

**Ham Enterprises Limited & 2 Others v
Diamond Trust Bank (U) Limited & Another
(Miscellaneous Application 654 of 2020)
[2020] UGCommC 172 (7 October 2020)**

[2020] UGCommC 172

Source: ulii.org · Research copy typeset by Esheria. Not court-issued or certified.

BEFORE: HON. DR. JUSTICE HENRY PETER ADONYO RULING**1. Application:**

- 20 This application was brought by notice of motion under Order 9 rules 6, 8, 10 and 30 and Order 52 rules 1, 2 and 3 of the Civil Procedure Rules SI 71-1 and section 98 of the Civil Procedure Act. It seeks orders that;
- a) The Respondents joint written statement of defence filed in HCCS No. 43 of 2020 be struck out on grounds that;
- i. It is a perpetration of illegalities committed by the Respondents in illegally conducting financial institutions business without a licence and / or conducting financial institutions business in contravention of the Financial Institutions Act (2004) as amended.

1

- ii. Alternatively, but without prejudice it is frivolous, vexatious and evasive and fails to disclose any reasonable answer to the Applicants claim of illegal conduct of financial institutions business by the Respondents.
- iii. Judgment be entered against the Respondents upon the Applicants' claim in HCCS No. 43 of 2020.
- iv. Costs of this Application be provided for.

2. Grounds for this Application:

The grounds in support of the application are contained in the affidavit of Allen Kagoya and they are;

15 i. That the Applicants filed HCCS No. 43 of 2020 against the Respondents seeking among others the recovery of monies unjustly and illegally obtained from the 1st Applicant's bank accounts and for various breaches of contractual, fiduciary and statutory duties.

20 ii. That the Applicants subsequently filed an amended plaint with leave of court on 10th August 2020 where they *inter alia* specifically raised questions of the illegality of the 2nd Respondent's conducting of financial institutions business in Uganda without a license to do so under the Financial 25 Institutions Act, 2004 (as amended).

iii. That the Applicants further raised the question of illegal conduct of the 1st Respondent in facilitating and abetting the illegal conducting of financial institution business by the 2nd

10

5 Respondent which by itself amounted the contravention of the Financial Institutions Act 2004 (as amended).

- iv. That the Respondents filed a joint written statement of defence pursuant to which the 2nd Respondent admitted to being a commercial bank licensed to operate in Kenya but which was * * * • 10 conducting financial business in Uganda.
- v. That the 2nd Respondent was obliged by law to show that it was licensed to conduct financial institutions business in Uganda by the authority of both the Central Bank of Uganda and the Central Bank of Kenya but it did not.
- 15 vi. That the Respondents joint amended written statement of defence also admits that the 1st Respondent was the appointed agent of the 2nd Respondent in undertaking the impugned business in Uganda without a license,
- vii. That the Respondents were again obliged by law to show that 20 the banking agency in (f) above was approved and authorized by both the Central Bank of Uganda and the Central Bank of Kenya but they did not.
- viii. That the Respondents joint amended written statement of defence is a perpetration of illegalities committed by the 25 Respondents in Uganda and Kenya which defence is bad in law and ought not to be maintained or cordoned by this Honourable Court.
- ix. That the 1st Respondent by facilitating acts and omissions of aiding and abetting the commission of offences under the 30 Financial Institutions Act 2004. (as amended) makes the 1st

⁵Respondent both a facilitator and principal offender of the committed offences.

- x. That in the alternative, but without prejudice, the amended joint written statement of defence is frivolous and vexatious as it constitutes general denials, is evasive and it fails to disclose 10 any reasonable answer or at all, to the aforesaid applicants claim of illegality.
- xi. That for the above reason, the defence raised by the respondents is meritless as it fails to answer or give any meaningful and substantiated answer with sufficient 15 particularity to the points of substance raised by the Applicants claim of illegality and the same ought to be struck out.
- xii. That this application raises substantial questions of law which can be determined on the face of the pleadings and thus should be able to dispose of the main suit without the need for an 20 interparty hearing.
- xiii. That this application raises serious questions of law of great importance as it is essential to the proper conduct of financial institutions business in Uganda.

The Respondents on the other hand opposed this application and 25 raised several grounds as seen from the, affidavit of Stephen Kodumbe, the head of Legal, head debt recovery and Company Secretary of the 2nd Respondent.

5 xiv. Affidavits:

Both parties filed affidavits in support and opposition to this application.

For the Applicants the affidavit in support was deposed by Ms. Kagoya Allen, who is stated to be an advocate of the high Court of 10 Uganda working for gain with M/s Muwema and Co Advocates, one of the law firms which is retained by the Applicants to handle HCCS No 43 of 2020 which is the head suit in this matter.

Ms. Kagoya deposed that she had had the opportunity to study the pleadings in the head suit, the relevant law touching it and thus was 15 authorised and familiar with the dispute between the parties as being among others the fact that the Applicants in HCCS No 43 of 2020 seeks the recovery of monies unjustly and illegally obtained from the 1st Applicant's bank accounts and various other breaches of contractual, fiduciary and statutory duties.

20 Ms. Kagoya averred that she was knowledgeable with the law relating to the act of lending and extension of credit by a financial institution under the Financial Institution Act, 2 of 2004 (As Amended).

Ms. Kagoya Allen further averred that the Applicants filed an amended plaint in the head suit wherein are they claiming a refund 25 of more than USD 25 Million in addition to other monies which the Applicants alleged were illegally deducted from the Applicant's accounts which they alleged raised questions of illegality arising from the conduct by the 2nd Respondent of financial institutions business

5 10 15 20 in Uganda without a license issued under the **Financial Institutions Act 2 of 2004** (As Amended) and the illegal conduct of the 1st Respondent in facilitating and abetting the illegal conduct of financial institutions business by the 2nd Respondent in Uganda in contravention of the Financial Institutions Act, 2 of 2004 (As Amended) for the said law defines the act of conducting a financial institution business to include the lending and the extension of credit by a financial institution which business were conducted by the respondents in contravention of the law and which was admitted by the Respondents in their filed joint written statement of defence in which the 2nd Respondent admits being commercial bank licensed to operate in Kenya but which conducted financial institutions business in Uganda, an act which was illegal and calls for the striking of the Respondents written statement of defence by allowing this application and awarding the Applicant prayers herein and also the specific prayers in the head suit of High Court Civil Suit No 43 of 2020.

25 The details of Ms. Kagoya Allen deposition is on record but among others alludes to the fact that the said respondents' joint amended statement of defence admits that the fact of the 1 respondent being appointed as an agent of the 2nd respondent in undertaking the impugned business in Uganda without a license, contrary to the law in addition to the fact of the respondents again being obliged by law to show that the banking agency was approved by both the Central Bank of Uganda and the Central Bank Of Kenya which they did not rendering their actions to offend both the Financial Institutions Act

30

6

c

5 10 15 2 of 2004(As Amended) of the Laws of Uganda and the Banking Act Chapter 488 of the Laws of Kenya in addition to the Kenyan Central Bank Prudential Guidelines on Agent Banking and Outsourcing of Financial Services which actions were punishable under the said law which called for the dismissal of the Respondents joint amended Written Statement of Defence which is" a perpetration * of illegalities committed by the Respondents both in Uganda and Kenya and thus bad in law and ought to be struck out as this this Application raises serious points of law which is the illegal acts of the Respondents which if sustained dispose of the head suit without the need for any interparty hearing and also renders all the credit facility agreements, mortgages and other securities executed thereunder being declared illegal and unenforceable *ab initio.*

20 25 The Respondents denied all the claims of the Applicants and in rebuttal tendered in an affidavit deposed by Mr. Stephen Kodumbe, the Head of Legal, Head Debt Recovery and Company Secretary of the 2nd Respondent Company, which is on record, the essence of which is that the 2nd Respondent never carried out any financial institutions business in Uganda and that the credit facilities alluded to by the Applicants were offered to the 1st and 2nd Plaintiffs / Applicants in Kenya after the 1st Applicant applied for credit facilities there with the said facilities transferred to the 1st Applicant's account in Kenya and the 2nd Respondent only instructing the 1st Respondent which is based in Uganda to act as the collection agent for the 2nd Respondent through an escrow account in order to enable repayments of credit

5 facilities taken out in Kenya but not acting as its agent in the conduct of financial institution business in Uganda.

Mr. Kodumbe further averred that the 2nd Respondent bank does not fall within the definition of a financial institution as envisaged under the Financial Institutions Act (as amended) 2004 and that as a result . ' t • 10 it did not carry out financial institutions business in Uganda and that the credit facilities offered to the 1st and 2nd Plaintiffs were not offered in Uganda. He deponed further that the 1st Applicant applied to the 2nd Respondent for a credit facility in Kenya which was obtained in Kenya and transferred to his account from Kenya.

- 15 Further to Mr. Kodumbe, the burden of proving financial business was conducted by the 2nd Respondent in Uganda is upon the Applicants. On whether the 1st Respondent was an agent of the 2nd Respondent in the conduct of financial institutions business, Mr. Kodumbe averred that the 2nd Respondent instructed the 1st 20 Respondent to act as a collection agent for the payments to be made by the 1st Applicant to an escrow account of the 2nd Respondent in repayment of the credit facilities taken from the 2nd Respondent and the 1st Respondent did not act as agent of the 2nd Respondent to conduct financial institutions business in Uganda.

- 25 He also averred that the even if the court found that there were illegalities in the issuance of the credit facilities, the same would not be a ground to strike out the Respondents' written statement of defence.

5 Additionally, that the 2nd Respondents provided specific denials and defences and answers to the allegations raised in the amended plaint of the Applicants in their written statement of defence.

Ms. Mbabazi K. Emejeit, Head of Legal and Company Secretary of the 1st Respondent Company also swore an affidavit which is on record * ' t • 10 also opposing this application deposing therein that Ms. Allen Kagoya was not competent to swear the affidavit which she did so on behalf of the Applicants since she lacked capacity to so do in addition to asserting that indeed the 2nd Respondent never conducted any financial institutions business in Uganda as alluded to by the 15 Applicants for the referred credit facilities were offered to the 1st and 2nd Applicants in Kenya after the 1st Applicant had applied to the 2nd Respondent for the same in Kenya with the same facilities obtained in Kenya and even transferred to his account in Kenya.

Therefore, according to both Mr. Stephen Kodumbe and Ms. Mbabazi 20 K. Emejeit this application was premature and thus should not be allowed such the head suit of HCCS No 43 of 2020 be allowed to proceed by this court with parties required to adduce factual evidence to support the contentions therein.

3. Submissions:

25 This application proceeded by way of submissions both is in support and in opposition of the same. The submissions which are on record are briefly summarized below.

a. Applicants submissions:

The Applicants through their submissions raised four issues for consideration and these are;

- i) Whether M / s Allen Kagoya, an advocate was authorized and competent swear the affidavit in, support this application.
- ii) Whether the written statement of defence in HCCS No 43 of 2020 is a perpetration of illegalities committed by the Respondents in illegally conducting financial institution business in Uganda without a license and / or in contravention of the Financial Institutions Act (2004) as amended.
- iii) Whether the Respondents written statement of defence is frivolous, vexatious, evasive and it constitutes general denials.
- iv) Whether the Applicant is entitled to judgment to be entered against the Respondents upon its claim in HCCS No. 43 of 2020.

On the first issue of whether the affidavit sworn by M/ s Allen Kagoya, an advocate is authorized and competent to support this application, the submissions of the Applicants are that Ms. Kagoya is competent to swear the stated affidavit on behalf of the Applicants since she is an advocate working with M/s Muwema & Co. Advocates, which a law firm retained by the Applicants and that she was well versed with the facts relating to the transactions between the parties herein.

10

5

15

5 10 15 20 25 On whether the written statement in HCCS No. 43 of 2020 was a perpetration of illegalities committed by the Respondents in illegally conducting financial institution business without a license and/ or in contravention of the Financial Institutions Act (2004) as amended, it was submitted for the Applicants that the financial transactions that the Respondents arrived at with the Applicants were contrary to the Financial Institutions Act 2 of 2004 (as amended) since the 2nd Respondent did not have a license to operate in Uganda but issued credit facilities to the Applicants who are residents of Uganda in addition to the fact that the 1st Respondent acted as an agent of the 2nd Respondent in order to facilitate the said financial transactions which was illegal and contrary to the Financial Institutions Act since the expression financial institutions business was defined under section 3 of the Financial Institutions Act, Act 4 of 2004 as amended by section 3 (k) & (1) of Act No. 2 of 2016 to include the extending or lending money held on deposit by way of financing of commercial transactions, consumer and mortgage credit as well as engaging in foreign exchange business with the 2nd Respondent being a foreign bank engaged in the business of lending or extending money held on deposits through mortgage credit and financing of commercial projects which acts were required to be licensed by Bank of Uganda even for a foreign bank and thus was illegal and expressly prohibited under the Financial Institutions Act where no prior licence was

30 According to counsel for the Applicants, there is sufficient evidence to show that the alluded financial institutions business was

obtained.

u

5 commenced in Uganda as the mortgage facility letter was drafted in Uganda by Ugandan lawyers and even witnessed in Uganda and further that the 1st and 2nd Applicants were Ugandan companies based in Kampala, Uganda and issued securities for the loan facilities through mortgages, debentures and other securities registered in 10 Uganda and that the 2nd Respondent never sought the permission of the Bank of Uganda to carry out its business in Uganda as required under sections 4(1) and 117 of the Financial Institutions Act.

Counsel for the Applicants then concluded on this issue that since the Respondents had not specifically denied conducting financial institutions business in their written statement of defence which was mission then this was an incurable defect which as provided for under Order 6 rule 8 and Order 8 rule 3 of the Civil Procedure Rules meant that the facts in the plaint in the head suit were admitted which this court should find so.

20 On the issue of whether the 1st Respondent was appointed as agent of the 2nd Respondent in contravention of the Financial Institutions Act, counsels for the Applicants submitted that this was true since the Respondents did not specifically deny this in their written statement of defence and so this should be deemed to have been 25 admitted a fact which is confirmed by clause 6 of the facility letter which was dated 23rd October 2017 in which the 2nd Respondent domiciled in Kenya appoints the 1st Respondent domiciled in Uganda as its collection and lending agent which action was illegal since no proof was attached to the written statement of defence in the head

- 5 suit to shown that prior approval of Bank of Uganda and the Central Bank of Kenya was sought for the 1st Respondent to act as an agent which omission was in contravention of **Regulation 5 Of The Financial Institutions (Agent Banking) Regulations 2017 and Section 126 (3) of the Financial Institutions Act** as well as the 10 relevant laws of Kenya making the 1st Respondent 'to become a principal offender as provided for under section 19 of the Financial Institutions Act when it took part in and facilitated the commission of an offence and therefore this should be found so.
- On whether the Respondents written statement of defence frivolous, 15 vexatious, evasive and it constitutes general denials, it was submitted for the Applicants it should be found so for the same offered no specific denials, was general in character and failed to substantiate the claims raised by Plaintiffs that the credit facilities were illegally obtained and so this issue should be found in the 20 affirmative.

Given all the above counsels for the Applicants thus urged this court to allow this application with the prayers made therein including the dismissal of head suit.

b. Respondents submissions:

25 In reply to the Applicants' submissions, the Respondents adopted the issues raised by the Applicants and answered them as follows.

On the issue of whether M/s Allen Kagoya, an advocate of the Applicants was authorized and competent to swear support this

- 5 application, counsels for the Respondents argued that it was improper for an advocate with personal conduct of a matter to swear an affidavit as to contested factual matters in a case with any such deposition to be struck out since could only have knowledge of an advocate and not of the facts. In making this allusion counsel relied

- 10 on the holding in *The Attorney General of the Republic of Burundi vs Secretary General of the East African Community Appeal No. 2 of 2019* as well as Regulation 9 of the Advocates (Professional Conduct) Regulations which not only prohibits such acts by an advocate but that in addition to the bar in not swearing the affidavit 15 counsel's affidavit was full of falsehoods which makes it irrelevant and should thus be found so.

On whether the written statement of defence of the Defendants in the head suit was a perpetration of illegalities committed by the Respondents in illegally conducting financial institution business 20 without a license and / or in contravention of the Financial Institutions Act (2004) as amended, Counsel for the Respondents insisted that the said written statement of defence contained several triable issues that require the court's investigation including the fact of whether Applicants did borrow any money from the Respondents 25 which they have failed to service in addition to the fact the issue of whether the Respondents committed any illegalities by conducting financial institution business in Uganda or that indeed the impugned credit facilities being obtained in Kenya remaining questions of fact that require the interrogation by court.

- 5 Furthermore, counsels maintained that the 2nd Respondent has never carried out any lending activity or extended any money held on deposit in Uganda so as to amount to conducting a financial institutions business in Uganda in contravention of sections 3 of the FIA 2004 and the Financial Institutions (Amendment) Act No. 2 of 10 2016 since the 2nd Respondent never lent to any of the Applicants money held on deposits in Uganda and as such did not conduct financial institutions business in Uganda for there was indeed evidence that the credit facility of USD 4.5 Million that was issued by the 2nd Respondent was obtained in Kenya and that since the Act is itself did not regulate financial institutions business or deposit taking outside of Uganda by a foreign financial institution then the fact of the 2nd Respondent carrying out a financial business transaction in Uganda would require proof through the adducing of evidence in a trial rather than at this preliminary stage in addition to

20 the fact of a Ugandan borrowing money outside Uganda not amount to deposit taking.

Lastly counsels submitted that this court should find even act of registering of mortgages in as securities for the loan facilities should be found to be a different transaction regulated by a different law and 25 further that there was no law that prohibits a Ugandan from mortgaging its property to a foreign financial institution.

Given the above counsels for the Applicants urged this court to dismiss this application with costs.

5 4. Decision of Court:

I have carefully considered the submissions of both parties and the authorities that they have cited. I have likewise adopted for resolving this Application the issues framed by the Applicant and I proceed to consider them and make findings on each as below.

10 On the issue of whether the affidavit sworn by Allen Kagoya, an advocate is authorized and competent to support this application, I note that both parties relied on different authorities and came to differing conclusions. The fact of the matter, however is that Ms. Allen Kagoya swore an affidavit in support of the application wherein she 15 asserts that she was an advocate of the High Court of Uganda working with one of the law firms, M/s Muwema and Co. Advocates

- retained by the Applicant to handle the main suit. A detailed consideration of her affidavit shows that Ms. Kagoya mainly deposes on the fact of being legal counsel with brief to provide legal counsel
- 20 to the Applicants mainly on the questions regarding the legality or not of the 2nd Respondent's engaging with the Applicants in conduct amounting to the carrying out of a financial institutions business in Uganda as well as the fact of 1st Respondent facilitating acting as an agent of the 2nd Respondent in that respect.
- 25 I note from the Affidavit of Ms. Kagoya that that these briefs entailed the provision of legal advice to the Applicants in regard to whether the actions of the parties or any of the parties contravened any of the provisions of the Financial Institutions Act, 2004 in relation to financial institutions business in Uganda.

5 From the affidavit of Ms. Kagoya it is clear to me that she deposes same in support of this application on behalf of her clients as a legal practitioner being best suited to do so given her knowledge and skills on the laws of Uganda and given the fact that the matters deposed to in support of this application are technical in nature as they relate to 10 whether the transaction between the Applicants and Defendants met the requirement of the Financial Institutions Act, Act 2 of 2004 As Amended I would concur with the submissions of counsels for the applicants that M/s Kagoya was competent to swear the affidavit in support of this application and not acted in contravention of any is professional duties for her situation is very similar to that which the court faced in the case of *Collin Kasule vs Fina Bank and Another Civil Revision No. 5 of 2015* and after examining the nature of the brief of counsel came to the conclusion that counsel of an applicant was capable and acted in order by swearing an affidavit in support 20 of an application made by parties only if to restate legal issues . I would find similarly so in this respect for the affidavit sworn here mainly relate to the interpretation of the law and not of facts which counsel for and applicant is by training and experience ought to be capable of doing so. This issue is thus answered in the affirmative.

25 On the issue of whether the written statement of defence is a perpetration of illegalities committed by the Respondents in illegally conducting financial institution business without a license and / or in contravention of the **Financial Institutions Act (2004)** as amended. Reference is made to section 3 (k) of the Financial

5 Institutions Act (2004) FIA, a financial institution which provides a definition of a company carrying a financial institution business as;

> *"a company licensed to carry on or conduct financial institutions business in Uganda and includes a commercial bank, merchant bank, mortgage bank, post office savings bank, credit institution, a building society, an acceptance house, a discount house, a finance house or any institution which by regulations is classified as a financial institution by the Central Bank".*

The said Act defines, a "*financial institution business"* to mean "

" ... *the business of (a) acceptance of deposits; (b) issue of deposit substitutes; (c) lending or extending credit, including*— *(i) consumer and mortgage credit; (ii) factoring with or without recourse; (iii) the financing of commercial transactions; (iv) the recovery by foreclosure or other means of amounts so lent, advanced or extended; (v) forfeiting, namely, the medium term discounting without recourse of bills, notes and other documents evidencing an exporter's claims on the person to whom the exports are sent; (vi) acceptance credits; (d) engaging in foreign exchange business, in particular buying and selling foreign currencies, including forward and option type contracts for the future sale of foreign currencies; (e) issuing and administering means of payment, including credit cards, travelers' cheques and banker's drafts;"*

10

15

5 With a *"foreign bank"* defined in the same section to mean;

> " *a body corporate or entity incorporated or formed under the laws of a country other than Uganda that*—

> *(a) is a bank according to the laws of any foreign country where it carries on business;* ** % -

10

15

(b) carries on a business in a country other than Uganda that if carried out in Uganda, would be wholly or to a significant extent, financial institution business

Going by the above definitions I would find as a matter of fact that there is no doubt that the 2nd Respondent is indeed a foreign bank for the purposes of the transactions between the parties.

However, the submissions by the Applicants are that the Financial Institutions Act applies to both local and foreign banks carrying out transactions. Relying on the definition of a financial institution reproduced above find that the said definition applies equally to the 2nd Respondent even if the 2nd Respondent issued credit facilities in Kenya to Ugandan entities without the approval of the controlling authorities as is clearly provided for under the Act for the Act makes it illegal for any 'money held on deposit' whether within Uganda and or outside it as seen from section 117 of the Financial Institutions

25 Act, 2004 which requires that a foreign bank to seek authorization of Bank of Uganda before it can engage in such activities, such as lending and extending credit facilities with the only exception to this

5 section is being the taking of deposits. For clarity the said provision of the law states;

Section 117 of the Financial Institutions Act.

10

"1*17 (1) A foreign bank may, in such form and in such manner as shall be prescribed by the Central Bank by statutory instrument apply to the Central Bank for permission to establish a representative office in Uganda to engage in such limited activities, excluding the taking of deposits as the Central Bank may approve. "*"

15 20 Given the above provision, I am of the considered opinion that indeed by their very actions the Respondents committed illegalities when money facilities were rendered by the 2nd respondent to the 1st and 2nd Applicants without prior authorization of the Bank of Uganda even where such funds were availed outside Uganda for the import of the Financial Institutions Act is that prior authorization is required

of the Bank of Uganda was a prerequisite.

- Having found as above I now turn to the question of whether the 1st Respondent acted as an agent of the 2nd Respondent to conduct financial institutions business in Uganda.

Regulation 5 of the

- 25 Financial Institutions (Agent Banking) Regulations 2017, provides that;

"A financial institution shall not conduct agent banking in Uganda without the prior written approval from the Central Bank."

In respect to this issue, arguments have been made to the effect that the 2nd Respondent is a not a financial institution and it did not carry A ** • out any financial institutions business in Uganda. However, given the facility letter dated 23rd October 2017 which is attached to this application and in the head suit, I would find that mortgage credit transaction was carried out illegally and that fact becomes a clear question of law and not fact as was held in the Philippine's case of **Republic Vs. Malabanan** cited with approval in the Kenyan case of **Zacharia Okoth Obado vs. Edward Akong Oyugi & 2 others Election Petition No. 4 of 2013**, Court observed that;

> *"a question of law arises when there is doubt as to what the law is on certain state of facts*,
while there is a question of fact when the doubt arises as to the truth or falsity of the alleged facts".

In the leading Canadian case of **Canada (Director of Investigations and Research) Vs. Southern Inc. [1997] 1 S. C. R. 748**, the Supreme Court of Canada held that,

25 "Questions of law are questions about what the correct legal test is, whereas questions of fact are questions about what actually took place between the parties"— *and questions of mixed law and fact are questions about whether the facts satisfy the legal tests."

20

5

10

- 5 Thus what would be in issue in this application is whether or not the mortgages and credit facilities rendered to the Applicants perpetrated illegalities which permeates the whole case which when brought to the notice of a court would render such transactions indefensible as was held in the case of **Makula International vs His Eminence**
- 10 **Cardinal Nsubuga and Another [1982] HCB 11** where it was held that court cannot sanction that which is illegal and that illegality once brought to the attention of the court overrides all questions of pleadings.
- From the pleadings in the head suit it is clear to me that the written 15 statement of the defence filed by the Respondents / Defendants does allude to the fact that DTB (K), the 1st Respondent here offered credit facilities to the 1st and the 2nd Applicants outside Uganda and within the letter of offer tied the same to DTB Uganda Limited which is the 2nd Respondent to act as its agent to collect funds for the repayment 20 of the said credit facilities.
- These actions, in my view, are by their very nature the carrying out of financial institution business which are regulated under section 4 (1) of the Financial Institutions Act 2 of 2004 As Amended for such actions requires valid licenses granted for that purpose by the 25 Central Bank of Uganda.

The fact of this matter shows syndicated financial institution business by the 1st and 2nd Respondents aimed at dodging the seeking of a licence from the relevant authority which actions are clearly illegal such as that I would remain with no option by the

5 authority of the holding in **Makula International Vs His Eminence Cardinal Nsubuga and Another [1982] HCB 11** would render such actions illegal once brought to the attention of the court and therefore overrides all questions of pleadings.

In this matter the allegation is to the effect that the written statement 10 of defence filed in the head suit perpetuates an illegality. The Respondents denies that their actions were illegal, however my reading of the said written statement of defence actually proves the pot that an illegality was committed given the reading of paragraph 19 of the Respondents written statement which was in response to is the Plaintiffs allegations as contained in their paragraph 13 (k) of the Amended Plaint the contents of both are reproduced below;

Paragraph 13 (kl of the Amended Plaintiff;

"On *the other hand, the 2nd Defendant being a financial institution licensed to carry on banking business in Kenya* 20 *could not conduct financial institution business in Uganda. Therefore, the financial transactions it contracted with the Plaintiffs were entered into contrary to the Financial Institutions Act 2004 (As Amended) and as such are illegal and unenforceable."*

25 The Applicants / Defendants response to the above is contained in paragraph 19 of the written statement of defence which is as below.

Paragraph 19 of the Written Statement of Defence:

"Paragraph 13 (k) of the Amended Plaintiff is denied and the Plaintiff shall be put to strict proof thereof The defendants contend that the credit facilities obtained by the Plaintiffs from the 2nd Defendant were lawfully obtained in Kenya and are recoverable and enforceable"*

The import of the defence above clearly proves to me the fact of the 2nd Defendant conceding that it is a financial institution licensed to carry on banking business in Kenya and it conducted financial institutional business in Uganda through the first defendant without first seeking the authority and license from Bank of Uganda as provided for in the Financial Institutions Act, 2 of 2004 As Amended.

That pleading is a perpetuation of an illegality which goes to the root of the dispute between the parties and thus by virtue of the holding in *Makula International* Vs *His Eminence Cardinal Nsubuga and Another* (Cited above) cannot be sustained by a court of law rendering all acts carried as a result of the illegal action of the Respondents to be null and void ab initio. I would thus answer this issue in the affirmative.

25 On the issue of whether the 1st Respondent was appointed as agent of the 2nd Respondent in contravention of the Financial Institutions Act, 2004 As Amended it was submitted by counsels for the Applicants that this was true position since the Respondents did not specifically deny this in their written statement of defence and that this fact was confirmed by paragraph 6 of the facility letter dated 23rd

10

15

- 5 October 2017 by which the 2nd Respondent, a financial business institution domiciled in Kenya appointed the 1st Respondent, a financial business institution domiciled in Uganda as it collection and lending agent which action was illegal since no proof was shown that prior approval of Bank of Uganda was sought for the 1st

- 10 Respondent to act as an agent and * that this is a violation of Regulation 5 of the Financial Institutions (Agent Banking) Regulations 2017 and Section 126 (3) of the Financial Institutions Act, 2 of 2004 As Amended as well as similar the laws of Kenya. That by doing so the 1st Respondent thus became a principal offender 15 under Section 119 of the Financial Institutions Act, 2 of 2004 As Amended when it took part in and facilitated the commission of an offence under the Financial Institutions Act, 2 of 2004 As Amended.

The Respondents denied this assertion insisting that the 1st Respondent never became an agent of the 2nd Respondent in 20 contravention of the law.

The relevant communications and the laws in relations to the allegations above are reproduced here below;

- i. Paragraph 6 of the Letter of Offer dated 23rd October ,2017 titled Establishment of a term loan for USD 4,000,000 (United States 25 of America Dollars Four Million):
 - > *By accepting this Letter of Offer you irrevocably authorise Diamond Trust Bank (U) Kampala who are our appointed agents for this lending to debit your account held with them with the said appraisal fee and taxes simultaneously*
- *with establishment of the facility in the banks books and on each anniversary of the term loan and remit funds to us.*
- ii. Regulation 5 (1) of the Financial Institutions (Agent Banking) Regulations 2017 provides that:
- *A financial institution shall not conduct agent banking in Uganda without the prior written approval from the Central Bank.*
- *iii.* Section 126 (3) of the Financial Institutions Act, 2 of 2004 As Amended provides that;
- 15 20 *A financial institution which does any act prohibited by this Act or fails to do anything required by this Act commits an offence and where no specific penalty is provided the financial institution is liable on conviction to a fine not exceeding two hundred and fifty currency points and in the case of a continuing offence to an additional fine not exceeding fifty currency points for each day on which the offence continues.*
- iv. Section 33 (4) of the banking Act of Kenya provides that;

25

5

10

The Central Bank may issue directions to institutions generally for the better carrying out of its functions under this Act and in particular with respect to (a) the standards to be e adhered to by an institution in the conduct of its business in Kenya or in any country where a branch or

subsidiary of the institution is located and; (b) Guidelines to be adhered to by institutions in order to maintain a stable and efficient banking and financial system

v. Section 117 of the Financial Institutions Act, 2 of 2004 As Amended on Representative offices for foreign banks:

(1) A foreign bank may, in such form and in such manner as shall be prescribed by the Central Bank by statutory instrument apply to the Central Bank for permission to establish a representative office in Uganda to engage in such limited activities, excluding the taking of deposits as the Central Bank may approve.

* "»•

(2) An application under subsection (1) shall be accompanied by the prescribed application fee.

(3) Where a foreign bank is granted permission to establish a representative office in Uganda, it shall not, without the prior permission of the Central Bank, *do any of the following*—

- (a)
- (b)
- (c) ;

[(d\)](#page-26-0) ; or

(e) **engage in any other activity other than such limited activity as the CENTRAL BANK may authorise the foreign bank to conduct.**

(4) Any person who—

(b) contravenes any of the provisions of subsection (3) of this section, commits an offence and is liable on conviction to a fine not exceeding two hundred and fifty currency points or imprisonment not exceeding two years or both.

25

30

10

5

5 10 15 From the above, I would tend to agree with the submissions of the Applicant that indeed the 2nd Respondent not only appointed the 1st respondent to be its agent in Uganda but that the 2nd respondent carried out financial business transactions on behalf of the 1st Respondent in contravention of the law both in Uganda which acts are illegal and would call for it being penalized since it- pleaded and attached no licensed authorizing it to transact business on behalf of the 2nd Respondent as provided for by the Financial Institutions Act , 2004 As Amended with such acts punishable on conviction to a fine not exceeding two hundred and fifty currency points or imprisonment not exceeding two years or both.

Arising from the determination as I have made above I would answer this issue in the affirmative that indeed the 1st respondent acted as an agent of the 2nd respondent when it carried out the impugned financial business transaction without first obtaining a license from

20 Bank of Uganda in contravention of the law which act is criminal and illegal.

Having found as above, I will find the remaining issues moot and so I will not delve into them further.

25 Therefore, arising from the illegal circumstances relating to the conduct of financial institute business by both the 1st and 2nd Respondents, I would allow this application with costs.

5 In addition, I would make consequential orders as listed below.

5: Orders:

Arising from the findings above I would make the following ORDERS, CONSEQUENTIAL and other SUPPLEMENTARY ORDERS;

- i. This Application is allowed with -costs to the Applicants.
- ii. The joint written statement of the Respondents filed in HCCS No. 43 of 2020 which is a perpetuation of illegalities is hereby struck out.
- iii. Judgment is hereby entered for the Plaintiffs as prayed for in their joint plaint by virtue of Order 9 rules 6, 8, 10 and 30 and Order 52 rules 1, 2 and 3 of the Civil Procedure Rules SI 71-1 and Section 98 of the Civil Procedure Act as follows;
 - a. I declare that by their illegal actions the Respondents / Defendants breached the different loan agreements terms entered into with the Applicants / Plaintiffs in the period between 16th February 2011 to 16th November 2019.
 - b. I declare that Credit Facilities between the 1st and 2nd Plaintiffs and the Defendants have since been settled at law.
 - c. I do order for the recovery by the Applicants from the Respondents/Defendants jointly of the Ugx. 34,295,951,553/= (Uganda Shillings Thirty-Four Billion Two Hundred Ninety-Five Million Nine Hundred Fifty -One Thousand Five Hundred and Fifty-Three Only) and USD. 23,467,670.61 (United States Dollars Twenty-Three

10

15

Million Four Hundred Sixty-Seven Thousand Six Hundred and Seventy Only) being monies that were unlawfully taken by them from the Applicants / Plaintiffs loan accounts.

- d. I do declare that since the 2nd Defendant did not produce and or attached a licensed allowing it to conduct financial institutions business in Uganda from Bank of Uganda in respect of the business alluded hereto then the alleged credit facilities that were stated to have been offered by it to the first Plaintiff were illegal and thus void *ab initio* and consequently unenforceable.
- e. I do declare that the appointment of the 1st Defendant by the 2nd Defendant as agent bank and security agent in respect of the 2nd Defendant's loan was illegal, unethical, unlawful, in breach of trust, in breach of fiduciary duty and in breach of the Financial Institutions Act 2004 (As Amended) as well the Bank of Uganda Consumer Protection Guidelines 2011 and the Kenyan Banking Act.
- f. I do hereby issue an order for the unconditional release / discharge of mortgages allegedly created over the Plaintiffs' properties comprised in Kyadondo Block 248 Plot 328 land at Kawuku, FRV 1533 Folio 3 Plot 36 - 38 Victoria Crescent II Kyadondo and LRV 3176 Folio 10 Plot 923 Block 9 Land at Makerere Hill Road and all Corporate and personal guarantees issued by the Plaintiffs.

10

5

25

- g. I do hereby vacate the order previously issued by this court for the taking an audit and account of all the 1st and 2nd Plaintiffs' loan accounts for the period between 16th February 2011 to date as it is now overtaken by events.
- h. I do issue a permanent injunction restraining the Defendants from enforcing * the mortgages over the Plaintiffs' properties comprised in Kyadondo Block 248 Plot 328 land at Kawuku, FRV 1533 Folio 3 Plot 36 - 38 Victoria Crescent II, Kyadondo and LRV 3176 Folio 10 Plot 923 Block 9 Land at Makerere Hill Road.
- i. I do not offer any General and punitive damages as against the Respondents for I have found nothing to warrant such.
- j. I do declare interest on (c) above from the date of filing this suit at the prevailing court rate of 8% per annum till payment in full.
- k. I award costs of this application and the head suit to the Applicants/ Plaintiffs.

vi. I do issue directives to Bank of Uganda which is the implementing authority under the Financial Authorities Act 2 of 2004 As Amended to take such necessary actions and measures to ensure that the provisions of the law is implemented in accordance with the intention of the law such as to protect the Ugandan economy from illegal hemorrhages and uncontrolled flows of financial resources and to ensure that financial institutional business in Uganda is operated within the letter of

10

15

5

5 the law to protect the nascent banking business industry in Uganda.

I so order.

Hon. Dr. Justice Henry Peter Adonyo 10 Judge 7th October 2020

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://ulii.org/akn/ug/judgment/ugcommc/2020/172/eng@2020-10-07>

CASE PAGE <https://chat.esheria.ai/case-law/uganda/ham-enterprises-limited-2-others-v-diamond-trust-bank-u-limited-miscellaneous-application-654-of-2020-2020-ugcommc-172-7-october-2020-and-others-unkn>

Prepared on 14 October 2026 · Esheria