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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO. 236 OF 2017

SHAKIL PATHAN ISMAIL

(Suing through his lawful attorney ULFAT ALI PIRZADA):.....PLAINTIFF

VERSUS

DFCU BANK LTD:.....DEFENDANT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

J U D G M E N T:

Shakil Pathan Ismail the Plaintiff in these proceedings filed this suit against DFCU Bank Limited herein referred to as the Defendant for recovery of UGX. 62,000,000/= being monies unlawfully blocked/deducted from his salary account, general damages, exemplary damages, interest and costs of this suit.

The Plaintiff was an employee of Crane Bank Limited earning a monthly salary of USD 2200. It is the Plaintiff's claim that Crane Bank Limited unlawfully blocked his account and thereafter made multiple deductions totaling to UGX. 62,000,000/= which sum has never been remitted to him.

Bank of Uganda in exercise of its powers as the Central Bank under the Financial Institutions Act No. 2 of 2004 took over the management of Crane Bank Limited on the basis that it was significantly undercapitalized as defined by law and placed it under receivership.

By way of a purchase of assets and assumption of liabilities agreement dated 25th January 2017 the Defendant as buyer took over some of the assets and liabilities of Crane Bank Limited (In Receivership) from the Receiver Bank of Uganda. The Defendant was assigned Crane Bank Limited's rights and liabilities under all its existing employment contracts subject to certain exclusion clauses.

According to the agreement Schedule 3 Clause 2; terminal benefits and all employment dues of Employees terminated by the Buyer within 2(months) from the Completion Date are listed as excluded liabilities.

Clause 5.3 provides for employee matters. It states that;

"The Receiver shall indemnify the Buyer against all liabilities to an Employee arising out of the employment of an Employee during the period prior to and ending on the Completion Date, including arrears of wages or salaries, overtime payments and accrued leave."

The Plaintiff was one of the employees of Crane Bank Limited whose employment contract was assigned to the Defendant. The Plaintiff's employment was terminated by the Defendant. It is the Plaintiff's claim that despite the termination of his employment no settlement regarding the deductions on his salary account has been made thus he filed this suit seeking recovery of the same.

Denying liability the Defendant contends that she is not a successor in title to Crane Bank Limited but only acquired some of its assets and liabilities in

January 2017. That the liabilities of Crane Bank Limited were not known to the Defendant and the Statutory Receiver of Crane Bank Limited as at 25th January 2017.

It is the Defendant's claim that the liability within Crane Bank Limited books was only presented to the Defendant at the time when the Plaintiff was leaving the Defendant's employment. The Defendant's termination of the Plaintiff's contract did not pass on to it a liability that was within Crane Bank Limited's books.

The issues for determination by the court as agreed by the parties are;

1. Whether the suit is properly before this court.
2. Whether the Plaintiff's monies were unlawfully deducted by Crane Bank Limited and if so whether the Defendant is liable.
3. Remedies available to the parties.

Before I delve into this case I would like to deal with an important issue wherein Crane Bank in Receivership applied to be joined as a Defendant. The Application was rejected because of the following reasons;

The hearing of the suit had gone half way and at a speed Counsel for the Applicant had vouched for when he submitted;

"My Lord the matter has been brought ahead because the Plaintiff stays in Canada and has got to go back."

It should be noted that the suit had been fixed for 23rd April 2018 but because of the reasons given by Counsel for the Defendant it was brought forward.

Interestingly the scheduling was held on 13th February 2018 but Counsel for the Applicant did not state that they intended to bring in Crane Bank Limited (in receivership) as a Defendant.

The Application was filed on 5th March 2018 and fixed for 30th May 2018 a date after that fixed for hearing the main suit. It is surprising that when the matter was brought forward to 7th March 2018 Counsel for the Defendant who was also Counsel for the Applicant reminded court of the need for speedy hearing of the suit and never at all mentioned the need to add Crane Bank in Liquidation, but proceeded to cross examine the Plaintiff instead.

The Plaintiff closed his case and it is only when the suit came up for defence that Counsel mentioned the need to dispose of the Application.

In my view to wait for the Plaintiff to first close his case and then attempt to add a Defendant of whom the Defendant was always aware of, was something done in bad faith. That being the case, the court did not allow the opening the matter again by filing of pleadings that would in any case now call for counter fillings and recall of the Plaintiff who Counsel for the Defendant himself submitted would be away in Canada.

Furthermore, the Application was filed 20 days after the scheduling conference outside the provisions of Order 12 rule 3 of the Civil Procedure Rules which provides;

O X11 r 3 (1)

“All remaining interlocutory applications shall be filed within twenty one days from date of completion of the alternative dispute resolution and where there has been no alternative dispute resolution, within fifteen days after completion of the scheduling conference; that date shall be referred to as the cutoff date.”

In the present case scheduling took place on the 13th February 2018. There was no alternative dispute resolution after the scheduling. The Application should have been filed by 28th February 2018. It was instead filed on 15th March 2018 after the 15 days allowed. No leave was sought. It was beyond the cutoff date and so could only in my view be filed after leave had been sought.

It could not be heard because it was in breach of the 1998 amendments to the Civil Procedure Rules.

One could add that Clause 9 of the Agreement between the Defendant and the Applicant which provides for indemnity and non hearing of this belatedly filed Application does not prevent the Defendant from proceeding against the Applicant at any time if need arose.

Lastly the Application to add Crane Bank in Receivership was filed by MMAKS Advocates. This very firm having represented Crane Bank for several years before it fell under could not again turn and file suits against the same bank albeit in receivership. This matter was settled in **Misc. Application No. 1063**

of 2017 arising out of Bank of Uganda vs Crane Bank Civil Suit No. 493 of 2017 wherein the court found MMAKS in conflict of interest. Court held that;

“It did not matter whether the firm had many lawyers and the one now assigned with the new matter did not personally handle the complainant’s earlier case. Conflict would still be imputed from the “Canteen factor.”

“Canteen factor in this case included social chat between colleagues or with client that gives away vital information. So if the interaction is between one of the partners, it will be imputed to the others.”

For those reasons MMAKS Advocates who had been Counsel of Crane Bank were declared “interest conflicted” in that Bank’s case.

Following that ruling this Court could now not turn around and proceed with an application brought in by MMAKS intending to bring Crane Bank on board as a Defendant.

As to whether the suit is properly before this court it is the Defendant’s claim that because the Plaintiff’s claim is entirely founded on his employment contractual rights, deductions from his salary account by his former employer Crane Bank the matter falls within labour disputes and a complaint ought to have been made to a labour office.

When asked whether he had reported the complaint to a labour officer PW1 Shakil Pathan Ismail told court that he had not reported the matter. According to him in August 2015 the system of the head office had been hacked and his password and one of his colleague's were used to transfer funds into some other account. He further told court that some police inquiries were going on therefore his salary was kept on hold and would be reinstated once the police inquiries were done. This he alleged was never done.

To avoid multiplicity of suits and the fact that we are dealing with crediting and debiting of the account creates a situation that would bring this matter into the ambit of a banker-customer relationship.

A good example that shows that this was a banker-customer relationship was the entry of 30th September 2015 in the Plaintiff's bank statement wherein Crane Bank credited the Plaintiff's account with UGX. 5,505,300/= and later on in the day by way of internal transfer it removed the money. Once the sum of money had been credited on his account it now became an issue governed by the banker-customer relationship laws. Therefore the unauthorized removal of the money was a subject of the commercial division of the High Court.

It is therefore the finding of this court that it was seized with jurisdiction.

On the second issue of whether the Plaintiff's monies were unlawfully deducted by Crane Bank Limited and if so whether the Defendant is liable, it is not in dispute that his salary was USD 2,200. Furthermore, it is also not in dispute that this money would then be converted into Ugandan currency based on the

exchange rate, prevailing at the time. That these conversions took place is well documented in **ExhP4** a letter of termination dated 24th February 2017 addressed to the Plaintiff by the Defendant.

In this letter the Defendant makes it clear that the Plaintiff used to earn USD 2,200. It is also clear from **ExhP4** that the exchange rate used was UGX. 3,600/= per dollar. There is therefore no doubt that the sum of money that the Plaintiff earned per month was USD 2,200 multiplied by UGX. 3,600/= which brought the Plaintiff's monthly earning to UGX. 7,920,000/=.

It is clear from **ExhD1** that for quite some time the Plaintiff's account was being credited by much less than he was earning which clearly meant that his salary was being deducted. The amounts of deductions are well documented in **ExhD2** and **ExhD1**.

The Defendant has all along contended that at the time she took over the bank certain liabilities were exempted and they remained with Crane Bank in Receivership.

The Defendant relied on the Purchase of Assets and Assumption of Liabilities Agreement signed between Bank of Uganda as the Receiver and the Defendant as the buyer. She specifically relied on Clauses 5.3, 9.1 and Clause 2 of Schedule 3 which I find necessary to reproduce. Clause 5.3 provides;

"The Receiver shall indemnify the Buyer against all liabilities to an Employee arising out of the employment of an employee during the period prior to and ending on

the Completion Date, including arrears of wages or salaries, overtime payments and accrual leave.”

While 9.1 provides for indemnities as hereunder;

“From and after the Completion Date the Receiver shall indemnify, hold harmless and defend the Buyer from and against all claims, costs, expenses , legal cases, losses , liabilities, demands and obligations, which the Buyer may incur or suffer arising out of the Excluded Liabilities or in relation to the Properties in the period between the Completion Date and the transfer of the Properties to the Buyer.”

The Defendant also relied on Clause 2 of the 3rd Schedule which was a summary of Excluded Liabilities namely that amongst those liabilities that would be excluded were;

“Terminal benefits and all employment dues of Employees terminated by the Buyer within 2 months from the Completion Date.”

I have considered the clauses relied upon by the Defendant and find that they emphasize that in the event the Defendant be found liable, the Receiver would indemnify her.

This is clear from the word indemnify which means compensate (someone) for harm or loss. The Definition therefore includes; “reimburse, recompense, repay, pay back.”

The word indemnify in the Purchase Assets and Assumption of Liabilities Agreement makes it clear that the Claimant would first have to establish the liability of the Defendant before the latter is indemnified. It was therefore necessary to sue the Defendant.

Secondly, the Plaintiff was not privy to the agreement because legally the Defendant assumed the position of Crane Bank when she took over the Bank. This position is buttressed by the Employment Act. Section 28(2) provides;

“Where a trade or business is transferred in whole or in part, the contracts of service of employees employed at the date of transfer shall automatically be transferred to the transferee, all rights and obligations between each employee and the transferee shall continue to apply as if they had been rights and obligations concluded between the employee and transferee.”

The relationship between the Plaintiff and Crane Bank simply shifted to the Defendant by operation of the law. This position would however have been changed if the Plaintiff had been privy to the Purchase of Assets and Assumption of Liabilities Agreement.

The Agreement cannot be used to amend the Employment statute. The Governor of the Bank of Uganda must have had this in mind when he wrote the Notice to all staff of Crane Bank Limited, **Exh P3**. He wrote;

“As a result your contracts of service with Crane Bank Limited have been transferred to DFCU Bank Limited. This transfer does not affect your statutory rights in anyway. Accordingly your employment with Crane Bank Limited and with DFCU Bank Limited shall be deemed to be continuous. DFCU Bank Limited as the incoming employer will following the integration of Crane Bank businesses make a decision repairing staffing levels.”

The wording of **ExhP3** is in accordance with section 28 of the Employment Act. It is therefore not in dispute that the Defendant took over the Employees and the employment contracts that existed between the Employees and Crane Bank Limited.

It follows that if there arose any dispute, the contracts to fall back to would be those very ones. It also follows that the Defendant would be the Employer.

The sum total is that the Plaintiff rightly sued the Defendant.

Turning to the monetary claims the Plaintiff sought UGX 62,000,000/=. It is trite law that this special damages cannot be recovered unless it has been specifically claimed and proved or unless the best available particulars or

details have, before trial, been communicated to the party against whom it is claimed; **Uganda Telecom Ltd V Tanzanite Corporation SCCA 17/2004**

As I have already stated herein above the Plaintiff's salary was USD 2,200 that was subjected to conversion to Uganda shillings at an interest rate of UGX. 3,600/= . The Plaintiff's claim is that from March 2015 to February 2016 the Defendant unlawfully deducted monies from his salary account. From ExhD1 the deductions made during that period are as follows;

MONTH	AMOUNT RECEIVED	UNLAWFUL DEDUCTIONS	AMOUNT THE PLANTIFF WAS DEPRIVED OF
MARCH 2015	4,090,300		3,829,700
APRIL 2015	4,140,300		3,779,700
MAY 2015	4,230,300		3,689,700
JUNE 2015	4,410,300		3,509,700
JULY 2015	4,925,300		2,994,700
AUG 2015	-		7,920,000
SEPT 2015	5,505,300	5,505,300	7,920,000
OCT 2015	956,500		6,963,500
NOV 2015	1,345,271		6,574,729
DEC 2015	1, 330,721		6,589,279
JAN 2016	1,460,700		6,459,300
FEB 2016	1,687,700		6,232,300
MAR 2016	1,379,500		6,549,450
TOTAL		<u>5,505,300</u>	<u>73,012,058/=</u>

The Plaintiff was expected to earn a monthly salary of UGX. 7,920,000/=. **ExhP1** shows that he was deprived of UGX. 73,012,058/=. The amount he was expected to earn would be US \$ 2,200 multiplied by 12 (being the months in which he did not receive his full salary) to arrive at an annual salary of US \$ 26,400. This sum of US \$ 26,400 would then be multiplied by UGX. 3,600/= to obtain the amount he was expected to earn between the period of March 2015 to March 2016 as UGX. 95,040,000/=. The difference between the amount he was deprived of and his actual salary is UGX. 22,027,942/=

The Plaintiff claimed UGX. 62,000,000/=. It seems the difference had been paid to him as referred to by the Defendant in **ExhP1** as money paid.

He prayed for UGX 62,000,000/= and since the Plaintiff cannot be awarded anything outside his claim it is that amount of money as claimed herein above mentioned that he is awarded.

The Plaintiff also claimed general damages. The settled position is that the award of general damages is in the discretion of court, and is always as the law will presume to be the natural and probable consequence of the Defendant's act or omission; **James Fredrick Nsubuga vs Attorney General HCCS No, 13 of 1993.**

A Plaintiff who suffers damage due to the wrongful act of the Defendant must be put in a position he or she would have been in had she or he not suffered the wrong and when assessing the quantum of damages, courts are namely guided by the value of the subject matter, the economic inconveniences that a party may have been put through and the nature and extent of the breach;

Kibimba Rice Ltd vs Umar Salim SCCA No. 17 of 1992; Uganda Commercial Bank vs Kigozi [2002] 1EA305.

In the instant case neither the Plaintiff nor his Counsel guided court on the quantum of general damages to be awarded by this court. Taking into account that the Plaintiff was deprived of part of his salary that caused him inconvenience, this court is left with no other option but to exercise its discretion on the award of these damages. For those reasons, I find an award of UGX. 20,000,000/= appropriate. It is so awarded.

The Plaintiff also sought exemplary damages. These form of damages may be awarded, where there has been oppressive, arbitrary, or unconstitutional actions by the Defendant, where the Defendant's conduct was calculated by him to make a profit which may well exceed the compensation payable to the Plaintiff, or where some law for the time being in force authorizes the award of exemplary damages; **Rookes vs Barnard [1964] ALL ER 367.**

It is my view that in an action where an outrage has been committed against the Plaintiff by the Defendant and the court forms the opinion that it should give exemplary damages to register its disapproval of the wanton and willful disregard of the law, it is entirely proper to award exemplary damages.

In the present case the matter before this court involves unlawful deductions from the Plaintiff's bank account arising from a banker-customer relationship.

The reasons for the deductions and withholding of his money were given by the Plaintiff himself when he told court that because of a police inquiry which involved his password, his salary was withheld. This was an obvious step to be

taken under circumstances of fear of loss of money. There is nothing to indicate any acts of malice, outrage or impunity by the Defendant.

For those reasons, the prayer for exemplary damages is denied.

The Plaintiff also sought interest at the commercial rate from the dates of accrual.

It is trite that interest is awarded at the discretion of court, but like all discretions it must be exercised judiciously taking into account all circumstances of the case; **Uganda Revenue Authority vs Stephen Mabosi SCCA No.1 of 1996.**

It is important to note that an award of interest is discretionary and its basis is that the Plaintiff has kept the Defendant out of his money, had use of it himself, so he ought to compensate the Defendant accordingly; **Harbutts Plasticine Ltd vs Wyne Tank & Pump Co Ltd [1970] 1 ChB447.**

It is without doubt that the Defendant kept the Plaintiff out of use of his money. The bank must have used this money for commercial purposes. It is also without doubt that if the Plaintiff had borrowed that money from the bank, he would have paid it back at commercial interest rate. What is good for the goose should also be good for the gander. I find that since the Defendant must have used the money at commercial rate, it is only fair to treat the Plaintiff in the same manner. The decretal sum shall therefore attract interest of 21% per annum from April 2016 till payment in full in respect of the special damages.

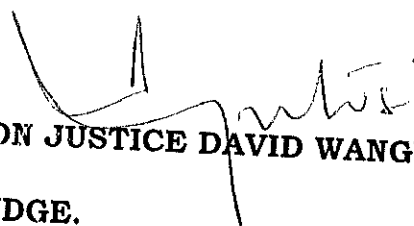
As for the general damages an award of 6% per annum from date of judgment till payment in full is awarded. The Defendant will also bear costs of the suit.

In conclusion judgment is entered in favour of the Plaintiff against the Defendant in the following terms;

- a) The Defendant pays UGX 62,000,000/=
- b) The Defendant pays general damages of UGX. 20,000,000/
- c) Interest of on a) at 21% per annum from April 2016 till payment in full and on b) at 6% per annum from date of judgment till payment in full.
- d) Costs of the suit.

154 Jan.

Dated at Kampala this.....day of.....2019


HON JUSTICE DAVID WANGUTUSI
JUDGE.

Judgment delivered in the presence of:

1. Mr. Lugayizi Timothy for the Defendant.
2. Ms Atuhaire Daphne, a Legal Assistant to Mr. Walusimbi Nelson, Counsel for the Plaintiff.
3. The Plaintiff.

C/C – Ms Mulelengi Beatrice.



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**Festo Nsenga –
Deputy Registrar**

15th January, 2019 – 9:58 a/m

