

UGANDA / JUDGMENT

Butime Katabarwa v Standard Chartered Bank (Civil Suit No. 963 of 2020) [2022] UGCommC 59 (19 July 2022)

[2022] UGCommC 59

COURT

Commercial Court of Uganda

BEFORE

Cornelia Kakooza Sabiiti, J

CASE / FILE NUMBER

Civil Suit No. 963 of 2020

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA**(COMMERCIAL DIVISION) CIVIL SUIT NO. 963 OF 2020****ERIC BUTIME KATABARWA::::::::::::::::::::::::::::::::: VERSUS****STANDARD CHARTERED BANK:::::::::::::::::::::::::::::::::****BEFORE: HON. JUSTICE CORNELIA KAKOOZA SABIITI****JUDGMENT**

The plaintiff sued the defendant for declarations inter alia that the defendant breached the banker-customer contractual relationship, breached the duty of care owed to the plaintiff, that the defendant unlawfully debited the plaintiff's account with a sum of UGX 5,816,563/=, compensation of UGX 100,000,000/=, interests and costs of the suit.

The facts constituting the plaintiff's cause of action are that; the plaintiff is a customer of the defendant bank operating Account Number 0101403158500 at Speke Road Branch in the names of Eric Katabarwa Butime. That on Friday 21st August 2020, a sum of UGX 5,816,563/\$=\$ was unlawfully debited from the plaintiff's account and credited to the Account of Youth Services unknown to the plaintiff. On the 22nd August 2020, the plaintiff having discovered the unlawful debit, reported the matter to the defendant Bank and requested it to reverse the disputed visa transaction but it did not heed. That although the defendant's officials confirmed receipt of the plaintiff's complaint and undertook to provide $\frac{C}{19}$ the plaintiff with response after the investigations that was to last 60 days they did not.

That on the 21st October 2020, the plaintiff was distressed by the loss of his money in the challenging Covid pandemic, kept following up in vain. That in total disregard of its obligations towards the plaintiff, the bank refunded a sum of UGX 5,816,563/- on the plaintiff's account on 24th October 2020 after a period of 2 months and having gained time use of the said money for profit making.

On the other hand, the defendant bank filed its written statement of defence pleading that the plaintiff and the defendant have enjoyed an affectionate banker-customer relationship without incident over a period of time. That the plaintiff applied for and was granted a Visa card which he would use to transact on his account with the defendant. Following the applicant's complaint to the defendant in respect of improper debiting of his account with UGX Shs. 5,816,563/-, the defendant bank contacted Visa, which investigated and later confirmed that it was a Visa Fraud where the plaintiff's details were used.

That there was a charge back from the merchant where the defendant bank received the money which was fraudulently debited from Visa and paid the same to the plaintiff's account and there is no loss suffered by him. That the investigations were done within the timeline that Visa is expected to investigate complaints. That the plaintiff acted negligently or fraudulently when he made his Visa card details available to third parties who perpetuated the fraud of UGX 5,816,563/-.

The plaintiff filed a reply to the defendant's defence denying the above allegations.

Representation

The plaintiff was represented by M/s Springs Advocates while the defendant was represented by M/s Ligomarc Advocates. This court gave directives to both parties in which they should file their submissions, however to date, it is only the plaintiff's submissions on file. I have only taken regard of the same. The hearing is adjourned.

Issues

The issues for determination are the following-

- i) Whether the plaintiff has a cause of action against the defendant?
- ii) Whether the defendant breached the Banker-Customer relationship?
- iii) What are the remedies available to the parties?

Resolution

To prove his case, the plaintiff, Eric Butime Katabarwa, testified as PW1 while the defendant called two witnesses: DW1 Mike Lameck Sonko and DW2 Belinda Florence Nabaggala.

Issue I : Whether the plaintiff has a cause of action against the defendant?

The plaintiff's counsel submitted citing the Black's Law Dictionary 8th Edition at page 664 where cause of action was defined as a group of operative facts giving rise to one or more bases for suing: a factual situation that entitles one person to obtain a remedy in court from another person. He also relied on the case of *Auto Garage & Others Vs Motokov* No. 3 (1971) EA 514 that a party to have a cause of action, proof must be shown that the plaintiff enjoyed a right, that right has been violated and the defendant is liable. He also relied on the case of *Lucy Nelima & 2 Others Vs Bank of Baroda Uganda Limited* Civil Suit No.55 of 2015.

Counsel strongly submitted referring to the plaintiff's claim, that the plaintiff held UGX 5,816,563/= on his account No.0101403 158500 with the defendant to which he had a right to property, the right was violated by the fraudulent, unlawful or improper withdrawal of the said sum and the defendant is liable as it concedes that it was an improper withdrawal, not authorized by the plaintiff. That the plaintiff did not participate in fraud and the Bank owes a duty of care, fiduciary duty and duty to safe guard the plaintiff's deposits.

I have considered the above submissions by counsel. It is not in contention that the plaintiff is the defendant's customer holding Account No. 0101403 158500 from 9th March 2010. It is also uncontroverted that on the 2nd August 2022 money to a tune of UGX 5,816,563/= was debited from the plaintiff's account to the Account of Youth Services without the plaintiff's authorization. By virtue of the bank-customer relation there is a legal obligation that is owed or due to another that needs to be satisfied. In the case of *Makua Nairuba Mabel Vs Crane Bank Ltd* Civil Suit No.380 of 2009 the court cited the case of *Simex International, Inc. v. Court of Appeals* No. 88013, 19 March 1990, 183 SCRA 360 where it was held that "the bank is under obligation to treat the accounts of its depositors with meticulous care, always having in mind the fiduciary nature of their

relationship" The Bank owes a duty of care, fiduciary duty to the plaintiff. I find that the plaintiff has established a cause of action against the defendant.

Issue 2: Whether the defendant breached the Banker-customer relationship?

With regard to the unauthorized/improper debiting of the plaintiff's account with a sum of UGX 5,816,563/=: counsel for the plaintiff submitted that the plaintiff attached his Bank statement PEX I to prove that he held an account with the defendant bank. That the defendant admitted that the plaintiff was a customer, there existed a contractual relationship between the plaintiff and the defendant from which the defendant debited UGX 5,816,563/: without the plaintiff's mandate. That at the hearing, DW1 and DW2 testified that UGX 5,816,563/: was fraudulently and improperly debited from the account and the plaintiff neither initiated nor sanctioned the said transaction. That the two witnesses confirmed that the contractual relationship between the plaintiff and the defendant had a duty of care, a fiduciary duty, a duty to act in good faith and a duty to safe guard the plaintiff's deposit account.

11/12/2022.

Counsel for the plaintiff submitted that DW2 admitted that the Bank issued the plaintiff a Visa card. At all times the defendant disclosed to the plaintiff that Visa International was its agent, the defendant therefore cannot deny liability yet Visa International acted on its behalf. Counsel prayed that the court finds that the defendant breached the Bank-customer relationship when it failed to safeguard the customer's deposits either by itself or through Visa International.

Counsel further argued that the defendant breached the Bank-customer relationship by not keeping the plaintiff informed of either the progress of the investigations or the findings. That according to PEX2, the plaintiff reported the fraudulent transaction on 22nd August 2020. The defendant confirmed receipt of the said complaint and undertook to respond to the plaintiff within 60 days as per PEX3, that this did not happen. That it was until the plaintiff threatened to escalate the matter to Police and lodge an official complaint with Bank of Uganda at the lapse of 60 days, then the defendant refunded the sum of UGX 5,816,563/= to the plaintiff.

Counsel further asserted that DW1 testified before court that the defendant is not liable to the plaintiff by virtue of clause 21 in the account opening forms DEX1 at Page 5, but during cross examination he confirmed that the transaction contemplated herein must be by the customer, the transaction in issue was not by the customer, the clause was not applicable in the circumstances, that the plaintiff did not participate in the fraud that happened to his account. That court should find that the said indemnity clause cannot absolve the defendant of liability.

I have carefully considered the above arguments. It has been led in evidence that on 21st August 2022 UGX 5,816,563 was debited from the plaintiff's account No. 0101403 158500 to Youth Services without his authorization. The plaintiff wrote a complaint through an email (PEX.2) dated 22/08/2020 to the defendant to the effect that

concerning the said unauthorized withdrawal. On the 24th October 2020 the defendant bank replied to the same and I quote;

... Following your confirmation that the transactions were not authorized by yourself, the matter was raised to our frauds team for immediate investigation. The investigation is carried out within 60 days and at the conclusion of our investigation, we will contact you immediately.

During cross-examination of DW1, he told court that the complaint was investigated. He said that Visa Incorporated investigations revealed that the plaintiff's Visa card details were stolen from him by an unknown third party and were used to make an online transaction and payment to merchant Youth services. That the plaintiff made online transactions on several online sites where his credentials could have been accessed by a fraudster. DW1 during cross-examination, also told court that he transacts frequently online. Following the investigations, it was established from DEX.5 that the customer's debit card details were stolen outside of their knowledge, the customer's debit card details were supplied to make online payments and online transactions were authorized without 3D verification. On the 24th October 2020 the plaintiff's money was refunded back to his account.

Justice Christopher Madrama in the case of Konark Investments (U) Ltd Vs Stanbic Bank Uganda Ltd Civil Suit No. 116 of 2010 observed that: It is an implied term of the contract between the banker and the customer that the banker will observe reasonable skill and care in and about executing the customer's orders. Generally, that duty is subordinate to the bank's other contractual duties. Additionally, if a bank executes an order knowing it to be UU dishonestly given, or shut its eyes to the obvious fact of the dishonesty, or acted recklessly in failing to make such enquiries as an honest and reasonable man would make, the bank

the bank would plainly be liable see Barclays Bank Versus Quince Care Ltd and Another (1992) for ALL ER page 331.

In this case, there is no evidence adduced that the Defendant bank took part in the fraudulent transaction or it shut its eyes to the obvious fact that money had been fraudulently debited from the plaintiff's account, or failed to make any inquiries. The moment the bank received the plaintiff's complaint, it forwarded it to its fraud team and investigations by Visa incorporated began, inasmuch so that it was discovered that the plaintiff did not take part in the transaction, his money was thereafter refunded. The investigations commenced on 24th August 2020 and it was communicated to the plaintiff that they would last for 60 days and on 24th October 2020, exactly 60 days later, the plaintiff's money was refunded back to his account. In my view, given the circumstances where the defendant bank has not been proven to have participated in the fraud, I establish no liability of the fraud on the defendant.

With regard to the issue of not keeping the plaintiff informed, the plaintiff told court that the defendant communicated to him only once on email in the period of 60 days and a phone call. That on the eve of the deadline of the 60 days he wrote a reminder email to the defendant. That the Defendant on 24th October 2020 without any communication, closure report or apology in disregard of his complaints, credited his account with UGX 5,816,563/=.

During cross examination, DWI told court that after investigations of 60 days are done, the outcome is either the customer did not take part in transaction in which case a refund is made or the investigations may show that the customer took part in the transaction in which case no refund is made. DWI further testified that none of these outcomes from the investigation were directly communicated to the customer/plaintiff.

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The Black's Law Dictionary 7th Edition at page 523 defines the term fiduciary

duty as a duty of utmost good faith, trust, confidence and conduct owed by a fiduciary to the beneficiary. A duty to act with the highest degree of honesty and loyalty toward another person and in the best interest of the other person. In the instant case, I cannot fault the bank for not communicating during the 60 days of the investigation since the plaintiff was put on notice of the

time period the investigations would take. However, I fault the Defendant bank for not communicating the outcome of the investigations to the plaintiff as part of their duty of care to their customer who only got to know of the outcome of the investigations in court. I find that the bank breached its fiduciary duty to the plaintiff by concealing or omitting to notify him of the outcome of the investigations.

With regard to the indemnity clause in the account opening, during cross-examination plaintiff counsel referred DW1 to DEX1, the account opening details at paragraph 21 which states; 'the bank will take no responsibility whatsoever for any loss incurred as a result of use of the visa card by customers over internet for* any transactions or for any other purposes.' DW1 confirmed to court that investigations revealed that the plaintiff did not initiate the transaction. Therefore, the indemnity clause does not apply to the plaintiff in this case.

Issue 3: What are the remedies available to the parties?

The plaintiff sought for damages in the sum of UGX \$100,000,000/\$ =, interest of 21% of UGX 5,816,563 from 21st August 2020 to 24th October 2020 when it refunded to the plaintiff's account. Interest on damages at a rate of 30% from the date of filing till payment in full, costs of the suit and any other relief.

It is trite law that "measurement of the quantum of damages is a matter for the $\frac{c}{19}$ $\frac{d}{12}$ discretion of the individual Judge which of course has to be exercised judicially with the general conditions prevailing in the country and prior decisions that are

relevant to the case in question". Rcf'cr kr Moses Ssali a.k.a, Bebe Cool & Others Vs Attorney General & Others HCCS 86/2010.

In my view, the award of UGX 100,000,000/: as general damages is rather on the higher side since general damages are not intended to better the position of the claimant as was held in the case of Uganda Commercial Bank v. Kigozi ¹²⁰⁰²¹ EA 305. The plaintiff refunded the money within the 60 days following investigations by Visa International. The submission that the defendant abdicated its role by having Visa investigate the matter is unbundled since the fraudulent transactions took place under the Visa platform who were best placed to investigate and communicate their findings to the defendant. Given the circumstances of the case. I therefore award of UGX 15,000,000/: as general damages as sufficient for the breach of fiduciary duty of failure by the defendant to communicate to the plaintiff the outcome of the investigations.

With regard to the interest prayed for, the guiding principle on interest under Section 26 (2) of the Civil Procedure Act is that it is at the discretion of court which must be exercised judiciously taking into account the circumstances of each case. Given that the bank did not contribute to the fraud but took reasonable steps to investigate and refund the plaintiff's money within the stipulated 60 days. I find no justification to award interest on the sum of UGX 5,816,563 from 21st August 2020 to 24th October 2020 when it was refunded. However, interest at the court rate is awarded on the general damages from the date of judgment till payment in full.

With regard to costs, it is the established principle of law under section 27 (2) of the Civil Procedure Act that "costs of any action, cause or matter shall follow the event unless Court for good cause orders otherwise". The Plaintiff being the successful party in this case is therefore entitled to costs of the suit and they allowed.

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In the result, Judgment is entered for the Plaintiff against the Defendant on the following terms;

- i) The Plaintiff is awarded general damages of UGX 15,000.000/.
- ii) Interest is awarded on the general damages at the court rate from the date of judgment until payment in full.
- iii) Costs of the suit are awarded to the plaintiff.

It is so ordered

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CORNELIA KAKOOZA SABIITI JUDGE

Date: 19th July 2022

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Prepared on 13 October 2026 · Esheria