

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL SUIT No. 0036 OF 2013

IWA KIZITO (Administrator of the Estate }
Of the late Felix Charles Maku) } PLAINTIFF

VERSUS

1. EQUITY BANK (U) LIMITED }
2. MINDRA JOSEPHINE } DEFENDANTS

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The plaintiff sued the defendants jointly and severally for breach of fiduciary duties, a declaration that the first defendant's act of ceasing the plaintiff's operation of a bank account as signatory was unlawful, an order re-instating him as a signatory to the account, a permanent injunction restraining the defendants from blocking the plaintiff's access to the account, general damages, interest and costs. It was the plaintiff's case that following the death of his brother, the late Lt. Felix Charles Maku, as a serving soldier of the Uganda Peoples Defence Forces during the peace-keeping mission in Somalia on 6th January 2009, he and the second defendant, the widow of the deceased, were granted letters of administration to the estate of the deceased on 17th December 2010. Among other relatives, the deceased was survived by a daughter, Alpha Holyfield, then aged eight years, his father Felix Mbayya and elder sister Florence Mesiku. In his unprivileged will, the deceased bequeathed 10% of his estate to his father, 20% to his elder sister, 10% to his widow (the second defendant) and 60% to his daughter, Alpha Holyfield.

Upon receiving the grant of letters of administration, the plaintiff and the second defendant assisted each of the beneficiaries to open up bank accounts to facilitate the distribution of death benefits receivable from the Uganda Peoples Defence Forces. Each of the beneficiaries opened up a bank account. Being a minor at the time, the administrators of her father's estate opened up a "Junior Account" number 1019100621415 in the name Alpha Holyfield, with the first defendant bank's branch at the Adjumani Branch on 12th September 2011, with the two

Administrators as joint signatories to the account. On 3rd October 2011 a sum of shs. 85,200,000/= constituting the 60% share in her father's death benefits, was wired to that account by the Uganda Peoples Defence Forces.

Soon thereafter differences emerged between the plaintiff and the second defendant as Administrators of the estate and joint signatories to the account. The second defendant sought the intervention of the then Grade One Magistrate at Adjumani by way of a letter of complaint and the magistrate endorsed on her letter of complaint a directive to the first defendant to allow her access the funds. Henceforth the plaintiff ceased to be a signatory to the account and the second defendant became sole signatory thereto. The plaintiff contends that the first defendant's decision ceasing his access to the account as signatory without his knowledge or consent was unlawful and he has since learnt that the second defendant as sole signatory, withdrew a sizeable amount of cash from the account for which she has never accounted. He contends further that the first defendant breached contractual obligations owed to him, hence the reliefs sought.

In its written statement of defence, the first defendant refutes the plaintiff's claim and avers that the account in dispute was opened up as a "junior account" in the names of the minor, Alpha Holyfield (a minor until 2019) and not as an estate account as claimed by the plaintiff. The plaintiff and the second defendant were signatories to the account as guardians of the minor but not as administrators of the estate of the deceased. On several occasions, the second defendant approached the first defendant expressing her desire to transact with the account but was denied access in absence of the plaintiff as co-signatory until following her complaint to the Grade One Magistrate on or around 24th April 2012, the first defendant received an order of court directing the bank to allow the second defendant operate the account as sole signatory and strike off the name of the plaintiff. The second defendant henceforth operated the account as sole signatory, opened up a fixed deposit account with the same bank, transferred part of the money onto that account and has since withdrawn interest accruing from that account. The first defendant refuted having entered into any contractual relationship with the plaintiff as administrator of the estate of the late Lt. Felix Charles Maku and therefore does not owe any contractual duties to him for which reason the suit against it should be dismissed with costs.

In her written statement of defence, the second defendant too refutes the plaintiff's claim and contends that whereas she is a joint administratrix with the plaintiff to the estate of her late husband, Lt. Felix Charles Maku, they have never opened up any bank account for the management of the estate. The account in issue was opened up as a "Junior Account" in the name of her daughter Alpha Holyfield, as one of the beneficiaries under the privileged will of her late father Lt. Felix Charles Maku. She and the plaintiff were merely co-signatories to the account and the funds on the account neither belong to them as signatories nor to the estate of the deceased but to the minor, Alpha Holyfield. Subsequent to the opening of the account, the plaintiff became un-cooperative, intending to out the funds instead to his personal use. Lack of co-operation from the plaintiff forced her to seek the intervention of court which obliged her with an order directing the first defendant to strike off the plaintiff's name as signatory to the account leaving her as sole signatory. She has since operated the account and transacted business thereon in the best interests of the minor, Alpha Holyfield. She prayed that the suit against her be dismissed with costs.

In his testimony, the plaintiff stated that upon being granted letters of administration to the estate of the deceased jointly with the second defendant, they opened up a bank account with the first defendant in the names of the minor, Alpha Holyfield. Later the Uganda Peoples Defence Forces wired a sum of shs. 85,200,000/= as the benefits due to the minor under her late father's privileged will, onto that account. Later on 3rd October 2013, he went to check on that account and was told the bank had received a letter from the magistrate in Adjumani stopping him from accessing the account. When he complained to the police, he was advised to file a suit instead. He is interested in receiving accountability from both defendants as to how the funds on that account have been managed since his access was blocked since he was never consulted by any of them before his name was struck off as signatory to the account. He wants his name restored as signatory to the account to enable him monitor the funds deposited on the account. While under cross-examination, he stated that the account was opened for the benefit of the child such as paying her school fees, Medicare and investment. At the time the account was opened the minor was in primary three and he has not seen her since the year 2004, does not know which school she goes to, who pays her school fees, in which class she is, all because the second defendant took her away and he obtains scanty information every now and the from his brother. He denied

having been approached by the second defendant at any time regarding the need to withdraw funds from the account to meet the minor's needs. He denied having any personal interest in the fund but insisted that he sued the two defendants out of his obligation as a signatory to the account.

P.W.2 Mr. Aluma Paulo testified that he is a brother of the deceased Lt. Felix Charles Maku and following his death, the benefits were distributed to the named beneficiaries under his privileged will and in accordance thereto. The plaintiff and the second defendant were the signatories to the account that was opened up for the benefit of the minor Alpha Holyfield. After the plaintiff's access to the account was blocked, they discovered that shs. 60,000,000/= had been withdrawn from the account and the bank failed to give them an explanation, hence the suit. That was the close of the plaintiff's case.

D.W.1 Mindra Josephine, the second defendant, testified that the account in issue was opened during 2011 in the names of her daughter, Alpha Holyfield who was and still is a minor. She and the plaintiff were the signatories to the account intending to manage the account jointly for the benefit of the minor. After the benefits due to the minor were wired onto the account, she suggested to the plaintiff that part of the funds be deposited on a fixed deposit account to generate interest to be used in payment of her school fees. The plaintiff instead started complaining that he wanted a share of the money despite the fact that she had before that given him shs. 3,000,000/- out of her own share in appreciation of his help. She suggested that the plaintiff could take a share of the interest that would accrue on the fixed deposit but the plaintiff refused to co-operate. She thereafter approached him on a number of occasions asking him to facilitate withdrawal of funds from the account to meet the needs of the minor to no avail. She wrote a number of correspondences to him without any reply. She then decided to lodge a complaint with the Grade One Magistrate at Adjumani which the magistrate endorsed with an order to the first defendant allowing her to become sole signatory to the account. She then transferred shs. 60,000,000/= from the Junior Account onto a fixed deposit account at the same branch. She has since been withdrawing interest accruing thereon to meet the needs of the minor, including school fees. She subsequently used shs. 10,000,000/= as part of the fund, to construct a house for rent.

D.W.2 Ms. Farida Susan, a sister to the plaintiff, testified that she resides with the second defendant testified that she overheard the plaintiff and her sister Flora demand a share of the money due to the minor with the second defendant leading with him that the amount he was demanding was too big. She interjected by insisting that the money should be reserved for the education of the minor but was rebuked by Flora as being naive. The plaintiff and the second defendant have since then been on bad terms. The second defendant has constructed a house for rent and is collecting rent from the tenants. That was the close of the second defendant's case.

D.W.3 Ms. Dranzoa Jane who testified on behalf of the first defendant stated that she was a teller at the bank during the year 2011 when the plaintiff and the second defendant opened up a junior account in the names of Alpha Holyfield. The purpose was to save money for the infant's school fees and to get a benefit of her late father which was expected. The benefit later came. It was shs. 85,000,000/= Issues arose between them. They were supposed to operate the account jointly. The bank received a court order shortly after that allowing the second defendant to operate the account alone. It was on basis of this order that the second defendant was allowed to operate the account alone. From that time she began to operate the account alone. The order was received by the bank Manager then Aromorach Proscovia who has since left the bank. A junior account is supposed to be operated by a guardian or parent of the child until adulthood. The money in the account belongs to the child and not the guardian or parent. That was the close of the first defendant's case.

In his final submissions, counsel for the plaintiff Mr. Samuel Ondoma argued that the first defendant breached the fiduciary duty owed to the plaintiff. The procedure used for the first defendant retaining the second defendant as sole signatory was unlawful. The relationship between the bank and customer is one of a contract. This was stated in *Esso Petroleum Company v UCB SC CS No. 14 of 1992*. Also in the case of *Dranchinson v. Swiss Bank Corporation [1921] 3 KB 110*. The legal duty between the plaintiff and the bank was a duty on non-disclosure of information concerning the account and not operating the account without the consent of the plaintiff. This duty is contractual. This was observed in the case of *Tonure v. National Provincial and Union Bank of England [1924] 1 KB 461*.

The first defendant bank could not unilaterally terminate the contract with the plaintiff without an order of court and he cited *Stanbic Bank U Ltd v. Uganda Crocs U Ltd CA No. 47 of 2003*. They cannot terminate without notice and he cited *Barclays Bank of Uganda v. Mubiru, SC CA No. 1 of 1998*. There has to be the consent of the customer or a decision from court. There must be mutual consent. These were joint signatories. The account was opened by the signatories without the participation of the minor who had no capacity to contract. The documents used to open the account were documents availed by the plaintiff and the first defendant. To the extent that the account is in the name of the minor, the entire transaction was void. The first defendant as a guardian is an interested party, he followed the matter and is entitled to relief although he has not incurred any loss. In the alternative, if the case is decided against the plaintiff, he should not be condemned in costs. It is not a personal claim and therefore the costs should be against the estate. It would kill the spirit of reconciliation if he is condemned in costs when they were all acting in the interests of the child. The suit was not motivated by animosity and the plaintiff has no personal interest in it.

In his submissions, counsel for the first defendant Arocha Joseph argued that the banking contract with the minor is not void. Necessaries in law are the basic necessities of life. The purpose of opening the account was to cater for the basic necessities of the child. It is therefore not a void contract. The customer of the bank is the minor. She is the one who holds an account with bank. The account holder was the minor. The signatory is not the customer of the bank but the guardian of the funds. This should have been a suit by the minor rather than the signatory. The intended beneficiary of the claim for general damages is the plaintiff and not the minor and this shows that the suit is not bonafide in the interests of the minor. The Court should be guided by section 3 of *The Children Act*, in arriving at a decision which is in the best interests of the minor and the welfare of the child. The Bank had to oblige that instruction of the magistrate so there was no wrongdoing on the part of the bank. The suit should therefore be dismissed and the plaintiff should pay the costs in person.

In her final submissions, counsel for the second defendant, Ms. Daisy Patience Bandaru argued that the banking contract is not void, it was valid. It was a contract for the welfare of the child and for the education of the minor. The plaintiff did not have capacity to sue. He could only have

filed the suit in his capacity as a next friend to the minor. He filed in his personal name without *locus standi*. The second defendant did not know the proper procedure for moving court to direct the name of the plaintiff being removed as signatory. The second defendant cannot be faulted for the manner in which the decision of court was made following her complaint there. Despite the informality, the wording is that of an order but for want of form. The bank was obligated to implement the order. The suit should therefore be dismissed with costs. Throughout hearing of the suit, the plaintiff did not seem to be acting bonafide. There was animosity on the part of the plaintiff, whereas he claimed interest in the welfare. The facts impute ulterior motive and he should be condemned personally in costs of the suit.

At the scheduling conference, the following issues were agreed upon;

1. Whether the defendant breached any of its duties towards the plaintiff.
2. Whether the procedure of retention by the first defendant of the second defendant as sole signatory to the account was lawful.
3. Whether the plaintiff is entitled to any remedies.

1. Whether the defendant breached any of its duties towards the plaintiff.

Resolution of this issue requires the determination of the nature of relationship that was created between the plaintiff and the first defendant when they opened up the “Junior Account” in the name Alpha Holyfield, to which both the plaintiff and the second defendant were signatories, it has to be decided who of the three is the customer of the first defendant.

A bank customer has been legally defined as someone who has an account with a bank or who is in such a relationship with the bank that the relationship of a banker and customer exists. In *Commissioners of Taxation v. English, Scottish and Australian Bank limited* [1920] AC 683, the following definition was provided;

A customer of the bank is a person who has a more permanent relationship with the bank, for instance, having an existing account with the bank. Habit or continued dealings will not make a party a customer unless there is an account in his name. Thus a person who had opened an account on the day before paying in a cheque was a customer of the bank.....The contrast is not between an habitue and a newcomer, but between a person for whom the bank performs a casual service, such as, for

instance, cashing a cheque for a person introduced by one of their customers, and a person who has an account of his own at the bank. (Emphasis added).

The key determinant therefore is having an existing account with the bank or an account in one's name. The legal position implies that opening an account one's name is the crucial element in establishing the banker-customer relationship. When an account is opened, specific legal rights and obligations come into play but these are obligations owed to the account holder, who may or may not be the signatory to the account. It is common ground from all parties in their respective testimonies that "Junior Account" number 1019100621415 that was opened by the plaintiff and the second defendant on 12th September 2011 was opened in the name Alpha Holyfield, a minor aged 8 years at the time. The customer of the first defendant is neither the plaintiff nor the second defendant, who are signatories to the account, but rather the minor Alpha Holyfield. Since the account is not in the name of the estate of the late Lt. Felix Charles Maku or in the names of the plaintiff and the second defendant in their capacity as joint administrators of that estate, it is not an estate account as was contended by the plaintiff in his plaint.

It was contended by counsel for the applicant that since the minor has no capacity to contract, the transaction made in her name by the plaintiff and the second defendant was void and unenforceable. Both counsel for the defendants disagree and contend that it should be categorised as a contract for necessities and therefore is an enforceable contract by the minor.

Section 2 of *The Children Act* defines a child as a person below the age of eighteen years while article 257 (1) (c) of *The Constitution of the Republic Uganda, 1995* too defines a child as a person under the age of eighteen years. It is felt undesirable that minors should enter into contracts carrying the high financial risks which will often be involved in business agreements. However, total unenforceability would act to the minors' disadvantage because if traders and service providers know that any contract with a minor would involve the risk of the minor deciding not to honour it, they would be reluctant to enter into such contracts at all. As a consequence, minors might have difficulty acquiring the basic requirements of everyday life, such as food or clothing. It is for that reason that persons that have not attained the age of eighteen years, regarded in law as "minors," have limited capacity to enter into contracts. The

object of the rules is largely paternalistic, i.e. it is intended to protect minors from the consequences of their own actions.

The plight of minors is illustrated in *Zouch, Ex Dimiss Abbot And Hallet, v. Parsons* [1765] Eng R 89; (1765) 3 Burr 1794; (1765) 97 ER 1103 in the words of Lord Mansfield, thus;

Miserable must the condition of minors be; excluded from the society and commerce of the world; deprived of necessities, education, employment, and many advantages; if they could do no binding acts. Great inconvenience must arise to others, if they were bound by no act. The law, therefore, at the same time that it protects their imbecility and indiscretion from injury through their own imprudence, enables them to do binding acts, for their own benefit; and, without prejudice to themselves, for the benefit of others.

The scope of a minor's capacity to contract is limited in law to goods and services considered to be necessities. For example, a minor has the capacity to contract for necessities such as lodging (see *Portman Registrars v. Mohammed Latif* [1987] 6 CL 217). That the concept of necessities covers both goods and services, was explained in some detail in *Chapple v. Cooper* (1844) 3 M & W 252, where it was held that a widow who was a minor was liable in contract for the cost of her husband's funeral, thus;

"Necessaries" include not only things which are absolutely necessary for survival, but also all those which are required for a reasonable existence. Food and clothing are obviously covered, but so are medical assistance and education. Once the goods or services are of a kind which can be put in the general category of "necessaries", there is then a further question as to whether they are appropriate to the particular minor. Whether a silk dress can count as a necessary will depend on the minor's normal standard of living. Items of 'mere luxury', however (as opposed to "luxurious articles of utility"), will not be regarded as necessities, nor will articles bought as gifts for others normally be so regarded

Therefore, contracts analogous to those of necessities, such as contracts of employment, will be enforceable only if in some way they contribute to the minor's ability to earn a living. This was the view of the Court in *Proform Sports Management Ltd v. Proactive Sport Management Ltd* [2007] 1 All ER 542: in that case, a footballer contract with a minor was held not to be binding because it was not analogous to a contract of necessities or employment contract of general benefits. The facts were that the claimant entered into a contract with Wayne Rooney, then a

child footballer to represent him. Mr. Rooney entered into another contract with the defendant, and the claimant sought damages alleging unlawful interference or the procuring of a breach. In the year 2000, when he was 15 years, Rooney had entered into a representation agreement with an agent (the claimant). In 2002, Rooney terminated that agreement and entered into an agreement with another agent (the defendant). The claimant sued the defendant for the tort of interference with contractual relations. In order to decide whether the tort had been committed, it was necessary to determine whether the 2000 agreement was enforceable. It was held that the year 2000 agreement was not a contract for necessary services. It simply provided for representation services, and did not involve finding Rooney work. Rooney was already registered with Everton Football Club at the time, which subsequently employed him. The year 2000 agreement was therefore voidable, and there was no liability in tort for inducing or facilitating the breach of a voidable contract. This decision essentially treats contracts related to work, as opposed to employment contracts, as a type of contract for services.

In contrast, in *Chaplin v. Leslie Frewin* [1966] Ch 71; [1965] 3 All ER 764, the court upheld a contract relating to the production of the minor's autobiography (he was the son of Charlie Chaplin an English comic actor, filmmaker, and composer who rose to fame during the era of silent film). The contract enabled the minor to earn money, and to make a start as an author, and for that reason was to be regarded as beneficial.

In my view, the rules about beneficial contracts of service extend to contracts related to the way in which the minor earns a living or sources funds for provision of necessities as long as such a contract is absolutely necessary or required for the survival or reasonable existence of the minor. In this case the minor was due to receive a sizeable endowment in cash to cater for her future needs of food, clothing, medical assistance, education, to mention but a few. Keeping the funds safely with a banking institution became absolutely necessary if her future needs were to be met out of that fund. The banking contract with the first defendant therefore qualifies as a necessary and is thus not void but a valid and enforceable contract.

The plaintiff and the second defendant, being the *de-facto* guardians of the minor, stand in a fiduciary relationship with her, more especially as signatories to her bank account. Historically,

constructive trusts were imposed on persons standing in a fiduciary relationship who had made profits as a result of the fiduciary relationship. The purpose of the constructive trust was to prevent the fiduciary taking the profit which he had made as a result of an abuse of his position. For example, in the seminal case of *Keech v. Sandford* (1726) *Sel. Cas. Ch. 61* a trustee was holding a lease on trust for an infant beneficiary; when the lease expired, the trustee renewed the lease for his own benefit. Despite the fact that the landlord was not willing to renew the lease for the benefit of the infant, the court held that the trustee held the lease on constructive trust for the infant. In *Hussey v. Palmer* [1972] *1 WLR 1286* Lord Denning commented that a constructive trust “is a trust imposed by law whenever justice and good conscience require it. It is a liberal process; founded on large principles of equity . . . It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution.’ However, under the law of banking, there is a clear principle that loan contracts and contracts for bank accounts in themselves do not create a trust relationship (see *Foley v. Hill* (1848) *2 HL Cas 28, 9 ER 1002, 1005*, per Lord Cottenham LC). The plaintiff thus does not stand in the position of a trustee vis-a-vis the first defendant.

As a signatory to the account, the plaintiff was technically a person having control over property of the minor but with no beneficial interest therein. He controlled the funds on the bank account for the benefit of the minor. In order to be a trustee, whether express or constructive, a trustee must be the legal owner of the property, for a trust is an obligation annexed to the ownership of property, whether the obligation arises by the act and intention of the parties or by operation of law. In this case, title to the fund did not vest in the plaintiff but in the minor. He was only managing the fund, standing in a fiduciary relationship with the minor, i.e. in a position analogous to that of trustee, and liable to account, but he is not a trustee in the strict accepted legal sense of the term. He is liable to account under a suit by the minor but has no legal relationship with the first defendant. The banking contract being that of the minor, it is only the minor who could sue for its enforcement and not the plaintiff. Under Order 22 r 1 of *The civil procedure rules*, every suit by a minor has to be instituted in his or her name by a person who in the suit is called the next friend of the minor. I therefore find that the first defendant did not owe any duties, fiduciary or otherwise, to the plaintiff and his suit against the first defendant is misconceived.

As regards the claim against the second defendant, the plaintiff and the second defendant being mere de-facto guardians of the minor in the management of her fund as signatories to the account, they did not owe one another any legal obligations *inter se*. Their duties in their fiduciary relationship with the minor are owed to the minor and the principal fiduciary duties are: to act in good faith; not to make personal profit out of her funds; not to place themselves in a position where their duty and their personal interest may conflict; not to act for their own benefit or the benefit of a third person unless properly authorised to do so; to be accountable to minor; and not to misuse any confidential information. In general, they are under a duty to act prudently in preserving the fund. If they act outside their powers or do not fulfil their duties, they may be held liable for breach of trust and will have to make good personally the loss thereby incurred by the minor. If any of them is to breach their duties owed to the minor, then it is the minor to sue the guardian in breach rather than an action by one guardian against the other. I find that the suit against the second defendant is misconceived as well.

Having answered the first issue in the negative, I do not find it necessary to consider the rest of the issues. It is an inflexible rule of equity that a person in a fiduciary position, such as the plaintiff, is not, entitled to put himself in a position where his interest and duty conflict. The rule is based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he or she was bound to protect. In this case, rather than suing in the name of the minor for the minor's benefit, the plaintiff sued in his name for his own benefit. I am unable to find any reason as to why he should not personally meet the costs of this litigation personally. The suit is therefore dismissed with costs to the defendants.

Dated at Arua this 22nd day of June 2017.

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Stephen Mubiru
Judge
22nd June 2017