

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO. 478 OF 2020

SAM KASIGWA **PLAINTIFF**

VERSUS

KCB BANK UGANDA LIMITED **DEFENDANT**

(Before: Hon. Justice Patricia Mutesi)

JUDGMENT

The plaintiff filed this suit seeking recovery of monies which he alleges to have been illegally debited from his account with the defendant bank, plus special and general damages, interest and costs of the suit.

The Plaintiff's case

The plaintiff opened a bank account with the defendant vide A/c No. 2291303163 and he was issued a visa card which allowed him to carry out transactions such as deposits and withdrawals both in the banking halls and ATM machines of the defendant bank's branches. On 25th October 2019, the plaintiff deposited US\$9,000,000/= on his account at the defendant's Jinja Road branch Kampala Uganda and thereafter he travelled to Nairobi Kenya.

The plaintiff claims that while he was in Nairobi Kenya, during the month of November 2019 he tried and failed to carry out transactions in the banking halls of the defendant's sister bank's branches in Nairobi. Further that when he sought to carry out transactions using his visa card, he discovered that his bank account had been illegally debited by the defendant without his consent to the extent that it reflected that the account was over drawn. That by 13th November 2019 his account reflected a negative balance of – 3,057,045 (-3,057,045) yet the plaintiff was not indebted to the defendant in any way. That he consequently suffered financial embarrassment as he was unable to meet his financial obligations including paying for meals and accommodation. Further that he was unable to send

money to treat his sick daughter in Uganda, and he also filed to pay fees for his pre-pilot license renewal exams and consequently lost a job offer from Aerospace Consortium Limited a Kenyan company.

On 20th November 2019 the plaintiff's advocates M/s. Tumwesigye, Baingana & Co. Advocates wrote a letter to the defendant demanding that the bank reverses the illegal debits and credit the plaintiff's account accordingly, and pay him compensation. In their response of 27th November 2019, the defendant stated that the allegations of unlawful debits were unsubstantiated and sought clarity on the specific unauthorised debits, whereupon the plaintiff obtained a bank statement which spelt out the details of the unauthorised debits of 11th, 12th and 13th November 2022. On 20th December 2019, the defendant reversed the unauthorised debits of 11th and 12th November 2019, for the sums of UShs. 1,508,800/= and UShs. 376,100/= respectively, leaving the sum of UShs. 3,057,045/= unreversed. The plaintiff is seeking for the recovery of the unrefunded monies which he claims were illegally debited from his account in the defendant bank, special and general damages, plus interest and costs of the suit.

The Defendants case

The defendant's case as reflected in their Written Statement of Defence is that whereas the plaintiff opened an account in Uganda, he opted to carry out transactions with the defendant's sister Bank in Kenya without prior notification of the defendant in Uganda. That during the period of his stay in Nairobi the plaintiff had alternative electronic cash withdrawal channels such as ATM and internet banking which were accessible and operational and he transacted using these E-channels before, during and after the alleged period he was in Kenya and he had therefore opted without justification not to use the defendants available E-channels on selective days. The defendant maintains that at all material times it debited the plaintiffs account upon his request and authorization, and that all debits of his account were initiated by the plaintiff himself. Further that it is not true that the defendant failed to pay the plaintiff's demands on request, as the plaintiff had through use of his ATM card, depleted all his money, and his failure to meet his obligations cannot be vested on the defendants. That following the

plaintiff's complaint, the defendant adhered to its customer experience standards and the plaintiff's account was accordingly reconciled. The defendant contends that it is not liable to the plaintiff as claimed.

Issues for determination

The parties in their joint scheduling memorandum framed the following issues for determination;

1. Whether the plaintiff's bank account was validly / lawfully debited by the defendant?
2. Whether there was a breach of a bank – customer relationship by the defendant bank?
3. Whether the plaintiff needed to notify the defendant's branch in Uganda before withdrawing his money while in Kenya – Nairobi?
4. What are the remedies available to the parties?

Representation and hearing

At the hearing the plaintiff was represented by Mr. Tugume Kevin Moses and the defendant was represented by Mr. Denis Lubogo. The plaintiff made a witness statement while the defendant adduced a witness statement made by Mr. Jonathan Batambuza a manager of the KCB Ben Kiwanuka street branch. The two witnesses further confirmed their statements in court and they were duly cross examined on the same. Both parties filed written submissions which are on record.

I have carefully considered the pleadings and evidence adduced by the parties, plus their written submissions and authorities cited therein. I have adopted the issues framed by the parties and now proceed to consider and make my findings on them as below.

Determination of Issues

Issue 1: Whether the Plaintiff's bank account was lawfully debited by the defendant?

PW1 Sam Kasigwa averred in paragraph 4 of his witness statement the defendant without his consent illegally debited his bank account on 11th, 12th and 13th

November 2019. The plaintiff also adduced a bank statement (Exhibit **PE1**) which shows the following;

- i. There was a debit of UShs. 73,887/= made on the plaintiff's account on 8th November 2019, which was reversed on 20th December 2019.
- ii. There was a debit of UShs. 768,000/= on 11th November 2019, which was reversed on 20th December 2019.
- iii. There was a debit of UShs. 767,600/= on 12th November 2019, which was reversed on 20th December 2019.
- iv. There were 10 unauthorised debit transactions made on his account on 13th November 2019, totalling to sum of UShs. 3,057,045/=: which have never been reversed to date.

The bank statement attached to the witness statement of DW1 Jonathan Batambuze also reflected the above transactions on the said dates and their reversal on 20th December 2019.

For the defendant, DW1 Jonathan Batambuze testified that the debits made on the 13th November 2019 were made upon the plaintiff's request, and he relied on the bank statement (PE1) which reflects that the disputed transactions were made using the plaintiff's ATM card No. 471374000150395347137400015. He testified that the bank issues ATM cards to only one customer and therefore it was not possible that it could have been any other person who withdrew the money on 13th of November 2019 other than the plaintiff himself.

Counsel for the defendant, citing the decision of Hon. Justice Steven Mubiru in **Civil Suit No. 0754 of 2020; Aida Atiku Vs Centenary Rural Development Bank**, submitted that in all electronic transactions, the client bears the burden to protect their account to guard against any forms of fraud to be conducted on the client account. Counsel submitted that it is not the Bank's responsibility to ensure that the customers undertake measures to protect their ATM card from being accessed by anyone other than the customer. That accordingly the defendant bank bears no liability for the **Shs 3,057,045/=** claimed by the plaintiff since there is evidence to show that the withdrawals were initiated by the plaintiff using his **ATM Card No. 471374000150395347137400015**.

However the defendant's claim that all the disputed debit transactions were initiated by the plaintiff is not supported by the evidence on record and this defence was negated by various admissions and contradictions made by DW1 during cross examination.

It is not disputed that following the plaintiff's complaint, the debits made on his account on 11th and 12th November 2019 were reversed by the defendant on 20th December 2019. These debit transactions had also been falsely reflected as having been made by the plaintiff using his ATM card whereas not. In an attempt to explain the bank's reversal of the debits made on 11th and 12th November, DW1 suggested that the debits could have been caused by a systems failure. This proves that it is possible that a debit transaction could be erroneously or fraudulently reflected as having been made by a customer using their ATM card whereas not. It was therefore incumbent on the defendant to adduce more than the plaintiff's bank statement to prove that the plaintiff effected the debits on 13th November 2013 using his ATM card. The defendant failed to meet this burden.

First of all the defendant did not provide an investigation report to substantiate this claim. Whereas the bank had written a letter (Exhibit **PE4**) to the plaintiff's lawyers undertaking to investigate his claims, DW1 admitted in cross examination that he was not aware if the bank conducted an investigation to address the plaintiff's complaint of illegal debiting, or whether there was any investigation report on the matter.

Secondly whereas DW1 admitted in cross examination that the defendant has cameras at all its ATM installations, the defendant did not provide any camera evidence showing that the plaintiff made the said ATM withdrawals on 13th November 2019. DW1 admitted that he did not know whether the camera at the specific ATM in issue was ever reviewed. It is illogical that after the plaintiff had made a complaint of unauthorised debits, the defendant did not bother to review the camera footage to identify if indeed it was the plaintiff who transacted using his ATM card as they now claim.

Thirdly exhibit **PE1** shows that following the transactions made on 13th November 2019, the plaintiff's account was overdrawn to the tune of – 3,057,045/=. As rightly

submitted by Counsel for the plaintiff, such a negative balance could only arise if the plaintiff had a prior arrangement with the defendant bank to over draw his bank account, yet the defendant did not adduce any evidence of any overdraft facility. In cross examination DW1 admitted that a customer cannot withdraw money from an ATM when there were no funds on his account, unless they have an overdraft but that he was not aware if the plaintiff had an overdraft facility with the bank. He further admitted that the defendant bank has never carried out any effort to recover the -3,057,045/=. Indeed, the defendant did not bring a counter claim against the plaintiff for this sum. All this further disproves the defence claim that the plaintiff initiated any of the withdrawals of 13th November 2019.

In conclusion I find that the defendant failed to adduce any credible evidence to prove their claim that the disputed transactions of 13th November 2019 were initiated and authorized by the plaintiff using his ATM card. In contrast the plaintiff was vigilant in his conduct when he promptly reported the disputed debits upon his return from Nairobi. He stated in his witness statement that he has been using his ATM card diligently exercising all precautions expected of a customer and denied having authorized the said transactions. Whereas the defendant had no capacity of proving his claim beyond reporting the disputed transactions, the bank had the necessary resources to disprove his claim but failed to discharge their burden of proof. Most importantly the plaintiff's claims are validated by the fact that the bank reversed the transactions of 11th and 12th November 2019 which were similarly reported by the plaintiff.

I therefore find that the plaintiff has proved on balance of probabilities that the said debits of his account on 11th, 12th and 13th of November 2019 were made without his consent and authorization and were therefore illegal, for which reason the defendant bank is liable. Issue 1 is accordingly resolved in the negative.

Issue No. 2: Whether there was a breach of the banker – customer relationship by the defendant bank?

Counsel for the plaintiff submitted that the bank-customer relationship is a contractual one, and it creates a debtor-creditor relationship where the bank collects money from its customer or receives payments on behalf of its customer and credits the customer's account and undertakes to pay out of this bank account strictly on the instructions / authorisation of the customer. That it cannot debit the customer's account without any prior authorisation and thus acting to the contrary would amount to breach of this contractual relationship. It was submitted that the defendant acted in breach of the banker-customer relationship when it illegally debited the plaintiffs bank account on the 11th 12th and 13th November 2019 without his authorisation, and refused to reverse the illegal debits of 13th November 2019. It was further submitted that there was breach of this contractual relationship when the defendant failed to honour the plaintiff's demands for payment from his bank account while he was in Nairobi Kenya.

In reply counsel for the defendant reiterated that the bank had validly debited the plaintiff account upon his own initiation and authorisation. Further that it is not true that the bank failed to make or pay the customer's demands on request because **Ex PE1** shows that the plaintiff used his ATM card to make withdrawals and depleted all his money thus leaving his account overdrawn. That the bank doesn't have a duty pay to a customer on money that is not in his account. The defendant thus it denied that it had acted in breach of the banker-customer relationship as alleged.

It is settled law that the relationship of a banker and his / her customer is one of contract. (See **Esso Petroluem Co. V Uganda Commercial Bank; Supreme Court Civil Appeal No. 14 of 1992**) Furthermore it is an implied term of that contractual relationship that the banker has an obligation to pay the customer or some person nominated by the customer when the customer makes a demand or gives direction for payment. (See **Osawaye V National Bank of Nigeria Limited 1973 (3) ALR Comm** at page 122) In **Konark Investments (U) Ltd V Stanbic Bank Uganda Ltd HCCS No. 116 of 2010** court held that the defendant bank debiting the customer's account without instructions of the plaintiff and without any justification amounted to the abuse of a banker-customer relationship.

In the instant case the contractual relationship between the parties arose when the plaintiff opened a bank account No. 2291303163 at the defendant's Luwuum street branch Kampala. Under this contract the defendant could only debit the said account with the plaintiff's prior consent and authorisation and the defendant was also duty bound to pay the plaintiff whatever money the Defendant held on the plaintiff's account upon demand by the plaintiff.

I find that the defendant breached the banker-customer relationship when it illegally debited the plaintiff's account on 11th, 12th and 13th November, 2019 without his consent and authorisation. Furthermore these illegal debits led to the plaintiffs account being overdrawn and wrongly reflecting a negative balance. The plaintiff testified that when he sought to use his visa card to pay for his meals and accommodation, he found his bank account wrongly reflecting a negative balance and consequently he was unable to meet his financial obligations while in Nairobi. I further find that the defendant breached the banker-customer contractual relationship when it failed to pay the plaintiff on demand due to his account being overdrawn as a result of the said illegal debits. Issue 2 is resolved in the affirmative.

Issue No. 3: Whether the Plaintiff needed to notify the defendant's branch in Uganda before withdrawing his money while in Kenya – Nairobi?

This issue arises from the plaintiff pleading that while he was in Nairobi Kenya in November 2019 he was unable to carry out transactions in the banking halls of KCB bank branches in Nairobi. In response the defendant asserted that whereas the plaintiff opened an account in Uganda, he opted to carry out transactions with the defendant's sister Bank in Kenya without prior notification of the defendant in Uganda.

During his cross examination DW1 in a departure from the above stated defence, testified that the plaintiff did not require prior notification to the Ugandan branch before initiating a transaction in Kenya. He stated that a customer would only need to notify the Uganda branch if they would require assistance while outside Uganda, for instance where a customer intended to transact outside their ATM limit. However DW1 was not aware whether or not the plaintiff was operating within his limits or not.

Based on this admission I find that the plaintiff did not need to notify the defendant's branch in Uganda before withdrawing his money while in Nairobi. Issue 3 is accordingly resolved in the negative.

However it is worth noting that the plaintiff's failure to access money on his account while in Kenya was not as a result of his alleged failure to transact in banking halls of KCB branches in Nairobi. The defendant asserted that while the plaintiff was in Nairobi, he had access to E-channels for withdrawing funds including ATM services and internet banking, and that he utilised these channels during the period he was in Nairobi. The plaintiff testified that he travelled to Nairobi on or around the 25th October 2019 and returned to Kampala on or around 30th November 2019. The plaintiff's bank statement (Ex PE1) shows that between 25th October and 10th November the plaintiff used his visa card to make various POS payments and ATM withdrawals. These transactions are not disputed by the plaintiff as being unauthorised. This shows that initially the defendant was transacting via the bank's alternative E-channels even without access to KCB banking halls in Nairobi. It is only after the illegal debits were made on his account from 11th -13th November 2019 that the plaintiff became unable to access his money because the account had been overdrawn.

Issue No. 4: What are the remedies available to the parties?

Special damages

The plaintiff prayed for special damages of UGX 3,057,045/= being the sum which was illegally debited from his account. The plaintiff proved with documentary evidence that the defendant bank illegally debited his account on 13th November 2019 for the sum of UGX 3, 057,045/=-, and these debits have never been reversed. The plaintiff is therefore entitled to recover the illegally debited sum from the defendant. Accordingly the defendant is liable to reconcile the plaintiff's bank account by reversing the illegal debits of 13th November 2019 on the plaintiff's account, and crediting the plaintiff's account with the sum of UGX 3,057,045/=-.

The plaintiff also prayed for special damages of USD 120,000 being loss of income of USD 2,000 per month for a two year contract period. He claimed that due to the illegal debiting and overdrawing of his account he was unable to pay fees and sit

for his pre-pilot licence renewal exams in Nairobi on 21st November 2019. That consequently he lost a job offer from Kenyan company Aerospace Consortium which was to earn him USD 5,000 per month on a two year contract. He prayed that court orders the defendant to pay the alleged loss of income or future earning.

However the plaintiff did not adduce any documentary evidence to prove this claim. He did not adduce any supporting evidence of either his professional qualifications or experience, nor did he provide documentary evidence of the two-year contract offered to him by Aerospace Consortium. While he claimed that he was due to sit for pre-pilot license renewal assessment, he did not avail evidence to prove that he had applied to do the same exams or even to show the scheduled date of the said exams. During cross - examination he could not remember the cost of license renewal exam fees. In any case it was speculative for the plaintiff to assume that he would have passed such exams. Indeed during cross-examination he admitted that he filed a suit challenging the EA Civil Aviation Academy Soroti for allegedly failing him in exams. I therefore find that this claim for alleged loss of income was not proved by the plaintiff, and it accordingly fails.

General damages

The plaintiff asserted in par. 13 of his witness statement that the defendant's illegal debiting of his account without his consent amounted to a breach of the bank-customer relation which greatly embarrassed and inconvenienced him and caused him mental anguish, for which he prayed for general damages of UGX 50,000,000/=.

General damages are the such as the law will presume to be the direct natural or probable consequence of the act complained of. In determining these damages, the court using its discretion and basing on the available evidence, decides what could have been the total convenience and probable loss due the acts of the party at fault (See **Stroms V Huthcinson (1905) AC 515**). General damages include damages for pain and suffering and inconvenience (**Kiwanuka Godfrey T/A Tosumi Autospares and Glassmart V Arua District Local Government HCCS No. 186 of 2026**).

The plaintiff adduced evidence that while in Nairobi he was unable to withdraw or utilise his funds because his account had been overdrawn due to the defendant's illegal debits on the same. He asserted that he suffered financial embarrassment as he was unable to use his visa card to pay his bills, and he failed to send money to treat his sick daughter who required urgent medical treatment. Whereas the bank reversed the illegal debits in respect of the unauthorised transactions of 11th and 12th November, this was done a month later and after the plaintiff had already suffered damages, and to date the unauthorised debit of 13th November 2019 have never been reversed.

I am convinced that due to the defendant's illegal actions, the plaintiff was greatly inconvenienced and suffered mental anguish due to his inability to access and use his account funds while in a foreign country, for which he is entitled to an award of general damages. Taking into consideration that the defendant has refused to reverse the illegal debits for over three years and consequently the defendant has been denied use of his funds for this period without any justifiable reason, I award the plaintiff UGX 20,000,000/= as general damages.

Exemplary damages

The plaintiff asserted that the defendant's acts of arbitrarily debiting his account without his authorisation was illegal, arrogant, oppressive and also unconstitutional for infringing on his property rights, for which he prayed to be awarded exemplary damages of UGX 30,000,000/=.

Exemplary damages are punitive in nature and are awarded in addition to compensatory damages, in order to punish and deter the defendant from repeating the wrongful act. They are awarded in the following three categories of cases; (i) where there has been oppressive, arbitrary or unconstitutional actions by servants of government and (ii) where the defendant's conduct has been calculated by him to make profits which may well exceed the compensation payable to the plaintiff and (iii) that some law for the time being in force authorizes the award of exemplary damages. Furthermore the mere fact that the injury complained of has been aggravated by the malice, insolence or arrogance by which it is accompanied,

is not justification for an award of exemplary damages, as aggravated damages can suffice instead (**See Rookes V Bernard (1946) ALL ER 367**).

In this case the plaintiff did not establish that the defendant's actions fall into the above categories of conduct and I therefore decline to award exemplary damages.

In the result Judgment is entered for the plaintiff in the following terms;

- i. The defendant shall credit the plaintiff's account with the sum of UGX 3,057,045/= (Uganda Shillings three million, fifty seven thousand, forty five shillings) within 14 days from the date of this judgment.
- ii. The defendant shall pay interest on the sum in (i) above at the rate of 15% p.a. from the date of filing suit until payment in full.
- iii. The plaintiff is awarded general damages of UGX 20,000,000/= (Uganda Shillings twenty million).
- iv. Interest on the general damages shall be paid at the rate of 6% p.a. from the date of judgment until payment in full.
- v. The plaintiff is awarded costs of the suit.

Dated this 21st day of February 2023


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Hon. Justice Patricia Mutesi