

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL DIVISION)**  
**CIVIL SUIT NO. 591/2013**

**KITENDA ZAKERI ----- PLAINTIFF**

**VS**

**ORIENT BANK LIMITED ----- DEFENDANT**

**BEFORE JUSTICE FLAVIA SENOGA ANGLIN**

**RULING**

The Plaintiff brought this suit against the Defendant seeking to recover his Personal Savings Account No. 11829205, which was with the Defendant Bank, Jinja Road Branch, interest, costs of the suit and an order reopening the Account.

It is the assertion of the Plaintiff that he at all material times maintained a savings account with the Defendant Bank and had saved up to Shs. 517,652,881/-.

The account was closed during police investigations in HCT ACD Suit No. 030/2011; where he was charged with conspiracy to defraud the Defendant Bank.

All efforts to withdraw money from the said account have proved futile and the Defendant has continued to block him from accessing the said account, without giving him any lawful reason for doing so.

The Plaintiff contests the continued closure of his account as illegal, unlawful and a breach of banking laws and contractual relationship. He also contends that any deductions made from his account are without justification and the Defendant bank has no lien over his money as he is not at all indebted to the bank or liable to them in anyway, hence the suit seeking the orders set out in paragraph 10 of the plaint.

In its defence, the Bank asserts that the Plaintiff was involved in fraudulent activities in which the together with one Walubiri Geoffrey defrauded the bank in excess of Shs of 880,000,000/-. The Plaintiff was prosecuted in the courts of law and was convicted on counts of conspiracy to defraud and theft of money from the Defendant Bank.

The Defendant Bank also contends that there are no sums on the Plaintiff's account being held by the Bank.

The Bank also filed a counter claim to recover the sums the Plaintiff is said to have stolen from the Bank. It is contended that the Plaintiff and the First Respondent to the counter claim remain indebted to the bank in the sums in excess of Shs. 880,000,000/- for the sums they fraudulently stole from the Defendant bank. Also, that those sums withdrawn from the

Plaintiff's account were stolen from the Defendant Bank. And that the Defendant Bank reserves the right to close/block the Plaintiff's account in the terms of the contract governing the parties.

It was prayed that the Plaintiff suit be dismissed with costs and judgment be entered for the Defendant bank counter claimant in the terms set out in paragraph 16 of the counter claim.

When the suit was called for hearing on 17.11.14, Counsel for the Defendant raised a preliminary objection under 0.6 r 28 C.P.R to the effect that the plaint does not disclose a cause of action against the Defendant. The case of **Tororo Cement Ltd vs. Frokina International Co. Ltd SCCA. No. 02/2001** – was cited for holding that *“whether a plaint does or does not disclose a cause of action is a matter of law which can be raised by the Defendant as a preliminary point at the commencement of the hearing of the action...”*

Counsel also relied upon the Criminal case of **Uganda vs. Walubiri Godfrey vs. Zakari Kitenda HCT 00 ACD CSC 030/2011** to submit that evidence was led to prove that the Plaintiff was party to the fraud committed against the Defendant and caused financial loss in excess of Ug.Shs. 880,000,000/-, and that the court found the Plaintiff guilty of theft and conspiracy to defraud the Defendant.

Furthermore, Counsel asserted that in the written statement of Defence, it was stated that the suit is barred by law as the pleadings are tainted with illegality. The case of **Makula International Ltd vs. His Eminence Cardinal Nsubuga and Another [1982] HCB II** was cited for the established principle that *“a court of law cannot sanction what is illegal and an illegality once brought to the attention of court overrides all questions of pleadings including admissions made therein”*.

It was then submitted that it is not in dispute that the Plaintiff was found guilty of theft of the suit money. And that if thus court is to make an order releasing the funds as sought, it would in effect be condoning and enforcing an illegality. The case of **Active Automobile Spares Ltd vs. Crane Bank Ltd and Rajesh Pakesh SCCA 21/2001** where court stated that *“it is trite law that courts will not condone or enforce an illegality. This is a well established principle of law.... If a Plaintiff cannot maintain his cause of action without showing as such part of cause of action, that he has been guilty of an illegality, then the court will not assist him”*.

It was stressed by Counsel that the Plaintiff's claim is founded on a transaction involving fraudulent receipt of funds on his account, which transaction had been declared illegal. He reinforced it with the maxim that *“he who seeks equality, should come to court with clean hands”*.

He argued that the Plaintiff defrauded the bank and obtained funds in excess of Shs. 880,000,000/- and then files this suit to recover a sum of Ug. Shs. 517,000,000/- of the defrauded sum is an abuse of court process. He prayed court to dismiss the main suit and proceed with the counter claim.

In reply, Counsel for the Plaintiff submitted that the preliminary objection was wrongly raised as it is based on facts disputed by the Plaintiff. The case of **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd [1969] EA 696** at P. 700 was relied upon to support the argument. It was held inter alia in that case that ***“a preliminary objection cannot be raised if any fact has to be ascertained or what is sought is an exercise of judicial discretion”***.

It was further argued that the continued denial of the Defendant to the Plaintiff to access his money received by telegraphic transfer after indictment and during trial and closure of his account without court order or his consent was improper as the said money sent by Telegraphic Transfer is not part of the Shs. 880,000,000/- claimed by the Defendant.

Moreover that, a conviction in a criminal case cannot bar a Plaintiff from seeking civil remedies against the Defendant from taking away his rights; and the Plaintiff ought to be heard on his claims against the Defendant in respect of unlawful debiting and closure of his account.

It was emphasized that courts have held that ***“although a preliminary objection is expeditious, it should be sparingly used and only in exceptional circumstances where the facts relevant to the points of law to be set down are so clear from the pleadings that there is no room for evidence upon any fact pleaded which would assist in the decision of that point of law or which fact if declared may result in the point no longer arising”***. See **Nas Airport Services Vs Attorney General [1959] EA 53 at P.60**

Counsel affirmed that the facts relating to the preliminary objection in the present case are not clear and need to be proved by way of evidence which necessitates a full trial. He prayed court to dismiss the preliminary objection.

Upon hearing both Counsel court frames the following issues for determination:

- 1. Whether the Plaintiff discloses a cause of action.**
- 2. Whether the Plaintiff is barred by law.**

The issues will be dealt with in that order.

**Cause of action:** A cause of action was defined in the case of **Auto Garage Vs Motokov (No. 3) [1971] EA 514** to mean ***“every fact which is material to be proved to enable the Plaintiff to succeed”***.

And the general principle of law is that ***“in order to prove that a plaintiff does or does not disclose a cause of action, it is necessary for the Plaintiff to establish three essential elements, namely: (a) that the Plaintiff enjoyed a right; (b) that the right has been violated; and (c) that the Defendant is liable”***. Refer to the case of **Tororo Cement Co. Ltd Vs Frokina (Supra)**.

The Court of Appeal stressed in that case that ***“if all the three elements are present then a cause of action is disclosed and any defect or omission can be put right by amendment”***.

***However, if any element is missing then no cause of action is established and no amendment will be allowed, the underlying principle being that where a plaint is a nullity, no amendment can redeem it, whereas a mere defect or an irregularity may be curable by amendment where the ends of justice so demand, where a cause of action is otherwise disclosed”.***

In the present case, the Plaintiff seeks to recover his Personal Savings Account which he held with the Defendant Bank and upon which he claims to have saved Shs.517,652,881/-. The account was closed by the Defendant Bank during police investigations in HCT-ACD-CSC-030-2011, without a court order and without the Plaintiffs consent. All efforts by the Plaintiff to access the account have proved futile and he contends that the continued closure of the account amount o breach of contract. And that all unilateral deductions by the Defendant from the account are without justification as the Defendant could not exercise right of lien. The Plaintiff claims to have suffered damage as a result of the Defendants actions.- Refer to Paragraphs 3, 4, 5 6, and 7 of the Amended Plaint.

This court finds that from the above facts the Plaintiff has established the three essential elements that prove that the plaint discloses a cause of action. The Plaintiff has in his pleadings established that he maintained an account with the Defendant on which there was money that is now withheld by the Defendant allegedly without justification.

The issues of proper defence or right of set off and or illegality raised by Counsel for the Defendant can only be decided after hearing of evidence from both parties and not on the pleadings.

**Whether the suit is barred by law:** As earlier pointed out in this ruling the Defendants Claims that the suit is barred by law as the pleadings are tainted with illegality. This contention is not separate from the contention that the Plaint does not disclose a cause of action as Counsel for the Defendant did not disclose the provisions of the law which bar the suit, if any.

It should be noted that the Supreme Court Justices have established that ***“a distinction must be made between an application to reject a plaint for not disclosing a cause of action and one where the Plaint is barred by law”***.- See the case of **Ismail Serugo Vs Kampala City Council & Attorney General SCCA No.2 of 1998, where Justice Mulenga relied upon the case Nurdin Ali Dewji & Others Vs G.M.M Meghji & Co, & Others (1953) 20 EACA 132**

And as already pointed out, the contentions made by the defence can only be effectively and finally determined after evidence has been heard from both parties.

Court is also persuaded by the arguments of Counsel for the Plaintiff to the effect that conviction in criminal proceedings cannot bar a party from seeking rights they claim are due to them unless expressly barred by any law.

Under Article 50 (1) of the Constitution ***“Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation.”***

The claim of the Plaintiff and the defence of the bank raise issues of fact and law which cannot be determined without trial. The action discloses a cause of action and is maintainable against the defendant. As to whether or not the suit succeeds depends on the merits which can only be determined after a full trial taking into consideration, all issues of fact and law.

The Supreme Court has consistently held that ***“a litigant must not be turned away from the seat of justice before his case is heard on merit, except in plain and obvious cases”***. Refer to the case of **Ismail Serugo (Supra)**

The preliminary objection is accordingly overruled for all those reasons. The suit should be fixed for hearing. The costs will abide the outcome of the suit.

**FLAVIA SENOGA ANGLIN**

**JUDGE**

**05.03.15**