethought in homicide cases. It is a state of mental disposition incapable of proof by direct evidence. The acts alleged to be fraudulent must, however, be set out in the plaint, and then it should be stated that these acts were done fraudulently. From the acts fraudulent intent may be inferred. Hence the saying that fraud is a conclusion of law.

In the instant case, while Mr. Mukasa – Mulema's involvement casts him in bad light in that his client's acts caused loss to the plaintiff, this alone is not sufficient proof of fraud on his part. He could have acted negligently but negligence is not the same as fraud. It is generally accepted that fraud must be proved strictly, the burden being heavier than on a balance of probabilities generally applied in civil matters: ***Kampala Bottlers Ltd vs Damanico (U) Ltd SCCA No. 22/92***.

The pleadings against the 5th defendant point to acts of alleged negligence camouflaged as fraud. The standard of care which can be demanded from an Advocate is set out in ***The Insurance Company of North America vs Baerlein and James [1960] E.A 993 at 997***:

> ***"Standard of care. The standard of care and skill which can be demanded from a solicitor is that of a reasonably competent and diligent solicitor. LORD ELLENBOROUGH has said:***
> ***'An Attorney is only liable for crassa negligentia.' Again, LORD CAMPBELL in discussing the essential elements to sustain an action for negligence has said: 'What is necessary to maintain such an***

> ***action? Most undoubtedly that the professional adviser should be guilty of some misconduct, some fraudulent proceeding, or should be chargeable with gross negligence or with gross ignorance. It is only upon one or other of those grounds that the client can maintain an action against the professional advisor.'*** **This, however, does not mean that the standard of care imposed upon a solicitor is below that imposed on other professional men; it only means that it is not enough to prove that the solicitor had made an error of judgment or shown ignorance of some particular part of the law, but it must be shown that the error or ignorance was such that an ordinarily competent solicitor would not have made or shown it. It would be extremely difficult to define the exact limit by which the skill and diligence which appears to satisfy his undertaking, and that *crassa negligentia* or *lata culpa* mentioned in some of the cases, for which he is undoubtedly responsible. It is a question of degree and there is a borderland within which it is difficult to say whether a breach of duty has or has not been committed."**

The above is an extract from CHARLESWORTH ON NEGLIGENCE (3rd Edn.). It illustrates an advocates' duty of care to a client. The 5th defendant was not the plaintiff's lawyer so we are not talking of lawyer/client relationship. However, the extract does in my view provide insight into the many accusations which the plaintiff has heaped on the 5th defendant as if he was its employee or counsel.

True Bailey has vanished into thin air, if he ever existed. Does this imply, however, that the lawyer who processed the impugned Lease Agreement is equally culpable as his client? I do not think so. Once it is accepted that fraud is a false representation by means of a statement or conduct made knowingly or recklessly in order to gain a material advantage, essential elements being ***knowingly*** and ***recklessly***, the evidence against the 5th defendant falls short of proof that he acted with guilty knowledge. To hold otherwise would be to imply that even the plaintiff's servants who in a period of less than a month paid a whopping US$385,914.61 against uncleared effects were equally culpable. In my opinion the possibility that the 5th defendant, like the plaintiff, was fooled cannot be ruled

out. I am therefore unable to make a finding that he too acted fraudulently in obtaining money from the plaintiff.

I would answer the 2nd issue partly in the affirmative (as regards the 1st and 2nd defendants) and partly in the negative (as regards the 5th defendant) and I do so.

3. ***Whether the 3rd and 4th defendants veil of incorporation should be lifted and be found liable for the alleged fraud of the first defendant***.

From the pleadings, the 3rd and 4th defendants are limited liability companies incorporated under the Laws of Uganda. I have already indicated that according to the evidence of DW1 Mutiso and DW2 Symes the first defendant is only a shareholder in the 3rd defendant company. He holds minority shares therein. The majority shareholder according to Exh. TD1 is Allan Shonubi with 52,470 shares. He did not appear as a witness.

From the evidence of DW2 Symes, one of the Directors of the company, he was completely unaware of what had gone on between the 1st defendant, 2nd defendant and one Ian Bailey, the alleged originator of the Counterfeit Draft. I have already accepted his evidence in this regard.

As regards ORGANIC FOREST HONEY LIMITED, the 4th defendant, the certificate of Incorporation, Exh. P8, shows that it was incorporated on 10th November 2006. The subscribers were ***Muwema Fred*** and ***Clive Mutiso***. The foot work regarding incorporation appears to have begun on 9/11/06, the same day Mr. Mutiso banked the ill-fated Draft. Upon incorporation, the company immediately purchased Singo Block 293 Plot 47 land at Myanzi at a price of Shs.15,000,000/=. Payments were effected by Mr. Mutiso on 28/11/06, Shs.3,000,000/=; 30/11/06 Shs.8,000,000/=; and 11/12/06 Shs.4,000,000/=. It is note worthy that this was the time Mr. Mutiso made the initial withdrawals against the uncleared effects. It is also noteworthy that on 11/12/06, the very day the last installment was paid on the Myanzi land, Mr. Mutiso withdrew US$255,000 against the uncleared effects.

Court is of the view that these were not mere coincidences. The proceeds from the Counterfeit Draft were clearly used in the purchase of this property. The company

appears to have been incorporated for that purpose. On the balance of probabilities it was.

I have addressed my mind to the able arguments of counsel on the issue of lifting the veil of incorporation with regard to the 3rd and 4th defendants. In simple terms, once a company is incorporated, it has its own separate legal personality distinct from its members. It is said that there is a veil of incorporation between the company and the identity of its members. In some situations, however, the courts are prepared to 'lift the veil' of incorporation and have regard to the identity of the membership of the company or treat the rights and liabilities of the company as those of its members. The courts may lift the veil, for instance, to prevent the company being used as a means of fraud or evasion of legal responsibilities.

Generally speaking the courts are precluded by ***Salomon vs Salomon [1897] A.C 22*** from treating a company as the 'alias, agent, trustee or nominee' of its members, but they will nevertheless do so if corporate personality is being bluntly used as a cloak of fraud or improper conduct.

Relating the same principles to the instant case, it is clear to me that the 4th defendant was strategically incorporated to benefit from the proceeds of the fraudulent transaction. It reaped that benefit. It was incorporated as one of the 1st defendant's many aliases. It is fair and just that its veil of incorporation be lifted to avoid the same being used as a cloak of fraud.

I would likewise answer the third issue partly in the negative (as regards the 3rd defendant) and partly in the affirmative (as regards the 4th defendant) and I do so.

4. ***Whether the parties are entitled to the remedies sought***.

The plaintiff's lead prayer is for judgment against the defendants for recovery of US$389,791.71. It includes foreign and other Bank charges incurred by the plaintiff. For reasons stated above, the Bank is entitled to this remedy as against the 1st and 2nd defendant jointly and severally.

It is so ordered.

The second prayer is for damages for the loss suffered by the plaintiff due to the 1st, 2nd and 5th defendants' fraud.

For reasons stated above also I have not found the 5th defendant liable for the loss suffered by the Bank on account of the fraudsters. I would dismiss the plaintiff's suit against him and I do so.

As regards the 1st and 2nd defendant, the general principle is that general damages are awarded to compensate the plaintiff and not to punish the defendant. I am of the view that since the general effect of an award of general damages is to place the plaintiff in the same financial position as if the wrong complained of had not been committed against it, the order for the full amount taken from the plaintiff by the two defendants together with the bank charges incurred by the plaintiff would have that effect. I have also considered the ease with which the fraudster was able to march away with the money as if the bank had no internal controls, and come to the conclusion that it would not be just and equitable to make any award of general damages, whether it be substantial or nominal.

I have therefore awarded none.

The other prayer is for a permanent injunction restraining the 2nd, 3rd and 4th defendants from selling off and/or in any way disposing of their properties pending payment of the decretal sum.

For reasons I have endevoured to give above, this remedy is also granted to the plaintiff as against the 2nd and 4th defendants. The claim against the 3rd defendant is dismissed with costs against the plaintiff.

The decretal sum of US$389,791.71 (United States Dollars Three hundred Eighty Nine Thousand Seven Hundred Ninety one and Seventy one Cents) shall attract interest of 5% per annum from the date of filing the suit till payment in full. The plaintiff shall also have the costs of the suit as against the 1st and 2nd defendants.

I now turn to the 5th defendant's counter claim.

It is against the plaintiff plus 1st and 2nd defendants. As against the plaintiff he prays for punitive and general damages for alleged false and malicious allegations amounting to libel made against him in the suit.

He also seeks punitive and general damages against Mutiso and Centre Hotels Ltd for the distress and inconvenience caused to him by the suit, and the costs of the suit.

I have addressed my mind to his claim.

He testified that he carried out his instructions as an Advocate under the Regulatory Professional Legal framework and that he never participated and/or aided any fraud or misrepresentation whatsoever as alleged in the plaint. I have already made my position clear on that. Having said so, it is trite that a plaintiff is at liberty to sue any defendant or defendants jointly and severally against whom he has a cause of action: ***Crane Insurance Company vs Shelter (U) Ltd CACA No. 14/1998***.

He testified that Mutiso called him and asked him whether he, the counter claimant, could handle for him a transaction involving a purchase of land. He made an appointment with him and he (Mr. Mutiso) went over with a gentleman who he later knew as Ian Bailey. He was a white man, "presumably British from what he told me" and then he introduced this whole transaction to me. Mistake No. 1: despite alleged intimacy with the so called Bailey, the witness cannot say where in the world he was from.

Then he continues (P. 111, Tapes 4 – 6):

> ***"Well at the time when I was drafting this agreement Mr. Ian Bailey used to communicate to me on phone and he had told me he would be here to sign this agreement on their behalf. So at the time when Mr. Mutiso confirmed that money was credited on the account on Centre Hotels and he would go ahead to sign. Mr. Ian Bailey communicated to me and to Mr. Clive Mutiso that he will not be here to sign so I could go ahead and sign since I had been duly instructed and being***

an advocate I could go ahead and sign on behalf of the lessee and bind them."

From this evidence, Ian Bailey purported to represent Bluefield Associates Inc. in the purported Lease Agreement. The plaintiffs have consistently argued that Bluefield Associates Inc. does not exist. As fate would have it, the said Bailey vanished into thin air, if he was not air itself. He did not appear as a witness to confirm or deny the counter-claimant's allegations. At the hearing, he said that he had lost touch with him. If he had acted on a duly notarized power of attorney, or had acted on a company resolution to give him instructions on the matter, that would be evidence of the company's possible existence. He instead acted on mere e-mail messages and phone calls which any rogue in the city could afford to send or make.

In my view notwithstanding the finding that he is not liable to the Bank for the fraud of his clients, he made a professional error of judgment by failing to make a due diligence study of his clients before acting as he did. The 1st defendant by counter-claim has in my view shown that the error of judgment was such that an ordinarily competent Advocate could have done a little more than the counter-claimant did. He cannot be allowed to found a cause of action on his own negligence. He therefore has no right to be assisted either as against the Bank or his purported clients. He can proceed against Bluefield Associates Inc., if he so wishes. Accordingly, his claim against the defendants to the counter claim also fails.

As regards costs, I have dismissed the plaintiff's claim against the 5th defendant and the 5th defendant's counter claim. The usual result is that the loser pays the winner's costs. This practice is subject to the court's discretion, so that a winning party may not necessarily be awarded his costs. For example in ***Dering vs Uris [1964] 2 ALL ER. 660*** the plaintiff sued the defendant in respect of libel in the book EXODUS. The jury, who were obviously not sympathetic to the plaintiff, awarded him contemptuous damages of one half penny. The trial judge did not award the plaintiff his costs, even though they probably ran into thousands of pounds.

In similar vein, given the conduct of each participant herein as stated above, save for the order against the plaintiff to pay costs attendant to the dismissal of the suit against the 3rd defendant, the justice of the case demands that I order each party to bear its own costs.

In the result, judgment is entered for the plaintiff in the following terms:

(i). US$389.791.71 (United States Dollars Three Hundred Eighty Nine Thousand Seven Hundred Ninety one and Seventy One Cents only) as against 1st and 2nd defendants.

(ii). A permanent injunction restraining the 2nd and 4th defendants from selling off and/or in any way disposing of their properties for as long as the decretal sum remains unpaid.

(iii). Interest on the decretal sum at the rate of 5% per annum from the date of filing till payment in full.

The following orders are also made:

a). Suit against the 3rd defendant dismissed with costs.

b). Suit against the 5th defendant dismissed.

c). Counter-claim dismissed in its entirety.

d). Save for the order for costs in (a) above, each party to bear its own costs.

Orders accordingly.

Yorokamu Bamwine

JUDGE

28/07/2009