THE SUPREME COURT DECISION IN HAM VS DTB IS AGAINST THE PUBLIC POLICY OF UGANDA

The Supreme Court generally mishandled the Ham vs DTB Civil Appeal No. 13/2021 when it delivered its judgment on the 6th of June 2023. This judgment was against the public policy of Uganda. In the handling of the case, the Court intentionally set up its ladder against the wrong wall and it ended up resolving the wrong problem.

There are two imaginary problems which influenced the Supreme Court decision. The first imaginary problem was that Ham is using legal technicalities to avoid paying his debts said to be owed to DTB. The second imaginary problem was that the High Court decision which was made in favour of Ham outlawed syndicated lending transactions between foreign banks and Ugandans.

We note that an unusual dissonance greeted the delivery of what should have been a landmark judgment in guiding the prudential regulation of the banking sector. This muted reception of the decision is caused by the courts failure to yield to the true facts of the case. The court also completely misdirected itself on the sovereignty of the Ugandan law when it declared incredibly, that there is no law which stops a foreign bank from lending in Uganda and that any transaction it carried out was legal per excellence. By subscribing to a de regulation of foreign led financial transactions conducted in Uganda, the judgment consigned itself into an irretrievable legal absurdity.

Origin of the Dispute

Ham's dispute with DTB Uganda started in 2019 when he conducted an Audit of his bank accounts and discovered that DTB had over a long period of time, stolen the equivalent of UGX 123bn from his accounts. Ham sent his audit findings to the bank in November 2019 and requested for a meeting to reconcile accounts. At that time Ham had an existing credit facility with DTB Uganda and Kenya amounting to US$ 10M. This facility had been contracted between 2017/2018.

Ham was however surprised when DTB turned down the Audit meeting request and instead started taking enforcement measures to recover the US$ 10M facility. Ham run to Court in early 2020 to report the stealing of money from his accounts and also to raise the issue of the illegal lending transaction of DTB Kenya which was done without prior approval of the Central Bank as required by the **Financial Institution Act 2004 (as amended)**.

The dispute would not have escalated to the courts if DTB had acted reasonably and sat down with its customer to look into the audit querries he had raised. On the facts, it is Ham who demands money from DTB, not vice versa.

Decision of the High Court

After hearing the arguments of the parties, the High Court declared that the US$ 10M credit facility was illegal for want of regulatory approval. The illegality attached to the US$ 10M credit transaction and not Hams claim of UGX 123bn which Court ordered to be refunded. Secondly, Court refused to order the Audit of the US$ 10M credit transaction since it had already been declared to be an illegality.

The above decision gave rise to the second imaginary problem which relates to the alleged outlawing of syndicated loans by the High Court. For the record, the High Court did not make any order in its decision, outlawing syndicated lending transactions between a foreign bank and any Ugandan. The only inference which can be drawn from the High Court decision is that any lending by a foreign bank in Uganda required the prior approval of the Central Bank.

Smuggling of the Syndicated Loan Issue in the Case

The syndicated loans was never part of the DTB appeal lodged in the Court of Appeal nor was it part of Hams appeal lodged in the Supreme Court. Anyone reading the file causally would have established that there was no syndicated loan arrangement between Ham and the DTB Banks.

In simple terms, a syndicated loan is an arrangement where two or more lenders come together to raise a loan to a customer by issuing the loan under the name of one of the lenders who is licensed to operate in the territory of the borrower.

In our case, DTB Kenya issued a direct credit facility of US$ 4.5M by issuing offer letters on the 23rd of October 2017 and 24th of August 2018 for Us$ 4M and US$ 0.5M respectively. There was no syndicated loan offered by the DTB to Ham and each Bank made a separate loan offer.

In April 2023, the Commercial Court of Tanzania sitting at Dar es Salaam delivered an instructive judgment on the legality of a loan issued by a foreign bank and an alleged arrangement of syndication in the case of **Kilimanjaro Oil Ltd vs KCB (Tanzania) Ltd** and **KCB (Kenya) Ltd Commercial Case No. 7/2020**.

In that case, KCB (Kenya) Ltd issued a loan of US$.15M directly to the Plaintiff and KCB (Tanzania) Ltd, its subsidiary was the arranger/intermediary. The Plaintiff challenged the legality of the transaction on the ground that it was procured in contravention of the Banking and foreign exchange laws of Tanzania. The Banks plea that this was a syndicated loan was rejected and Court nullified the loan transaction for want of regulatory approval.

Sovereignty of the Ugandan Law

Under the principle of the sovereignty of laws, a country's legislature passes laws for the governance and regulation of any matter conducted in that contrary. If any person, local or foreign is involved in any regulated matter in that country, that person is subject to the laws of that country to the extent that they are involved in the regulated activity.

It is therefore repugnant to the sovereignty of our national law for the Supreme Court to have ruled that the **Financial Institutions Act**, which is the substantive law regulating banking business in Uganda, does not apply to foreign banks conducting the same business in Uganda.

Under **Article 79 of the Constitution**, it is only Parliament which has the power to make laws on any matter for the peace, order, development and good governance of Uganda. These laws are made to govern all persons that dwell and operate in Uganda, whether local or foreign.

We take the view, the Supreme Court had no power to usurp the power of parliament and start discriminating between foreign and local banks in respect of a statute of general application relating to the banking sector. (See **Article 21 of the Constitution**).

Denial of a Fair Hearing

Whereas there was no evidence of loan syndication, the Supreme Court still allowed DTB to smuggle a ground of foreign loan syndication into Hams appeal. This was allowed in violation of the rules of the Court which required DTB to have submitted a cross-appeal or notice of affirmation of the decision of the Court of Appeal before introducing new matters. (See **Rules 87 and 88 of the Judicature (Supreme Court Rules) Directions S. 1 13 – 11**.

Whereas the court allowed DTB to flout its rules and seek orders outside the appeal, the same court could not allow Hams request to be heard on a formal application for judgment against DTB in respect of the admitted grounds of appeal (see **Order 13 r. 6 Civil Procedure Rules**). It also refused to entertain an application to adduce additional evidence from the Central Bank of Kenya indicating that DTB Kenya had illegally conducted banking business in Uganda (see **Rule 30 the Judicature (Supreme Court Rules) Directions** (supra).

The public policy of Uganda does not allow the courts to selectively apply its rules and the law to favour one party against the other nor does it allow the courts to deny a litigant access to the courts to plead his or her case. The Supreme Court judgment in Ham vs DTB was issued in contravention of the constitution and its constitutionality shall be challenged.

Despite the court indicating that the application for judgment on admission would be considered in the final judgment, it made no mention of this application in the said judgment. What is odd is that the application to adduce additional evidence is pending ruling even if the court has issued its final judgment. This is a real mockery of the administration of justice.

The Socio-Economic Implication of the Judgment

It is ironic that the Supreme Court decision is promoting a shadow banking system at a time when Uganda is struggling to get off the grey list of the **Financial Action Task Force (FTF)**, an International watchdog which monitors countries with significantly weak anti-money laundering and terrorist financing enforcement regimes.

Whereas supporters of the Supreme Court decision would like us to believe that the decision is endeared to international practice of foreign lending which will increase foreign cash inflows, studies show that grey-listing leads may lead to a decline of foreign capital inflows, downgrading of the country's credit rating while increasing the cost of doing business in the respective country. The latter occurs partly due to the attendants high costs on electronic and financial transfers of commercial banks, large costs on processing letters of credit etc.

Logic would have dictated that allowing unregulated foreign banks to engage in predatory practices which compete against the regulated banks can only increase the fragility of the financial system. Syndicated loans are regulated financial transactions everywhere in the world. The Supreme Court had no legal basis for ruling otherwise.

The Supreme Court decision can also be used by other foreign money lenders who are not a deposit-taking banks in Uganda, to cross the border and just start transacting without obtaining a license under the **Tier 4 Microfinance Institutions & Money Lenders Act 2016**. The decision has left the back door open to other foreign lenders to profiteer on the carte blanche offered by the Supreme Court in an apparent binge to exploit unsuspecting Ugandans whilst denying the country much needed tax revenue.

Abdication of Duty by BoU

The BoU has abdicated its statutory by declaring that is does not regulate lending obtained from foreign banks since they do not take deposits from the Ugandan public. However, one of the key functions of the Bank of Uganda is to maintain monetary stability. (See **S. 4 Bank of Uganda Act Cap 51**). One wonders how can BoU maintain the monetary stability of the country when it refuses to monitor the external cash inflows from foreign sources.

Why should BoU as a regulator of the banking industry work so hard to constantly devise means of ensuring that some players in the Banking industry operate outside the rule book? It is the duty of BoU to ensure prudence of the monetary and Fiscal policy of the country. It appears however that BoU has joined hands with the Supreme Court to take us in the opposite direction.

Conclusion

In conclusion, though the Supreme Court judgment is dangerous, it will remain largely irrelevant to the gainful regulation of commercial banking and the practice of the law in Uganda. No serious Bank will be motivated to engage in illicit money transfers and come out to openly acknowledge it, because of this judgment.

Secondly, no serious court (including the Supreme Court itself) can allow it to continue flouting its rules of procedure and the established principles of law. Any court which chooses to do that will cease to function as a court of law.

Thirdly, no serious lawyer in Uganda can risk his client's case (whether local or foreign) by casually defying the court's rules of procedure and the governing law of Uganda.

We cannot just mourn the passing of this Supreme Court decision, we shall challenge it.

DATED at Kampala this **19th** day of **June 2023**.

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