**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(COMMERCIAL DIVISION)**

**HCT - 00 - CC - CS - 358 - 2006**

**DAMAS MULAGWE :::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: PLAINTIFF**

**VERSUS**

1. **LANEX FOREX BUREAU LTD**
2. **STANHOPE FINANCE CO. LTD**
3. **NOORALI MANJI ::::::::::::::::::::::::::::::::: DEFENDANT**
4. **MOHAN DROLIA MANJI**
5. **DIAMOND DROLIA**

**BEFORE: HON. JUSTICE GEOFFREY KIRYABWIRE**

**J U D G M E N T**

The Plaintiff brought this suit against the Defendants jointly and severally for the refund of US$160,000 being money deposited by him with the first Defendant. The Plaintiff further sought the recovery of interest on the said amount at the rate of US$12,000 per month from October 2005 until payment in full. It is the case of the Plaintiff that sometime in the year 2003 at the request of the first Defendant he made a financial deposit to them of US$160,000 in consideration of a monthly interest of US$12,000 which undertaking was reduced into writing. However, upon demand to repay the said sums the first Defendant has failed to do so. It is also the case for the Plaintiff that the first and second Defendants had common management, directorship and shareholding. That being the case, the second, third, fourth and

fifth Defendants are jointly liable with the first Defendant for the non payment of the said sums.

The Defendants deny the allegations and in the particular the second to fifth Defendants aver that the claim discloses no cause of action against them. The first and second Defendants at the time of the suit were closed following statutory intervention by the Central Bank.
At the pre trial scheduling conference, the following issues were agreed for trial;

1) Whether the first Defendant could lawfully take deposits from the public?
2) Whether the Plaintiff did make a deposit with the first Defendant of US$160,000 as alleged?
3) If the Issue No. 2 above is answered in the affirmative, whether the Defendants or any of them is liable to pay the Plaintiff the said sum with interest as claimed?
4) Remedies.

Mr. P. Katamba and Mr. Wamukota appeared for the Plaintiff while Mr. K. Masembe appeared for the Defendants. The Plaintiff's called two witnesses namely; Mr. Roopesh Solanki (the former manager of the first Defendant as PW1) and the Plaintiff (as PW2). The Defendants called one witness Mr. Nandannan Kannapulakkal (the former General Manager of both the 1st and 2nd Defendants as DW1).
Before I address my mind to the above issues, it is important to point out that the Court found itself in quite a dilemma when the tapes used to record the proceedings turned out to be counterfeit and the whole recorded proceedings were lost. It took a very long time to resolve this matter until all the parties agreed that the lawyers provide court with their hand written notes to guide the Court and form the Court's record. For this practical solution the Court thanks the parties and their lawyers.
Secondly, counsel for the Plaintiff in their written submissions sought to add an issue under order 15 rule 5 (1) of the Civil Procedure Rules (CPR).

This issue is whether or not if the Plaintiff made the alleged deposit with the first Defendant, such a transaction is enforceable in law?

Counsel for the Defendants objected to this addition and did not address it directly. That notwithstanding, I find that the added issue is really part of Issue No. 3 as framed before court and both parties generally submitted on it and Court will therefore incorporate its detail within Issue No. 3 as no prejudice has been occasioned to the parties.

**Issue No. 1: Whether the first Defendant could lawfully take deposits from the public**

This issue as I see it, addresses the legality of the whole deposit transaction. Counsel for the Plaintiff submitted that the deposit was legal. He relied upon S.3 of the Foreign Exchange Act 2004 and definition of foreign exchange therein which provides;

> *"Foreign exchange business means the business of buying, selling, borrowing or handling of foreign currency …"*

It is the case for the Plaintiffs that this is wide enough to cover the transaction between the Plaintiff and the first Defendant. The first Defendant even issued an acknowledgment Exh. P.1 signed by Mr. Roopesh Solanki as manager dated 3rd October, 2005 which reads;

> *" …* ***Ref: $160,000- Deposit***
>
> *This is to confirm that we have received the sum of $160,000- (one hundred sixty thousand dollars) as fixed deposit from Mr. Damas Mulagwe at an interest rate of $12,000- (twelve thousand dollars) per month for three months automatically renewable …"*

Counsel for the Defendants however it was submitted that the law regulating the activities of forex bureau is the Exchange Control (Forex Bureau) Order, S.1 No. 7 of 1991. Regulation 3 thereof provides;

> *"… Forex bureau means a business enterprise licensed under paragraph 8 of this order to carry on the business of buying and selling foreign currency …"*

Regulation 15 of the order further provides

> *"… A forex bureau shall in carrying out the business of a forex bureau,* ***only engage in spot transactions*** *and in particular no officer or staff member shall …*
>
> e) *Issue any official forex bureau receipt for a purpose other than to cover an actual purchase or sale of foreign exchange …" (emphasis mine)*

Counsel for the Plaintiff in response to this submitted that the Foreign Exchange Act 2004 being the principal Act takes precedence over the Exchange Control (Forex Bureau) Order S. 1 No. 7 of 1991 as these are regulations. In particular he referred me to Section 21 of the Foreign Exchange Act 2004 which provides

> *"… This Act shall take precedence over all other existing legislation relating to foreign exchange and any contradiction in any law is modified to the extend of the contradiction …"*

I have addressed myself to the submissions of both counsel on this issue and the law.
Section 20 (2) of the Foreign Exchange Act 2004 seems to resolve this whole issue. It provides

> *"… the Exchange Control (Forex Bureau) Order 1991 shall continue in force until revoked or amended by regulations made under Section 18 …"*

I have not seen any revocation or amendment of that order. That being the case, counsel for the Defendants is correct in stating that; forex bureau's may not take deposits from the public. This is specifically prohibited and thus is illegal. That resolves Issues No. 1.

**Issue No. 2: Whether the Plaintiff did make a deposit with the first Defendant of US$160,000- as alleged.**

The position of the Plaintiff is straight forward that a deposit of US$160,000- was made to the first Defendant and that this was acknowledged in Exh. P.1 (supra). This deposit was signed for by one Solanki as manager of the first Defendant. The Plaintiff testified that the said

deposit of US$160,000- was accumulated over time starting with US$20,000- beginning 22nd December, 2003. The Plaintiff in support of this relied on counterfoil tabs from his cheque book to show when these payments were made (Exh. 13, 14, 15 and 16).

Counsel for the Defendants challenged Exh. P.1 on the grounds that the wording showed that the deposit had been made at once whereas the testimony of the Plaintiff showed otherwise that the monies had been accumulated over time. This submitted counsel for the Defendants was a modification of a written document which was not admissible under Sections 91 and 92 of The Evidence Act. Counsel for the Defendants attacked the credibility of Mr. Solanki (the manager of the first Defendant at the time) observing that he had made an admission that he forged several telegraphic transfers and was a convicted felon whose evidence should not be relied upon.

I have addressed my mind on the submissions of both counsel and the evidence before me.

The resolution of this issue is really a finding of fact. I have already found that the first Defendant under the law was prohibited from taking deposits as a forex bureau. There is however overwhelming evidence that the first defendant actually did take deposits from the public and this among other things led to the suspension of its license by Bank of Uganda. Indeed counsel for the first Defendant wrote on the 21st November, 2005 (See Exh. P.9) indicating that some claims would be paid while others which included that of the Plaintiff required further discussions. It is important to note that; in that letter, counsel for the first Defendant noted that they wanted *"… a meeting to have all pending claims settled once and for all …"*

A review of Exh. D.6 which is a table entitled *"claims considered for settlement"* show a list of 37 claimants seeking refund from the first Defendant. Only claims number 36 for M/S Leo Impex (U) Ltd and 37 for the Plaintiff are deposits not linked to telegraphic transfers. Furthermore, it is only the deposit of the Plaintiff that has an interest component. In that regard, the transaction between the Plaintiff and the first Defendant is unique when compared to the rest of the cases. In any event all the transactions in exhibit D.6 are not spot transactions and can therefore be deemed to be deposits from the public. That notwithstanding, there is

evidence that about a year earlier on the 19th February, 2004 the Plaintiff in a similar manner deposited US$60,000- at an interest rate of US$4,500- per month (Exh. P.16).

These are two documents namely; Exh. P. 1 and 16 seem to suggest a course of dealings between the Plaintiff and the first Defendant that is a relevant fact within the meaning of Section 15 of The Evidence Act (Cap 6). That fact is that it is in 2004 and 2005 similar transactions had occurred and were documented. Based on the evidence before me therefore, I find that the Plaintiff did deposit the said US$160,000- with the first Defendant.

**Issue No. 3:** **If the Issue No. 2 above is affirmative, whether the Defendants or any of them is liable to pay the Plaintiff the said sum with interest.**

This issue is the same in substance as the additional issue raised by counsel for the Plaintiff as to whether such a transaction is enforceable in law.
Counsel for the Plaintiff submitted that; the money is indeed recoverable and therefore the transaction should be seen as enforceable.
He submitted that the duty to observe the law is on the person who asks for, solicits or receives the money but not on the person who submits to the demand and pays the money. In this regard, I was referred to the case of

**Kiriri Cotton Ltd V Ranchhoddas K. Dewani** [1960] E A 193.

He further submitted that even where a loan agreement was illegal, when the parties thereto are not in paridelicto, the Defendant should still repay the money as had and received. In this regard, counsel for the Plaintiff referred me to the case of

**Coffee Marketing Board, V Kigezi Growers Cooperative Union** HCCS No. 437 of 1994

Counsel for the Defendants in response submitted that if court found that the money was deposited then only the first Defendant company should be liable and not the other

shareholders and directors (i.e. the other Defendants) based on the principle of corporate liability. If there was a fraud then it was perpetuated by an employee one Solanki and not the shareholders or directors of the first Defendant. However, in this case no fraud had been pleaded.

Following the findings in the earlier issues, this issue to my mind is straight forward. I have already found on the evidence before court that the Plaintiff deposited the US$160,000-. The evidence also shows that even after closure by the Central Bank when the first Defendant found a genuine case of money deposited with it, then the claimant was settled. In other words, that money deposited with the first Defendant was treated as had and received. I see no reason to treat this case in a different way. The said deposit of US$160,000- is money had and received and should be refunded. I so order that the first Defendant repay it.

As to the interest of US$12,000- per month also claimed by the Plaintiff, I find that this is not recoverable because it would go contrary to Regulation 15 of the Exchange Control (Forex Bureau) order 1991 which prohibits any business other than a spot transaction.

I however agree with counsel for the Defendant that there is no liability that has been established beyond the first Defendant that affects the second to fifth Defendants. The Plaintiff in paragraph 9 his plaint only pleads common management, directorship and shareholding in respect of the second, third, fourth and fifth Defendants. That in my view without more is not sufficient to lift the corporate veil against them. I agree that; Mr. Solanki appears to have been behind this whole mess. That notwithstanding, the other Defendants at best can be said to have exercised extremely poor corporate governance in the management of the first Defendant that had a collateral effect on what happened.

I accordingly dismiss the case against the second, third, fourth and fifth Defendants.

**Issue No. 4: Remedies**

I accordingly find that the claim for US$160,000- has been proved as money had and received and should be paid without interest as this was a prohibited transaction. The prayer for general damages is equally denied for the same reason given above.

In line with my holding in **Wamala Nanseera V North Bukedi Cotton Company Ltd.** High Court Civil Suit No. 755 of 2005; where a party exercises poor corporate governance which contributed to the dispute that party though successful should be denied costs. For that reason, the second, third fourth and fifty Defendants are denied costs. The Plaintiff was involved in a prohibited transaction and shall also not benefit from costs. Each party shall therefore bear their or its own costs.

Justice Geoffrey Kiryabwire

**JUDGE**

**Date: 10/01/2011**

10/01/2011

11:37 a.m.

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

- Kalibala h/b for Masembe for Defendant
- Plaintiff
- Ruth Naisamula – Court Clerk

**……**

**Geoffrey Kiryabwire**

**JUDGE**

**Date: 10/01/2011**