

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

[Coram: Egonda-Ntende, Musoke & Obura, JJA)

**Civil Appeal No. 21 of 2007**

(Arising from High Court Civil Suit No. 442 of 2001)

**BETWEEN**

Robert Bitwire=====Appellant No. 1

Peninnah Arinaitwe=====Appellant No. 2

**AND**

The Co-operative Bank Ltd=====Respondent


(On Appeal from the Judgment of the High Court of Uganda (Okumu-Wengi, J.)  
delivered on the 4<sup>th</sup> July 2001.)

**Judgment of Fredrick Egonda-Ntende, JA**

[1] I have had the benefit of reading in draft the judgment of my sister, Hellen Obura, JA. I agree with it and having nothing useful to add.

[2] As Elizabeth Musoke, JA, agrees this appeal is dismissed with costs here and below.

Dated, signed, and delivered this 12<sup>th</sup> day of Nov. 2019

  
Fredrick Egonda-Ntende  
**Justice of Appeal**

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
*(Coram: Egonda-Ntende, Musoke and Obura, JJA)*  
**CIVIL APPEAL NO. 21 OF 2007**  
**BETWEEN**

**1. ROBERT BITWIRE**

**2. PENINNAH BITWIRE ::::::::::::::::::::::::::::::::::::::: APPELLANTS**

**AND**

**THE CO-OPERATIVE BANK LTD**

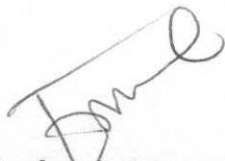
**(IN RECEIVERSHIP/ STATUTORY LIQUIDATION) ::::::::::::::: RESPONDENT**

**JUDGMENT OF ELIZABETH MUSOKE, JA**

I have had the benefit of reading in draft the judgment of my learned sister, Hellen Obura, JA. I concur with the reasoning and conclusions reached therein.

I, too, agree that the appeal should be dismissed with costs in this Court and the Court below.

Dated at Kampala this .....12<sup>th</sup>..... day of .....Nov.....2019



**Elizabeth Musoke**  
**JUSTICE OF APPEAL**

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

(CORAM: Egonda-Ntende, Elizabeth Musoke, and Hellen Obura JJA)

**CIVIL APPEAL NO. 21 OF 2007**

*(Arising from the decision of the High Court of Uganda at Kampala before His Lordship Hon. Justice R. O. Okumu Wengi dated 04.07.2001)*

- 1. ROBERT BITWIRE**
- 2. PENINNAH BITWIRE:.....APPELLANTS**

**VERSUS**

**THE CO-OPERATIVE BANK LTD:.....RESPONDENT  
(IN RECEIVERSHIP/STATUTORY LIQUIDATION)**

**JUDGMENT OF HELLEN OBURA, JA**

This is an appeal against the decision of R.O Okumu Wengi, J. by which he dismissed the plaintiff's case with costs.

The background facts to this appeal are that the plaintiff sued the now defunct defendant bank in their capacity as administrators of the estate of their deceased father, David Bitwire (herein after called the deceased) who was a customer of the bank in its Kasese branch. It is contended that in August 1998 armed bandits of the Allied Democratic Forces (ADF) stormed Kasese town and looted the deceased's premises taking away among other things two cheque leaves. The following October the very two cheque leaves were presented and a large amount of cash was withdrawn from the plaintiff's account.

It was contended that the deceased had given immediate notice to the bank to stop any withdrawals using those cheques yet the bank had gone ahead and cashed them anyway resulting in the total loss of Ug. Shs. 100,000,000/=. The plaintiff further contended that in the same month of August 1998 the deceased deposited Ug. Shs. 20,000,000/= into his account and kept the deposit slip but that money was not credited into the account. In a third claim the plaintiff contended that the bank had also caused a debit entry of Ug. Shs. 30,000,000/= to be made in the deceased's account without his instructions. The plaintiffs thus sued to recover a total of Ug. Shs. 150,000,000/=. The suit came in the heels of a demand by the bank to the customer to repay the sum of Ug. Shs. 136,527,776 which was outstanding. The defendant had also served the plaintiffs with statutory notice after which it would sell off the plaintiff's property held on a legal mortgage to the bank.

The respondent denied liability contending that it had never been instructed to stop payment of the two cheques which it claims were properly presented and duly honoured. At the trial the appellants called two witnesses while the respondent called one witness and at the conclusion of the case the learned trial Judge found against the appellants whose claim was dismissed with costs.

Being dissatisfied with the trial Judge's decision, the appellants appealed to this Court on 4 grounds, namely that;

1. *The learned trial Judge failed to evaluate the evidence adduced regarding delivery and receiving notice from the applicant stopping the respondent to pay on the cheques thus coming to a wrong conclusion.*
2. *The learned trial Judge erred in law and fact when he held that the Bank did not receive notice stopping the payment on stolen cheques and that what the respondent did, on paying the cheques was fulfilling her duties to the customers applicant.*
3. *The learned trial Judge erred in law and fact when he held that the respondent did not receive deposit of Ug. Shs. 20,000,000/= and held that the respondent is not entitled to it.*

4. *The learned trial Judge erred in fact and in law in not granting the remedies sought.*

When the matter came up for hearing, Mr. Moses Adriko who appeared for the respondent informed Court that both parties were directed by this Court to file written submissions within given timelines but the directive was not complied with by the appellants and so the respondent also failed as there was no submission to respond to. Counsel for the appellants was absent. The 1<sup>st</sup> appellant who was present informed this Court that he had been at the chambers of his lawyers the previous day and they promised to be in court but he could not see any of them. Given the delay in prosecuting the appeal, this Court directed the 1<sup>st</sup> appellant to present their case.

The 1<sup>st</sup> appellant stated that their preference was to have this matter settled but they first wanted to know the amount of money generated by the sale of 2 of their properties by the respondent and what was still owing. He said to that end, they have requested for a statement from the respondent to find out the outstanding loan, what properties were sold and how much was recovered from sale of the properties in order to resolve the matter with the respondent.

In relation to the substance of this appeal, the gist of the 1<sup>st</sup> appellant's submission was that they had a police report which showed that the cheques had been stolen during the ADF rebel incursion of Kasese town. However, they later found that the cheques were cashed and they do not know who authorised payment of the money. Furthermore, that the cheques were cashed when they had notified the bank not to pay and the evidence is on the record of appeal together with a letter by which they reported the incident to the police. The 1<sup>st</sup> appellant also alluded to the witnesses they brought to support their claim.

In his submissions in response, the respondent's counsel referred to the issues framed in the respondent's conferencing notes as the issues for determination by this Court. He then argued grounds 1 and 2 together thus submitting that there was no evidence that the countermand of payment was received by the respondent and that there was no indication on the ledger card that a countermand had been communicated to all bank officials. He contended that there was no

effective countermand of the cheques and hence they were paid out in the ordinary course of business.

On ground 3, the respondent's counsel referred to the evidence of DW1 that the deposit slips did not bear a stamp from the bank and supported the learned trial Judge's finding that there had not been a deposit of Ug. Shs. 20,000,000/= on the account of the deceased.

The duty of this Court as a first appellate Court is to re-evaluate all the evidence on record and come to its own conclusions. See: ***Banco Arabe Espanol v Bank of Uganda, [1999] UGSC 1; Rwakashaija Azarious and others v Uganda Revenue Authority, [2010] UGSC 8*** and ***Selle & Another v Associated Motor Boat Company Ltd & Others [1968] EA 123***. With the above duty in mind, I have carefully studied the Court record and considered the submissions of the appellant and counsel for the respondent. I shall consider the grounds in the order they were argued by counsel for the respondent.

In grounds 1 and 2, the appellants' fault the learned trial Judge for finding that the respondent bank did not receive notice stopping payments of two cheques even when the appellants claim to have adduced such evidence at the trial.

I find it pertinent to reproduce the decision of the learned trial Judge at page 36 paragraph 1 lines 2 -26 where he stated thus:

*"On the first issue Robert Bitwire junior testified that on the night of 31/7/1998 his father's business premises were invaded by the ADF rebels who burnt down his hotel. In the process some cheques that were inside a drawer were lost. He said that the interior of the drawers where the cheques could have been had remained intact from the vandal fire. He testified that the two cheques in the chequebook were already signed by his late father. The loss was then reported to the Police and the bank who was required on 1/8/98 to stop payment of those cheques. He stated that in October of the same year the cheques were paid out by the bank. He then testified that a complaint was raised with Johnson Agaba the bank Manager then and with Patrick Karuhanga of the current accounts section. In cross examination the witness said*

*that no hotel workers had had access to the office where cheques were kept. That his father would at times leave behind signed cheques before he went on a long trip to Kampala. When he was questioned about the letter to the bank to stop payment of the lost/stolen cheques (Exhibit P.2) he stated:*

*He (his father) wrote to the bank. There is no indication that the (police) statement was received by the bank. My father wrote to the bank stopping payment. I did not write it. The letter was signed and received by the Bank's Patrick Byaruhanga of current accounts. His name is not here on the letter. His signature is.... This letter was handed to Byaruhanga in the bank. There is no stamp of Co-operative Bank acknowledging receipt of the letter."*

The learned trial Judge stated further in his judgment on page 37 paragraph 1, lines 3 - 27 and page 38 paragraph 1, line 1 - 14 as follows:

*Byaruhanga told court that in May 1997 he was a banking assistant in the defendant's Kasese branch. He identified the letter brought in by Mr. David Bitwire on 1/8/98. He also testified that it was wrong for the bank to have honoured the cheques stoppage of which he had forwarded to the bank manager. He said in cross examination;*

*When Bitwire gave me Exhibit P.2 I was at my bench in Current Accounts. He came to me at 10:00 to say his cheques had been looted by ADF who indeed had attacked the night before. I advised him to report to Police and then put it to us in writing. He came and presented the stop payment letter. I had shown him how to draft it. He came with the letter which I received, signed, dated and sent to the manager...the manager could have put a stamp on it to indicate that he had received the letter. I do not see any indication here that the manager received the letter.*

*When Byaruhanga was shown leave forms that he had filled he told court that he had requested for 28 days leave commencing on 13/7/98 but that he did not proceed on leave as the forms tended to indicate. He then conceded that his head of department had recommended his leave and that he was indicated to report back on 28/8/98. He was also unable to show from the ledger card of the Customer's account that he made any entry on it on 1/8/98. But he did indicate an entry by him on 31/7/98. He was however unable to show*

court a stop payment endorsement on the ledger card. He then conceded that the signature on his leave application form differed from the one on Exhibit P.2 (the stop payment letter). But he explained in re-examination that as a banker he would use initials on bank documents but that on his leave form or on his own bank account he used full signatures. He further told court on his re-examination:-

*"I am sure I was in the bank as of 31/7/9 to 28/8/98. I recall putting a stop payment order on the ledger."*

*But then again he said:-*

*"When I forwarded the stop payment letter to the Manager it would be the responsibility of the officer with the ledger card at the times the cheques are presented."*

*For the defence side Constance Tusimire DW1 told this court that the two cheques had been presented to the bank for payment by the customer. She denied that a stop payment order had been made to the bank by the customer. She further told court that a stop payment jacket would have been put on the ledger. She also stated that there was no stop payment endorsement on the ledger.*

The learned trial Judge then concluded on page 39 paragraph 3 lines 8 – 11 as follows:

*"...I am also not certain that indeed the stop payment order was duly made to the bank by the customer. It was not stamped and no entry was made on the ledger card. What I am certain of is that the cheques had been signed by the customer..."*

I have had the opportunity of carefully perusing Exhibit P.2 on page 130 being a request to the respondent to stop payment of the two cheques. It was authored on 1<sup>st</sup> August 1998 by the deceased who stated that Cheque Nos. 951794949 and 951794951 on account No. 020 had been lost and requested the respondent bank to stop their payment and, if possible, confiscate them.

During his testimony PW1 (1<sup>st</sup> appellant), agreed in cross examination that there is no indication that the police statement of the allegedly lost/stolen cheques had been received by the bank. He



was also aware by his own testimony that there is no stamp of Co-operative Bank Ltd acknowledging receipt of exhibit P.2.

PW2, Byaruhanga Patrick, a former staff of the respondent testified that he received, signed and dated Exhibit P. 2 on 1<sup>st</sup> August 1998 and sent it to the manager. He however stated during cross examination that he did not see a bank stamp on the letter to indicate that the bank manager had received it. He also confirmed during cross examination that the other process that was required of him in handling a request of this nature was to write on the ledger card that the two cheques should be stopped but again he said this was also not done.

The question to be answered is did the respondent bank receive the letter stopping payment of the cheques (notice of countermand) from the deceased?

According to **Paget's Law of Banking 13<sup>th</sup> Edition at page 421 paragraph 17.185**, notice of countermand must be clear and unambiguous, and it must be brought to the actual (not constructive) knowledge of the bank.

**Black's Law Dictionary 16<sup>th</sup> Edition** defines actual notice at page 1061 as:

*"Notice expressly and actually given and brought home to the party directly...Actual notice is such notice as is positively proved to have been given to a party directly and personally, or such as he is presumed to have received personally because the evidence within his knowledge was sufficient to put him upon inquiry."*

This therefore means that in this case the appellants had to prove that exhibit P.2 was received by the respondent either directly or by presumption based on evidence within the respondent's knowledge which was sufficient to put it upon inquiry. It is only then that it can be said there was an effective notice of the countermand which the respondent could be held liable for not effecting. I must however, observe that the evidence of PW1 and PW2 which would prove this were not at all helpful.

PW1 testified that it was his father who wrote to the respondent stopping payment and the letter was received by a staff of the respondent called Patrick Byaruhanga (PW2) of current accounts who signed it. He however, conceded that the copy of the letter that was tendered in evidence does not bear the bank stamp to confirm that it was received. PW2 on his part stated that he received and initialled the letter and passed it onto the manager who should have acknowledged receipt of the same by stamping it. He also confirmed that there is no bank stamp on the letter and that the countermand was not entered in the ledger card.

It is also noteworthy that even the alleged police statement regarding the lost cheques was never served on the respondent. Perhaps if it had been served the respondent could have been put on notice of the lost cheque leaves and this could have prompted it to stop payment upon presentation of the said cheques.

Given the appellants' evidence as relate to service of the countermand notice on the respondent, as highlighted above, I find that the absence of a bank stamp on exhibit P.2 supports the learned trial Judge's conclusion that the respondent had no actual notice of the countermand.

I must point out that there is also doubt as to whether PW2 himself initialled exhibit P.2 on 1<sup>st</sup> August 1998 because he was scheduled to be on leave at the time. If at all he indeed received the letter, I did not find any satisfactory reason as to why it was not stamped and no countermand notice entered in the ledger card. The unresolved controversy over the presence of PW2 in office at the material time casts doubt on his evidence and makes it unreliable.

The Bills of Exchanges Act Cap. 68 under section 72(1) defines a cheque as a bill of exchange drawn on the banker payable on demand. Section 74 of the Act provides that the duty and authority of a banker to pay a cheque drawn on him or her by his or her customer are determined by;

- (a) Countermand of payment
- (b) Notice of the customer's death

In the absence of the respondent's actual notice of the deceased's countermand of payment/ letter stopping payment, I find that the respondent was under contractual duty to pay Cheques Nos. 951794949 and 951794951 as it did. I therefore have no reason to fault the learned trial Judge for finding as he did.

In view of the foregoing, grounds 1 and 2 are without merit and should fail.

Turning to ground 3 of the appeal, it was the evidence of PW1 that on 28/08/98 the deceased deposited Ug. Shs. 20,000,000/= by bank draft on account No. 20 vide exhibit P.5 but the same was not credited and money was not indicated in the bank statement marked Exhibit P4.

For the respondent, Constance Tusimire, DW1 testified that in the ledger card, there is no entry of a deposit of Ug. Shs. 20,000,000/= as stated in the deposit slip. DW1 pointed out that the deposit slip was not received in the bank, she also testified that being a claim of draft deposit, there was no draft number or origin and so no cashier would receive such a voucher. She mentioned that there are no details of the draft number or which bank it was coming from and concluded that the deposit was not genuine.

On the alleged deposit of Ug. Shs. 20,000,000/=, the learned trial Judge stated in his judgment on page 40 paragraph 1 lines 3 - 27 and page 38 paragraph 1 line 3 - 19 as follows:

*"On the Shs. 20 million deposit I am equally unwilling to accept that the deposit was genuine. I do not believe the evidence of Plaintiffs on this matter proof of which rests on the holder of a Deposit slip...In the present case the defendant's witness Constance Tusimire pointed out that the deposit slip was suspect. She indicated that the bank draft allegedly deposited was not indicated in the deposit slip which bore no details such as the number of the draft and the originating bank. The slip according to her had not been received at the bank..."*

In arriving at his decision the learned trial Judge referred to his earlier decision in the case of **Kabao vs Co-operative Bank Ltd High Court Civil Suit No. 452 of 2001** where it was held

that; *“deposit slips are not incontrovertible documents beyond dispute...once certain features were missing the onus of proof rested with the alleged depositor...deposit slips are not receipts.”*

During his cross examination, the appellant was not sure who had made the deposit between himself and the deceased. At one point he testified that it was him who deposited the Ug. Shs. 20,000,000/= but he later stated that it was the deceased who deposited the draft but he did not know who had given his father the draft. He did not seem to know facts surrounding the alleged deposit of Ug. Shs. 20,000,000/=.

The deposit slip in issue is exhibit P4 dated 28/8/98 indicating the draft amount of Ug. Shs. 20,000,000/=. I note that the deposit slip refers to a draft which cannot be sufficiently identified. There is no draft number or originating bank. The person who filled in the deposit slip did not indicate his or her name.

In their pleadings the respondent had denied the deposit of Ug Shs. 20,000,000/= on the deceased's account and in the respondent's oral evidence the reasons for denial of the transaction were stated. Since the contents of the deposit slip had been disputed, the burden shifted to the appellant as holder of the deposit slip to prove that the deposit was indeed made as alleged. I find that the appellant did not adduce sufficient evidence to discharge that burden and I cannot fault the learned trial Judge for finding as he did.

Accordingly, I also find that ground 3 is without merit and it therefore fails.

The appellant's complaint in ground 4 is that the learned trial Judge erred in fact and in law in not granting the remedies sought. It is my considered opinion that my findings in grounds 1, 2 and 3 above dispose of ground 4 as well.

In conclusion, I find no merit in all grounds of this appeal and thus no reason to upset the decision of the trial court. I would dismiss the appeal with costs here and below.

Dated at **Kampala** this.....12<sup>th</sup>.....day of .....Nov.....2019.



Hellen Obura

**JUSTICE OF APPEAL**