THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION

HCT - 00 - CC - CS - 364 - 2010

CHRIS TUSHABE .... PLAINTIFF

VERSUS

CO-OPERATIVE BANK (IN LIQUIDATION) ..... DEFENDANT

BEFORE: THE HON JUSTICE GEOFFREY KIRYABWIRE

Ruling

This ruling arises from two preliminary objections raised by counsel for the defendant bank, on the grounds that the present suit is res judicata and that the cause of action is barred by limitation.

The facts leading to this objection are that the plaintiff CHRIS TUSHABE filed the present suit against the defendant CO-OPERATIVE BANK LTD (IN LIQUIDATION) for the payment of special damages of Ushs 948,672,000/=, interest thereon at the rate of 20% p.a, general damages for breach of customer banker relationship and costs.

The plaintiff's claim arises from irregularities involving debits and credits made on the plaintiff's bank account with the defendant bank leading to non recognition of Ushs 948,672,000/=.

The defendant filed a written statement of defence in which the plaintiff's claim was denied. The defendant further contended that the claims in the present suit are res judicata as they ought to have been made in a previously concluded suit HCCS 815 of 2000 (**CHRIS TUSHABE V CO-OPERATIVE BANK LTD** (IN LIQUIDATION), which related to the same questions in the present suit for which Judgement was given on the 20th June 2005. The defendant in addition contends that the claims in the present suit are barred by limitation, having arisen during the period 1998/1999.

At the hearing, the plaintiff was represented by Mr. Niwagaba while the defendant was represented by Mr. Masembe.

I will proceed to consider the objections in the order in which they were raised by counsel for the defendant.

1. **That the suit is Res judicata**

Counsel for the defendant submitted that the plaintiff had filed HCCS No. 815 of 2000 between the same parties, in respect of the same claim, and that the said suit was heard and determined by Hon The Justice Stella Arach Amoko (as she then was) in June 2005.

Counsel for the defendant submitted that HCCS No. 815 of 2000 suit was resolved by a partial consent judgment entered into by the parties on 28th January 2001 with the receivers/liquidators of the bank while a judgment was delivered on 20th June 2005 in respect of three remaining issues which were not covered by the consent judgment. Counsel for the defendant further submitted that the 8 new claims raised by the plaintiff in the present suit are also res judicata because they ought to have been dealt with in the previous suit. Counsel for the defendant relied on Section 7 of the Civil Procedure Act and the cases of **POSIYANO SEMAKULA V SUSAN MAGALA & 2** ORS [1979] HCB 90 and **BARCLAYS BANK V JING HONG** (HCCS 35 of 2009) for his submission.

In reply counsel for the plaintiff submitted that the matter is not res judicata. He submitted that the test for res judicata is whether or not the claim in the present suit was directly in issue in the previous suit and in this case, the previous suit is not similar to the present one. Furthermore, that the consent judgment entered into by the parties in HCCS No. 815 of 2000 does not relate to the matters in this suit, because the present claim is based on documents obtained in 2004 after the conclusion of the proceedings in 2003.

I have considered the submissions of both counsels and the authorities cited in respect of this issue for which I am grateful.

Section 7 of the Civil Procedure Act Cap 71 provides for the doctrine of res judicata and states

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court."***

The test for determining whether or not a suit is res judicata is laid down in several authorities which all in substance are saying the same thing.

In the case of **POSIYANO SEMAKULA V SUSAN MAGALA & 2 ORS** [1979] HCB 90, the Court held that,

> ***"In determining whether or not a suit is barred by res judicata, the test is whether the plaintiff in the second suit is trying to bring before the court in another way in the form of a new cause of action a transaction which has already been presented before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If this is answered affirmatively, the plea of res judicata will then not only apply to all issues upon which the first court was called upon to adjudicate but also to every issue which might have properly belonged to the subject of litigation and which might have been raised at the time, through the exercise of due diligence by the parties."***

Furthermore, in the case of **DANIEL SEMPA MBABALI V ADMINSTRATOR GENERAL [1992-1993] HCB 243**, it was also held that,

"a matter is said to be res judicata when the matter in issue was directly and substantially in issue in a former suit, the subsequent suit should be between the same parties or between parties under whom they or any of them claim; the court which tried the first suit must have been competent to

try the subsequent suit and fourthly, the issue in the subsequent suit must have been finally decided by the court in the first suit. The plea of res judicata is one that goes to the jurisdiction of the court. The doctrine is fundamental to the effect that there must be an end to litigation."

This test above is summarised by the Supreme Court in the case of **KARIA & ANOR V AG & ORS [2005] EA** (SCU), Tsekooko JSC (as he then was) while referring to Section 7 of the Civil Procedure Act Cap 71, held that the provision requires that the following broad minimum conditions have to be satisfied in order for a suit to be res judicata;

1. ***There has to be a former suit or issue decided by a competent court.***
2. ***The matter in dispute in the former suit between the parties must also be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar.***
3. ***The parties in the former suit should be the same parties or parties under whom they or any of them claim, litigating under the same title.***

It is no doubt that HCCS No 815 of 2000 was filed before this Court and was determined by Hon. Lady Justice Stella Arach- Amoko (as she then was) and therefore, the suit was determined by a competent court. The parties in both suits are still the same namely **CHRIS TUSHABE V CO-OPERATIVE BANK LTD** (IN LIQUIDATION).

The remaining question for determination by the court is whether the matter in dispute in the former suit is also directly or substantially in dispute between the parties in this suit.

In the case of **KAMUNYE & ORS V THE PIONEER GENERAL ASSURANCE SOCIETY LTD** [1971] EA 263, (COA), Law Ag V-P, at 265, found that,

> ***"…the plea of res judicata applies not only to points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time (Greenhalgh v, Mallard [1947] 2 ALL ER 255). The subject matter in the subsequent suit must be covered by the previous suit for res judicata to apply. (Jadva Karsan v. Harneam Singh Bhogal (1953) EACA 74)".***

I have perused the plaint in HCCS 815 of 2000 and the current suit and I find the transactions leading to the cause of action are essentially the same in both suits. The cause of action in both suits is breach by the defendant of the banker-customer relationship which existed between the plaintiff and the defendant. The facts giving rise to the cause of action in both suits are that in 1993, the plaintiff opened an account number 3895 with Kasese Branch of the defendant's bank and account number 884 with the defendant's Ishaka branch. Furthermore, that in November 1998, the plaintiff's premises were ransacked by thieves leading to the loss of the plaintiff's property including bank statements, cheques and deposit slips. The plaintiff in both suits avers that he requested for copies of the documents relating to his account from the bank which reluctantly gave him the same. In both plaints, the plaintiff avers that on perusal of the account ledger card obtained by him from the defendant, he discovered several wrongful transactions.

The case for the plaintiff in bringing the present suit is that the documents on which he relies for the claim in the present suit were obtained on 14th August 2004, upon a request made to the defendant to furnish more documents on being dissatisfied with the ledger card furnished to him by the defendant. Furthermore, that on the basis of these additional documents, the plaintiff discovered several other irregular transactions and the plaintiff in the current suit lists 13 claims which he alleges are different from those in HCCS No. 815 of 2000.

Counsel for the defendant however submitted that the documents upon which the plaintiff is seeking to rely were obtained in September 2004, whereas judgment in HCCS No. 815 of 2000 was delivered in June 2005 and therefore the plaintiff would have amended his pleadings before the suit was concluded, but did not.

To my mind the facts giving rise to the claims in both suits are the same. The only difference is that the plaintiff in the present suit is seeking special damages of Ushs 948,972,000/= on the basis of documents he discovered after the hearing of the previous suit. The plaintiff avers that the new documents were discovered in September 2004. It is true that this was after the submissions in HCCS No. 815 of 2000 were made. The question however is whether these documents give rise to a new cause of action upon which the plaintiff can institute the present suit.

I find that there is no new cause of action upon which the plaintiff can found his present claim. The claim is premised on the breach of the banker-customer relationship which is also the basis of the previous suit. In this suit, the plaintiff is merely claiming special damages as a result of wrongful transactions which he discovered after the hearing of the previous suit. There is also a claim for general damages for breach of the banker/customer relationship. According to HALSBURY'S LAWS OF ENGLAND 4th Ed Vol. 28, Paragraph 864,

> ***"Accrual of cause of action; …In an action for breach of a simple contract the cause of action <u>is the relevant breach and not the time of damage</u>, as a breach of contract is actionable per se..."***

It follows that the relevant breach occurred during 1997. The subsequent claims are merely additional damages arising from that breach but can not be said to found a new cause of action. Furthermore, the plaintiff in the plaint merely states that he obtained the documents which form the basis of this suit after writing a letter to the defendant upon being dissatisfied with the ledger card provided by the defendant. There is no proof that these documents could not be obtained upon exercise of due diligence. Even if that was not the situation there were still two opportunities to deal with this evidence first to reopen the case as Judgment was not given until 2005 and secondly even after Judgment there was an opportunity to apply for review under Order 46 of the Civil Procedure Act rather than file a new suit.

Even if I was wrong on this matter which I consider not the pursuit of these additional relief's is affected by delay and would consequently be defeated under the doctrine of Laches (see *Mzee bin Ali v Allibhoy Nurbhoy 1 KLR 58*). The plaintiff had this additional information for about six years before taking action on it in Court. I cannot understand why the plaintiff took no action given the fact that even the defendant bank was already in liquidation and effectively closed.

That notwithstanding this suit is clearly Res Judicata and I so find. The first preliminary objection is therefore upheld.

2. Whether the suit is barred by limitation?

In respect of the second preliminary objection that the suit is time barred, counsel for the defendant submitted the limitation period in respect of such suits is 6 years under the Limitation Act. Furthermore, that the claims in the present suit were made for the period between July to August 1997, which is over 14 years ago. Counsel for the defendant further submitted that no factors such as fraud were pleaded by the plaintiff in order to postpone the period of limitation and as thus, the suit is time barred.
In reply, counsel for the plaintiff submitted that the documents relied on in this suit were obtained in 2004. Furthermore, that the plaintiff made a claim for the sums arising from these documents in 2004 and it was replied to in 2005, upon which the plaintiff sought an administrative remedy before instituting this suit.

I have carefully considered the submissions of both counsels in respect of this objection and I find as follows; the cause of action in this suit is the breach of the banker-customer relationship that existed between the defendant and the plaintiff.

The banker-customer relationship is essentially one of contract. According to 'PAGGET'S LAW OF BANKING' 12th Ed, by Mark Hapgood QC, Chapter 7, Paragraph 71, page 115,

> ***"The relationship of banker to customer is one of contract. It consists of a general contract which is basic to all transactions, together with special contracts which arise only as they are brought into being in relation to specific transactions or banking services..."***

The contract constituted by the relation of banker and customer is further summarised by Atkin LJ in the case of **JOACHIMSON V SWISS BANK CORPORATION** [1921] 3 KB 110 at 127.

It follows therefore that the relationship between the plaintiff and defendant being that of contract, the limitation period in respect of contracts under the Limitation Act applies.

Section 3 (1) of the Limitation Act (Cap 80) provides that,

"The following actions shall not be brought after the expiration of six years from the date on which the cause of action arose—

(a) actions founded on contract or on tort;"

According to HALSBURY'S LAWS OF ENGLAND 4th Ed Vol. 28, Paragraph 864,

"Accrual of cause of action... In an action for breach of a simple contract the cause of action is the relevant breach and not the time of damage, as a breach of contract is actionable per se. Accordingly, such an action must be brought within six years of breach. After the expiration of that period the action will be barred, although damage may have accrued to the plaintiff within six

years of action brought. In such an action it is not necessary to prove actual damage, and special damage is merely alleged as a measure of the damages to be recovered. Although time may be extended for the reasons dealt with subsequently in this title (*disability*), it is not extended merely by the fact that the breach has not been discovered or that damage has not resulted until after the expiration of six years."

Furthermore, at Paragraph 890, the same authors note that,

> ***"Negligence amounting to breach of contractual duty. Where one person is employed by another to perform a duty and the failure to perform, or negligence in the performance of that duty gives rise to a cause of action in contract, , time runs from the date of the breach of contract, which will be the date of non-performance or negligence and not from its being discovered or from the occurring damage, unless;***
>
> *(1) the action is;*
>
> ***(a) based on fraud of the defendant; or***
>
> ***(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or***
>
> ***(c) the action is relief from the consequences of a mistake; in which case time runs from the date the plaintiff discovered the fraud, concealment or mistake or could with reasonable diligence have discovered it; or***
>
> *(2)* ***the plaintiff can not establish, in addition to the contractual duty owed by the plaintiff, a general duty of care owed as a matter of law in which case, in accordance with the rules applying to actions brought in the tort of negligence, time will run from the date when damage is sustained by the plaintiff or when he had the necessary knowledge to bring an action in negligence****..."*

In this case, I have already found that the plaintiff's cause of action is the defendant's breach of its duty under the banker-customer relationship which occurred during the period between 1st July 1997 and 31st October 1997. The plaintiff has not pleaded disability or any of the factors provided for in the authorities above, to extend the limitation period. It therefore follows that the breach, having occurred in 1997 about 13 years ago, from 12th October 2010 when the present suit was filed, the suit is barred by limitation and therefore, the second preliminary objection is upheld.

In the premises, both preliminary objections succeed and accordingly, the suit is dismissed with costs.

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Justice Geoffrey Kiryabwire
JUDGE

Date: 17/08/2012