

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT No. 0370 OF 2017

5	1. CENTRE FOR LAW AND PEACE UGANDA	}	
	2. RATO ENTERPRISES LIMITED	} PLAINTIFFS
	3. GEORGE OKOT	}	
	4. RICHARD OBEDI	}	

VERSUS

10	1. BANK OF UGANDA	}	
	2. DFCU BANK LIMITED	} DEFENDANTS

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

The 1st plaintiff, a civil society organisations, together with the rest of the plaintiffs, who were customers of the defunct Crane Bank Limited, sued the defendant jointly and severally for breach
of contracts of banking, refund of fees and charges, an order of cancellation of a directive of the
1st defendant that caused the transfer of the 2nd to 4th defendant’s bank accounts from Crane Bank
Limited to DFCU Bank without their consent, a declaration that by that directive the 1st defendant
violated the rights of the 2nd to 4th plaintiffs and a multitude of other Crane Bank Limited
customers, and costs. The 2nd to 4th plaintiffs contend that the transfer of their accounts from Crane
Bank Limited to DFCU Bank involved disclosure to the latter without their consent, of confidential
private and business information to the latter. It is contended further that the 1st defendant as well
failed it its duty when for several years it permitted Crane Bank Limited to continue undertaking
financial institutions business below the minimum required standard, thereby exposing depositors’
savings to the risk of loss. The 2nd defendant is as well faulted for having unlawfully proceeded to
deduct a sum of money it claimed to be due from the 2nd plaintiff under credit arrangement with
Crane Bank Limited, from a cheque banked with it by the 2nd plaintiff. In all this, the 1st plaintiff
is joined to the suit as a public spirited organisation, seeking to enforce the rights of a “class of
persons who are depositors in financial institutions and commercial banks in Uganda affected by
Bank of Uganda.”

b. The objections.

The defendants object to the propriety of the suit on a number of grounds, i.e. being a claim founded on breach of banking contracts, the suit is not properly filed under article 50 of *The Constitution of the Republic of Uganda, 1995*; the suit is a disguised representative suit yet the plaintiffs did not seek a representative order; the plaintiffs have no *locus standi* for seeking the reliefs sought; the plaint does not disclose a cause of action against the 1st defendant; the plaint is bad for misjoinder of parties and causes of action.

10c. Submissions of counsel for the 1st defendant.

Counsel for the 1st defendant submitted that Section 124 of *The Financial Institutions Act*, grants the 1st defendant qualified immunity yet the plaintiffs have not pleaded *malafides*. It is a fatal defect which cannot be cured by amendment. Page 73 of the list of authorities is on misjoinder. No similar questions of law or fact arise.

d. Submissions of counsel for the 2nd defendant.

Counsel for the 2nd defendant submitted that paragraph 5 of the plaint demonstrates that the claim it is not in public interest but for private gain. One needs to plead violations yet none have been pleaded. Para 5 and 8 of the plaint seek orders for the benefit of the plaintiffs. The claim is based on breach of contract. They are using a provision in public law for the enforcement of private rights. It is a disguised representative action with no representative order. Para 4 of the plaint demonstrates that. Misjoinder of parties and cause of action; for constitutional violation which arises under public law cannot be joined in action in private law. The *Kabaka of Buganda* case.

e. Submissions of counsel for the plaintiffs.

Counsel for the plaintiffs submitted that there are cross-cutting issues. There is public interest involved. The facts are so intertwined. This is public interest litigation.

f. The issues arising;

A preliminary objection is a legal objection to the opponent's pleading. It complains of a defect inherent in the pleading, or which arises by clear implication out of the pleadings, and which, if argued as a preliminary point, may dispose of the suit. It asserts that the pleading lacks the averments necessary to sustain a cause of action or a defence, as the case may be, or for some other reason is vague and / or embarrassing. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It is thus based on a commonly accepted set of facts as pleaded by both parties. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

Some of the more common objections are; - that the court has no jurisdiction over the person of the defendant; that the court has no jurisdiction over the subject matter of the suit; that the plaintiff has not legal capacity to sue; that there is another suit pending between the same parties for the same cause; that the plaintiff does not state facts sufficient to constitute a cause of action; *res judicata*; that the suit is barred by limitation; that the defence is insufficient in law, a sham or frivolous.; that a pleading is prolix, vexatious or embarrassing; that there is a misjoinder of parties or cause of action. According to Order 6 rule 28 of *The Civil Procedure Rules*, a point of law that is pleaded which when so raised is capable of disposing of the suit, may then by consent of the parties, or by order of the court on the application of either party, be set down for hearing and disposed of at any time before the hearing.

According to Order 15 rule 3 of *The Civil Procedure Rules*, the court may frame issues from all or any of the following materials; - (a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the advocates of the parties; (b) allegations made in the pleadings or in answers to interrogatories delivered in the suit; and (c) the contents of documents produced by either party. It is in that regard that the following are deemed to be the issues arising as preliminary points of law in this suit;

1. Whether the suit is properly filed under article 50 of *The Constitution of the Republic of Uganda, 1995*;

2. Whether the proceedings are a disguised representative suit and thus incompetent for lack of a representative order;
3. Whether the plaintiffs have *locus standi* for seeking the reliefs sought;
4. Whether the plaint discloses a cause of action against the 1st defendant;
5. Whether the plaint is bad for misjoinder of parties and causes of action.

g. The decision;

The Commercial Court was established in 1996 by *The Constitutional Commercial Court (practice) Directions 1996* as a division of the High Court of Uganda. According to regulation 4 of that instrument, the business of the Commercial Court comprises “all actions arising out of or connected with any relationship of a Commercial or business nature, whether contractual or not,” including, but not be limited to; (i) the supply or exchange of goods and services; (ii) banking, negotiable instruments, international credit and similar financial services; (iii) insurance, reinsurance; (iv) the operation of stock and foreign exchange markets; (v) the carriage of goods (by water, land and air); and (vi) foreign judgments and commercial arbitration questions. The Division therefore deals with disputes within the realm of Commercial law or related to business dealings.

The key phrase in regulation 4 of *The Constitutional Commercial Court (practice) Directions 1996* is “any relationship of a Commercial or business nature.” Commercial law is the body of law that applies to the rights, relations, and conduct of persons and business engaged in commerce, merchandising, trade, and sales, while business is the activity of making one's living or making money by producing or buying and selling products (such as goods and services). This Division therefore has jurisdiction over disputes arising in “relationships” involving commerce, merchandising, trade, or buying and selling products (such as goods and services). A relationship being a connection, association, or involvement, the implication is that the scope of disputes that fall under the docket of this Division are of a transactional nature; contractual relations or relations of a commercial character, i.e. interaction between two or more parties relating to business or commerce, characterised by mutual influence and exchange or a mutuality of obligations.

Despite variations of detail, all commercial transactions have one thing in common: they serve to transmit economic values such as materials, products, and services from those who want to exchange them for another value, usually money, to those who need them and are willing to pay a counter value. It is the purpose of the relevant legal rules to regulate this exchange of values, to spell out the rights and obligations of each party, and to offer remedies if one of the parties breaches its obligations or cannot perform them for some reason. Disputes of a commercial character may give rise to issues in public or private law, but within a transactional setting. Everything which relates to the legal requirements, modifications, exemptions, interpretation and extinction of rights and to the capacity of the interacting parties in a transactional setting will thus fall under the docket of this Division.

Before exercising jurisdiction, this division must be satisfied that the subject matter of the suit falls within the provisions of regulation 4 of *The Constitutional Commercial Court (practice) Directions 1996*. The subject matter of a suit is the right or rights actually put in issue by the pleadings of the parties. The applicant in the instant application seeks to impeach actions of the respondents taken in the course of a procurement process, as contravening provisions of the Constitution. The action is brought in public interest under article 50 of *The Constitution of the Republic of Uganda, 1995*. The applicant does not plead being in a transactional relationship with any of the respondents. His intention as a public spirited individual is, *inter alia*, to ensure that the implementation of [the procurements] is done in accordance with the Constitution and the national content provisions of the relevant petroleum sector laws,” and for the taking of “a proper legal audit of the procurement processes...”

In this suit, the plaintiffs seek to enforce rights arising out of existing relations or interactions of persons engaged in commerce, business merchandising, trade, and sales, of goods and services alongside enforcement of statutory duties of the 1st defendant. The thrust of the suit seeks to ensure that the 1st defendant as regulator is held accountable in the execution of its mandate and the other defendant, for its conduct as a commercial bank. The arguments of counsel for the defendants all relate to alleged defects inherent in the plaint, or which arise by clear implication out of the plaint. They are all based on a commonly accepted set of facts as pleaded by both parties, and do not require any additional facts to be ascertained. What is sought is not the exercise of judicial

discretion and it is the court's considered view that these are matters which if argued as preliminary points, may dispose of the suit. The first and third issues will be considered concurrently.

First issue; whether the suit is properly filed under article 50 of *The Constitution of the Republic of Uganda, 1995*.

Third issue; whether the plaintiffs have *locus standi* for seeking the reliefs sought.

Courts have now acknowledged that where there has been violation of constitutional or legal rights of persons who, by reason of their socially or economically disadvantaged position, are unable to approach the court for judicial redress, a member of the public could move the court for enforcement of such rights of such persons. Members of the public are enabled, in appropriate cases to come forward to protect the rights of a person or persons belonging to a determinate class who, by reason of poverty, helplessness or disability or socially or economically disadvantaged position, are unable to approach the court for relief. This principle has been extended to cases where no specific regal injury is caused to a person or to a determinate class or group of persons by the act or omission of State or public authority and injury is caused only to public interest. Where there is a public wrong of public injury by an act or omission by the State or a public authority which is contrary to the Constitution or to any law, any member of the public having sufficient interest can maintain an action to or redress such public wrong or public, injury.

Courts now recognise that they exist not merely to vindicate individual rights but also to vindicate public rights and therefore permit members of the public to agitate such rights. Any member of the public having sufficient interest can maintain a suit for judicial redress of public injury arising from breach of public duty or violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. Of course, it must be ensured that the person who comes forward is acting bona fide and not for personal gain or private profit or out of political motivation or other oblique consideration (see *S.P. Gupta v. President of India and others*, AIR 1982 SC 149; *People's Union For Democratic Rights and others v. Union Of India and others* (1982) 3 SCC 235; and *State Of Tamil Nadu v. Union Of India*, AIR 1983 1 SC 130).

The primary objective of article 50 of *The Constitution of Uganda, 1995* is to protect the individual against arbitrary interference by public authorities. The rights envisaged by that article are antecedent rights “*in rem*” which, irrespective of any wrong having been committed, are available for the benefit of the person of inherence against a person of incidence so unlimited so as to
5 comprise the whole world. Examples are the right to personal freedom, reputation, possession and ownership. Article 50 is for the enforcement of rights and freedoms as defined under its title. It is designed for suits challenging commissions or omissions as being inconsistent with or in contravention of the rights specified therein.

10 Article 50 of *The Constitution of Uganda, 1995* is thus construed as a public law tool that invokes a public-spirited citizenship, and the notion of the civic virtue of pursuit of the common good. Suits under article 50 of *The Constitution of Uganda* thus may be filed for the protection of individuals’ private rights as a factor in the pursuit of the public good, i.e. suits for the enforcement of private rights driven by public-minded sentiments that have public aims of promoting freedom,
15 equality and community. It is arguable that this public law tool was never intended to be used to resolve private disputes. The provision does not encompass relationships between individuals that are not of public importance. Relationships between individuals will be the subject of this remedy only if they directly concern the society. From this perspective, suits for the violation of human rights violations are best seen as *sui generis*.

20 On the other hand, the provision may be perceived as permitting private law enforcement for human rights violations. It creates a privately enforceable cause of action for human rights violations where “a fundamental or other right or freedom guaranteed under [the] Constitution” is the basis of the claim. From this perspective suits for the violation of human rights violations are
25 best seen as torts.

The acts of public authorities which are alleged to breach human rights will usually be acts in the public sphere, which are therefore also subject to judicial review. It is thus wrong to try to resolve important constitutional issues concerning the relationship between the individual and the state
30 within what is essentially a private law doctrine of damages. There is a danger when that is done of failure both precisely to articulate and carefully to evaluate the considerations of principle and

policy with regard to liability in the public law arena as the court focuses on the private interest, which may result in the scope of such liability being drawn either too widely or too narrowly. The consequence of focusing more on the claimant's rights rather than on the reasonableness of the defendant's conduct is likely to be an increase in the extent of liability of the public body.

5 Furthermore, the dominance of the private law paradigm may lead to the adoption of rules which are entirely appropriate in private law but which may not be appropriate in the public law context, in particular those concerning the measure of damages.

From a different perspective, the high degree of overlap in material scope between judicial review
10 and article 50 of *The Constitution of the Republic of Uganda, 1995* in terms of both defendants and challenged acts, implies that the impact of the suit for violation of human rights must be considered in any examination of the extent of public bodies' liability for loss caused by administrative acts. It would make sense for human rights breaches to be remedied not only by provision of damages under the article, which it is important to underline is perceived as a residual
15 remedy, but also through orthodox tort law by means of the progressive interpretation of the tort of negligence. This would save time and other resources that would otherwise be involved in filing a suit under article 50 of *The Constitution*, and supplement it with a separate suit for a private law claim.

20 Any person other than an officious intervener or a wayfarer without any interest or concern beyond what belongs to any citizen of the country or a person with an oblique motive, having sufficient interest in the matter in dispute is qualified to be a person aggrieved and can maintain a suit for judicial redress of public injury arising from breach of public duty or for violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance
25 of such constitutional or legal provision. What is "sufficient interest" will essentially depend on the co-relation between the matter brought before the Court and the person who is bringing it. It is not possible to lay down any strait-jacket formula for determining sufficient interest which may be applicable in all cases. Of necessity the question has to be decided in the facts of each case. This point was eloquently summed up by the Indian Supreme Court in the case of *S.S.P. Gupta v. President of India and others*, AIR 1982 SC 149 as follows:
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5 What is sufficient interest to give standing to a member of the public would have to be determined by the Court in each individual case. It is not possible for the court to lay down any hard and fast rule or any strait-jacket formula for the purpose of defining or delimiting “sufficient interest.” It has necessarily to be left to the discretion of the Court. The reason is that in a modern complex society which is seeking to bring about transformation of its social and economic structure and trying to reach social justice to the vulnerable section of the people by creating new social, collective “diffuse” rights and interests imposing new public duties on the State and other public authorities infinite number of situations are bound to arise which cannot be imprisoned in a rigid mould or a procrustean formula. The Judge who has the correct social perspective and who is on the same wavelength as the Constitution will be able to decide, without any difficulty and in consonance with the constitutional objectives, whether a member of the public moving the Court in a particular case has sufficient interest to initiate the action.

15 The Court will have to decide in each case, particularly when objection is taken, not only the extent of sufficiency of interest but also the fitness of the person for invoking the jurisdiction under article 50 of *The Constitution of the Republic of Uganda, 1995*. Ordinarily, it is the affected party who comes to the Court for a remedy. The Court in considering the question of standing in a particular case, if the affected party is not before it, will enquire as to why the affected party is not coming before it and if it finds no satisfactory reason for non-appearance of the affected party, it may refuse to entertain the suit. Public interest litigation is not adversary litigation, but rather a challenge and incentive for the government and its officers to make basic human rights meaningful to the poor and vulnerable (see *Akhil Bharatiya Soshit Karamchhari Sangh (Railway) v. Union of India and others, 1981 AIR 298; 1981 SCR (2) 185; AIR 1981 SC 298*). However, if a fundamental right is involved, the impugned matter need not affect a purely personal right of the plaintiff touching him or her alone. It is enough if he or she shares that right in common with others.

30 Fundamental rights are in essence universal standards of what is regarded as fair in the relationship between the State and the citizen. In that context the purpose of Chapter III of *The Constitution of the Republic of Uganda, 1995* is to protect individuals from dictatorial and oppressive governments. In contrast, torts are legal wrongs which one person or entity commits against another and for which the usual remedy is an award of damages. They protect people from wrongful conduct by others and give claimants a right to sue for compensation or possibly an

injunction to restrain the conduct. Although many torts protect fundamental rights and liberties, such as personal liberty, property rights, and provide protection from interferences by other people or entities and by the state, and despite the fact that nowadays a new culture of human rights as general principles of justice has developed in which the citizen can legitimately expect that his or her human rights will be respected by his or her neighbours as well as by the government, our jurisprudence still is that a private person cannot be sued for a breach of another's fundamental rights. Suits for enforcement of rights are distinct from ones seeking relief for tortious acts and omissions as well as ones for breach of contract.

10 The law of contract, from its principles of formation to those governing fairness and remedies, is complete within its own framework. It can on its own answer the main contractual issues that are essential to establishing, interpreting, and enforcing contractual relations. Freedom of contract entails the fact that private parties are free to decide on their contractual arrangements; in principle they are free to enter into a contract of their choice and on the terms they wish. Consequently parties may agree on a contractual waiver of an interest protected by a fundamental right. The law of contract provides rules for the way in which parties use their freedom, both relating to the formal aspects of the agreement and to the substance of the contract. In contract law cases the courts then weigh interests rather than rights. Article 50 of *The Constitution of the Republic of Uganda, 1995* therefore was never intended for claims seeking the enforcement of contractual rights.

20 Article 50 of *The Constitution of the Republic of Uganda, 1995* envisages a person or organisation representing a weaker section of the society, coming to court to complain about a breach of any fundamental right of any citizen or any public wrong done to the members of the public generally in breach of any fundamental right. If socially or economically vulnerable people are unable to protect themselves, a public-spirited individual may use this provision on their behalf. A suit for the enforcement of rights thus should relate to rights that have explicitly been worded in the Constitution or an international treaty or that can be derived from these rights. A person can approach the High Court under this article only for the vindication of fundamental rights. The plaintiff should therefore articulate facts disclosing the following features of the fundamental right(s) sought to be enforced: (a) an expression of a legal principle concerning human dignity and

personal freedom; (b) in a rule that has been quite broadly formulated; (c) which has been recognised as “constitutional” by Parliament and / or the courts.

Public interest litigation does not mean that which is interesting as gratifying curiosity or a love of information or amusement (see *Stroud’s Judicial Dictionary*, Vol. 4 (4th Edn.) but rather relates to causes in which the public, a class of the community or the community at large, as opposed to particular localities, has some pecuniary interest or some interest by which their legal rights or liabilities are affected (see *Black’s Law Dictionary*, 8th Edn). For that reason, the plaintiff need not be personally aggrieved in order to file a suit; one needs only to be socially and spiritually motivated and to have sufficient, bonafide interest in the proceeding, acting not for personal gain or private profit or political motivation but seeking redress for a public wrong or public injury.

The subject matter must be one that; (i) affects a significant number of people not just the individual; or raises matters of broad public concern; or impacts on disadvantaged or marginalised groups, and; (ii) it must be a legal matter which requires addressing *pro bono publico* [for the common good] (see *Aboneka Michael and another v. Attorney General, H.C. Misc. Cause No. 386 of 2018*). The suit is brought for and in the interest of the public, initiated only for redress of a public injury, enforcement of a public duty or vindicating interest of public nature (see *Muwanga Kivumbi v. Attorney General, S. C. Constitutional Appeal No. 06 of 2011*).

The issue at hand must be a serious, justiciable issue, where “serious” refers to a “substantial constitutional issue” or an “important issue.” The plaintiff must have a real stake in the proceedings at hand or be ordinarily engaged in the issues raised by the proceedings and the court should consider any other interrelated matters which may be useful to take into account such as; the plaintiff’s capacity to bring the matter before a court, whether the issues in the case transcend the rights of those most directly impacted by the decision at hand, whether the issues in the case at hand have the potential to provide access to justice to those who may otherwise be disadvantaged yet could be impacted by the decision, whether there are better or more efficient alternatives to granting standing to the party to bring the matter before a court, how the outcome of the case might impact those who are equally or more directly affected by the issues at hand, and whether there is potential for a conflict between private and public interests (see *Canada (Attorney General) v.*

Downtown Eastside Sex Workers United Against Violence Society, [2012] 2 SCR 524 and Attorney General of British Columbia v. Council of Canadians with Disabilities, 2020 BCCA 241).

5 In addition, the plaintiff should demonstrate that the public spirited litigant has a “genuine interest” in the subject matter if the litigation. The party does not have to establish that it has a direct personal, proprietary or pecuniary interest in the litigation, but should demonstrate that it is acting in good faith for the genuine purpose of having a point of law of general public interest resolved. This is usually established by disclosure in the pleadings of the a real stake the party has in the proceedings at hand or that it is ordinarily engaged in activates relating to the issues raised by the
10 proceedings.

Public interest litigation is instituted to address or curb social menaces and institutionalised injustice that affects people on a large scale, for the benefit of the public who may be aware of the rights but lack financial ability to enforce those rights as well as for those who may not be aware
15 at all about their infringed rights. The mere fact that a decision of court in a case brought by an individual will benefit the public does not place the suit in the category of public interest litigation. Where a legal wrong or legal injury is caused to a person or to a determinate class of persons by reason of a violation of any legal or constitutional right or in case of breach of any fundamental rights of such person or persons, any member of the public can maintain a suit in the High Court
20 under Article 50 of *The Constitution of the Republic of Uganda, 1995*, seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons.

Since the primary goal of public interest litigation is to ensure that the provisions of the Constitution or the law are followed to the fullest extent possible, to ensure that unconstitutional
25 laws, acts and omissions do not go unchallenged, in order to advance the cause of the community, disadvantaged groups and individuals who experience high levels of marginalisation and oppression, or the public interest, the strict rule of *locus standi* applicable to private litigation is relaxed. Although the strict rule of *locus standi* applicable to private litigation is relaxed in public interest litigation, not only is it that no facts alleging breach of a fundamental right have been
30 articulated in the plaintiff in the instant case, but also the plaintiffs are not espousing a cause of the downtrodden and the poor who have no access to justice. The 1st plaintiff instead seeks to pursue

the cause of persons who are opulent and sophisticated enough to operate bank accounts, and thus able to seek redress on their own. It therefore cannot, in a representative capacity as a public spirited organisation, be a person aggrieved, when its own interests are not in issue.

5 I therefore find in answer to the two issues that the plaint not only fails to articulate the fundamental right(s) alleged to have been infringed, but it also has failed to disclose that the 1st plaintiff has sufficient interest in the subject matter. On the other hand, the rest of the plaintiffs seek remedies for alleged violation of contractual obligations rather than fundamental rights. Accordingly the suit is not properly filed under article 50 of *The Constitution of the Republic of Uganda, 1995*.

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Second issue; whether the proceedings are a disguised representative suit and thus incompetent for lack of a representative order.

The answer to this issue calls for a distinction between public interest litigation on the one hand
15 and representative suits on the other. The distinction between representative suits and public interest litigation is that the former is in relation to numerous parties who must have the same interest while the latter relates to a large number of persons who due to various constraints such as illiteracy, extreme poverty, marginalisation and / or ostracisation by society, cannot sue or defend their rights (see *The Environmental Action Network v. Attorney General, H. C. Misc. Application No.39 of 2001* and *British American Tobacco v. The Environmental Action Network H. C. Misc. Application No 70 of 2002*). It is intended for those sections of society which are not in a position
20 to come to court because of their disadvantaged position. By this class of litigation, the portals of the Court are thrown open primarily to the poor and downtrodden, the ignorant and the illiterate.

25 Public interest litigation relaxes the principle of *locus standi* and allows a person whose rights are not infringed to stand before the courts to present the matter of public interest. The long-standing rule of *locus standi* takes the back seat, the court can relax the rule and start to look into complaints by people on behalf of poor, illiterate and marginalised people who cannot stand on their own foot for the right cause. In contrast, a “representative suit” is a suit filed against one or more persons
30 on behalf of themselves and others having the same interest in the suit. In that case the procedural requirements of *locus standi* are not relaxed. Where the plaintiff sues in a representative character,

the plaintiff must show that he or she has an actual existing interest in the subject matter (see Order 7 rule 4 of *The Civil Procedure Rules*). The impugned matter must affect a purely personal right of the plaintiff touching him or her especially. One person then presents the claim of others similarly interested in a suit, along with his or her own claim. It is a suit by a person whose legal right has been violated presenting the matter of similarly affected individuals.

Where a large number of people have suffered a similar injury and are seeking a remedy, in order to avoid numerous suits being filed or in order to obtain a decision on a common question, a representative suit is filed against one or more persons on behalf of themselves and others having the same interest in the suit. The object is to facilitate the decision of questions that a large number of people are interested in without recourse to the ordinary requirement of joining as parties all persons who are interested in a suit, so that the matter involved therein will be finally decided upon and fresh litigation over the same matters may be avoided. In a representative suit, the following conditions must be satisfied; (i) the parties must be numerous; (ii) they must have the same interest; (iii) Court must have granted permission or direction; and (iv) notice must have been issued to the parties whom it is proposed to represent (see Order 1 rule 8 of *The Civil Procedure Rules*). The plaintiff in a representative suit must obtain the consent of the persons he or she seeks to represent, hence the requirement of publication of the notice.

In the instant case, the 1st plaintiff has no direct and substantial interest in the subject matter and the outcome of the suit, which suit has been found not befitting as public interest suit, yet the 1st plaintiff seeks to enforce the rights of a “class of persons who are depositors in financial institutions and commercial banks in Uganda affected by Bank of Uganda.” On the other hand, the 2nd to 4th plaintiffs seek a declaration that the directive by the 1st defendant for the transfer of their bank accounts from Crane Bank Limited to DFCU Bank without their consent, which is alleged to have involved disclosure to the latter without their consent, of confidential private and business information, violated their rights and the right of a multitude of other Crane Bank Limited customers. While the 2nd to 4th plaintiffs have existing direct interest in the subject matter of the suit, they did not comply with the requirements of Order 1 rule 8 of *The Civil Procedure Rules*. Indeed this is a disguised representative suit and thus incompetent for lack of a representative order.

Fourth issue; whether the plaint discloses a cause of action against the 1st defendant.

A cause of action was defined as a bundle of facts which if taken together with the law applicable to them give the plaintiff a right to a relief against the defendant (see *Attorney General v. Major General Tinyefuza, Constitutional Petition No.1 of 1997*). It is alternatively defined as every fact which is material to be proved to enable the plaintiff succeed or every fact which if denied, the plaintiff must prove in order to obtain judgment (see *Cooke v. Gull, LR 8E.P 116* and *Read v. Brown 22 QBD 31*). The pleadings must disclose that; the plaintiff enjoyed a right known to the law, the right has been violated, and the defendant is liable (see *Auto Garage and others v. Motokov (No.3) [1971] E.A 514*). Whether or not a plaint discloses a caution of action must be determined upon perusal of the plaint alone together with anything attached so as to form part of it (see *Kebirungi v. Road Trainers Ltd and two others [2008] HCB 72*). Order 7 rule 11 (a) of *The Civil Procedure Rules*, requires rejection of a plaint where it does not disclose a cause of action.

Whereas section 124 of *The Financial Institutions Act, 2004* provides that no suit or other legal proceedings lies against the Central Bank or any officer, employee or agent of the Central Bank for anything which is done or is intended to be done in good faith under the Act, in *Peter Ssajjabi and another v. Attorney General and another, Constitutional Petition No. 51 of 2013*, it was held that the said provision gives unjustified and arbitrary protection to the 1st defendant, which is contrary to article 21 (1) of *The Constitution of the Republic of Uganda, 1995* which provides that all persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law. That provision was thus declared to be in contravention of articles 2, 20 (2), 22, 28 (1), (3) (a), 42, 44 (c) and 126 *The Constitution*.

Although the decision was handed down on 26th August, 2021 while this suit was filed on 6th June, 2017 the general principle is that judicial decisions do not have retrospective effect on decided cases (see *Cadder v. HM Advocate General for Scotland [2010] 1 WLR 2601*), or any judicial construction of a criminal statute that is unexpected and indefensible by reference to the law that has been expressed prior to the conduct in issue (see *Bouie v. City of Columbia, 378 U.S. 347 (1964)*). Thus decided cases cannot be revisited in light of subsequent authorities.

However the position is different where proceedings are ongoing; judicial decisions ordinarily are retroactive in application to such proceedings, i.e. those decisions necessarily must apply to prior events. A judicial decision constitutes a new legal precedent, it will ordinarily be applied to all undecided cases that are subsequently litigated, and regardless of whether the relevant events
5 occurred before or after the new precedent was announced. Judges trying cases apply the law as it stands at the time of trial (see *Willow Wren Canal Carrying Co Ltd v. British Transport Commission* [1956] 1 W.L.R. 213; [1956] 1 All E.R. 567). Under the rule of *stare decisis*, a prior case directly in point has the same force and effect upon the court which decided it and on all inferior tribunals as a statute, unless and until overruled by a higher court. At trial a first instance
10 judge is bound by the doctrine of precedent to apply the law as laid down in a decision of a superior court, even if there is a possibility that that decision may be reversed on appeal. The objection based on the ground of immunity therefore fails.

The claim against the 1st defendant is stated to be the tort of breach of its statutory duty. For a
15 claim of this nature, the plaintiff must show that (i) there is a statutory duty owed by the defendant to the plaintiff; (ii) there was a breach of that duty by the defendant; (iii) there was damage caused to the plaintiff; and (iv) that damage must have been caused by the breach of the statutory duty. In paragraph 13 of the plaint, it is averred that the 1st defendant acted “fraudulently and negligently” yet liability for this tort arises when the act or omission complained of is so unreasonable that it
20 falls outside the ambit of the discretion conferred upon the statutory body. Failure to meet the prescribed statutory standard is then treated as unreasonable conduct amounting to negligence. The defendant may argue that in spite of his contravention of the statute, nonetheless he acted reasonably in the circumstances and therefore should not be held liable in negligence.

25 The careless performance of a statutory duty does not give rise to a cause of action unless there exists a right of action for breach of statutory duty simpliciter or a common law duty of care in negligence. Liability arises where the statutory obligation or prohibition was imposed for the benefit or protection of a particular class of individuals, and secondly, where the statute creates a public right and an individual member of the public suffers “particular damage” (see *Phillips v. Britannia Hygienic Laundry* [1923] 2 KB 832 and *Lonrho Ltd v. Shell Petroleum Co Ltd* [1980] 1
30 WLR 627). The plaintiffs have not pleaded the basic facts required to establish this cause of action.

Fifth issue; whether the plaint is bad for misjoinder of parties and causes of action.

According to Order 2 rule 4 (1) of *The Civil Procedure Rules*, except as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite those causes of action in the same suit. The right to relief must have arisen in respect of the same act or transaction or series of acts or transactions and a common question of law or fact so as to avoid multiplicity of proceedings (see *Barclays Bank DCO v. C. D Patel and others [1959] 1 EA 214*). The case should be of such a character that if separate suits were brought, common questions of law or fact would arise. Therefore causes of action which arose independently and do not show any common question of law cannot be joined together (see *Yowana Kahere v. Lunyo Estates Ltd [1959] 1 EA 319*).

A joinder is permitted in cases where the issues or parties involved overlap to give rise to a common question of fact or law, and all rights to relief claimed are in respect of, or arise from, the same transaction or series of transactions. “Series” means a number of similar or related events or things, one following another (see Paul Procter (Editor), *Cambridge International Dictionary of English*, Cambridge University Press (April 28, 1995). The purpose of a joinder is to hear matters concurrently where it will increase efficiency and / or fairness. Joinders help courts avoid repetitive cases where the facts are the same. In any event, no decree may be reversed or substantially varied on appeal on account of any misjoinder of causes of action not affecting the merits of the case or the jurisdiction of the court (see section 70 of *The Civil Procedure Act*).

Where in a suit there are two or more plaintiffs and two or more causes of action, the plaintiffs should be jointly interested in all the causes of action. If the plaintiffs are not jointly interest in all the causes of action, the case is one of misjoinder of plaintiffs and cause of action. Where in a suit, there are two or more defendants and two or more cause of action, the suit will be bad for misjoinder of defendants and causes of action, if different causes of action are joined against different defendants separately. Misjoinder of causes of action occurs when perfectly distinct and unconnected claims are made against one defendant; or where a claim is made for several reliefs of distinct natures, against several defendants in the same plaint. In order to prevent confusion in

pleadings and decrees, where each party's case is distinct and depends upon its own peculiar circumstances, a court will anxiously discountenance this multifariousness. Multifariousness consists in uniting in the same plaint distinct and disconnected subjects, matters or causes.

5 One of the questions raised herein is whether in a case like the present, an aggrieved party has the choice of pursuing both a public law remedy and a private law remedy in the same suit. The purpose of the objection raised is to unscramble what the defendants consider to be a poorly drawn and confused plaint which fails to distinguish properly and state separately different causes of action, which confusion the plaintiffs have compounded by wrongly joining the defendants and
10 causes in one suit, and to thereby disable the defendants from pleading responsively.

While there can be little doubt about the courts' power to give a multiplicity of remedies or relief in appropriate cases, the means of access to those remedies or relief is guided by rules designed to promote procedural fairness. Therefore, the choice of the means of access may be critical, for if
15 one applies for the wrong remedy the suit will be dismissed on that procedural ground alone. No such difficulty would arise though where it is possible to seek alternative remedies in the same proceedings. However where the remedies sought may not be sought cumulatively or in the alternative, it is necessary to opt for one or other and the choice of the wrong remedy will thus involve starting all over again.

20 One must resort to public law in order to hold the 1st defendant accountable in the discharge of its supervisory authority over financial institutions in Uganda. Public law describes the system of institutions and rules that govern the relationship between the state and the people residing in its territory. It is that part of the laws of a state insofar as they regulate the relationship between the
25 state and its people. These rules will have different origins: many will be contained in the constitutional text itself, and others will be found in the common law (judge-made law), in statutes and delegated legislation, and sometimes the rules will be unwritten, existing in the form of practice and convention only.

30 Public law is premised on an understanding of law as a constraint on the arbitrary exercise of power hence there is a greater focus on civic virtue and the role of government to promote the

common good. It is predominantly concerned with delimiting the extent of the power of the state, hence public law institutions and doctrines were created and invoked for this task. While public law regulates the relationship between the state and individuals (a vertical relationship), private law regulates the interaction of individuals (a horizontal relationship). The boundary of one's private space is determined by the extent to which a person's actions interfere with the rights of or harm others. In disputes arising from the sphere of private law, the role of the State is merely to recognise and enforce the relevant law and to adjudicate the matters in dispute between them through its judicial organs.

Prior to the promulgation of *The Constitution of the Republic of Uganda, 1995* the main difference between public law and private law was whether the act or acts affect society as a whole or an issue between two or more people. The concept of liability in damages existed solely in private law. Procedural exclusivity sought to keep the two procedural routes separate and distinct. For example hitherto there was no right to compensation in public law for maladministration. The law recognised a qualitative difference between a claim by one private individual against another or a public body acting in the private sphere, and a claim by a private individual against a public body acting in the public sphere.

There were two procedural avenues used in order to obtain damages from public bodies for unlawful administrative acts; to seek judicial review and supplement that action with a private law claim; or to bring a claim for damages through an ordinary private law action. When the Court found an administrative act to be unlawful in the public law sense, it had five principal remedial options at its disposal: the three "prerogative remedies," declaration and injunction. These traditional remedies did not include a power to award damages. All the remedies in judicial review proceedings were discretionary and the prerogative remedies could not, and still cannot, be obtained in private law proceedings. That distinction currently is not always that sharp in light of section 8 of *The Judicature (Judicial Review) Rules, 2009* which provides that;

8. Claims for damages.

- (1) On an application for judicial review the court may, subject to sub-rule (2), award damages to the applicant, if—

- (a) he or she has included in the motion in support of his or her application a claim for damages arising from any matter to which the application relates; and
- (b) the court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his or her application, he or she could have been awarded damages.

5

Nevertheless, damages are not automatically awarded when an unlawful administrative act is established. An individual who wishes to recover damages in this branch of public law still must also establish the existence of a cause of action in private law. Claimants attempting to recover compensation from a public body in respect of loss caused by an administrative act, can as a basis of claiming damages alongside the public law remedies, use an analogous cause of action in private law such as; nuisance, false imprisonment, malicious prosecution, occupier's liability, misfeasance in public office, unlawful interference with property, breach of statutory duty and interference with contractual relations.

15

On the other hand, the blurring of the distinction between public law and private law in the area of enforcement of rights arises partly because "the public good is in nothing more essentially interested, than in the protection of every individual's private rights" (see William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, first published 1765–69, 1827 ed) 101). This distinction therefore can sometimes be blurred, where some acts may arguably violate both kinds of law at the same time. Certain acts that are primarily a function of private law may be considered sufficiently "public" in nature to be classified as violations of public law since many violations of rights involve the infliction of private harm. Such "private" violations of rights may therefore be enforceable by suits under Article 50 of *The Constitution of Uganda, 1995* which provides as follows;

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50. Enforcement of rights and freedoms by courts.

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- (1) 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.
- (2) Any person or organisation may bring an action against the violation of another person's or group's human rights.

Since the expression used in this article is “redress which may include compensation,” just like it is with judicial review, damages are a residual remedy and will not be automatically awarded under this provision when a violation of a right is established. Although it is possible to claim damages from a public authority for breaching one’s human rights, the principles upon which damages may be awarded are somewhat different from those which apply in ordinary tort law. Damages may only be awarded where the court is satisfied that such an award is necessary to afford just satisfaction to the person in whose favour it is made.

10 The remedy of damages generally plays a less prominent role in a suit based on breach of the bill of rights, than in suits based on breaches of private law obligations in the latter case of which, more often than not, the only remedy claimed is damages. Where an infringement of an individual’s human rights has occurred, the concern will usually be to bring the infringement to an end and any question of compensation will be of secondary, if any, importance. Additionally, in
15 considering whether to award non-pecuniary damages and, if so, how much, there is a balance to be drawn between the interests of victims and those of the public as a whole (see *Anufrijeva v. London Borough of Southwark* [2004] 2 WLR 603 at [52]–[53]).

The general principle regarding joinder of causes of action is reflected by Order 2 rule 4 (1) of *The Civil Procedure Rules*, where a plaintiff may unite in the same suit several causes of action against
20 the same defendant or the same defendants jointly. However according to rule 8 (2) thereof, if upon hearing the parties it appears to the court that the causes of action are such as cannot all be conveniently disposed of together, the court may order any of such causes of action to be excluded, and consequential amendments to be made, and may make such order as to costs as may be just.

25 The objection raises issues regarding the availability and limits of private law remedies to human rights violations in respect of suits filed under article 50 of *The Constitution of Uganda, 1995*. When the two or more causes of action are joined in one suit, there will be a tension between rights-based norms which are actionable *per se*, largely irrespective of fault and where interferences
30 are presumed unlawful without the need to prove loss on the one hand, and the tort of breach of

statutory duty, where the focus is on the reasonableness of the defendant's conduct and whether the claimant has in fact suffered loss or damage, on the other hand.

5 Nevertheless, in the sphere of enforcement of rights, both public and private law remedies have advantages and disadvantages and should operate in conjunction as complements to each other. In fact, the two systems of control can and should be mutually reinforcing and complementary. Human rights enforcement would be improved by a careful consideration of remedies offered by each of the two branches of the law within the context of the same set of facts. There are instances where a matter brought to court in private interest affects matters that are in the public interest (see 10 for example *Muwanga Kivumbi v. Attorney General, S. C. Constitutional Appeal No. 06 of 2011*).

I have found no reason, on the facts of this case, to decide that another cause of action founded in public law cannot be joined in a suit filed under article 50 of *The Constitution of Uganda, 1995* where the issues or parties involved overlap to give rise to a common question of fact or law, and 15 all rights to relief claimed are in respect of, or arise from, the same act, transaction or series of transactions. However, to join therein a claim for private rights arising from breach of contract would result in joining in the same suit parties who are without a common interest in the subject of the litigation and have no connection with each other. A suit cannot be maintained either at law or in equity against two or more persons, who have no common interest in the subject matter of 20 the litigation. Joining the 2nd defendant against whom an alleged breach of contract is made to a suit intended to enforce the public duties of the 1st defendant therefore constitutes a misjoinder of causes of action.

According to Order 6 rule 29 of *The Civil Procedure Rules*, if, in the opinion of the court, the 25 decision of the point of law substantially disposes of the whole suit, the court may thereupon dismiss the suit or make such other order in the suit as may be just. Since all the objections raised have been sustained, the suit is accordingly struck out with costs to the defendants.

30 Delivered electronically this 16th day of May, 2022

.....Stephen Mubiru.....
Stephen Mubiru
Judge,
16th May, 2022.