

# Beyond the Media Rhetoric: A Legal and Economic Exposition of the Ham v DTB Case

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In order for one to understand the rationale behind the court decision in the Hamis Kiggundu Versus Diamond Trust Bank Uganda & Kenya (Ham Vs DTB) case, we have to go back four decades, to when the rule on courts not entertaining illegalities was set. The rule avers that *“an illegality once brought to the attention of court cannot be allowed to stand.”* On 13th of December 1978, a company called Makula International Ltd filed a case against two respondents, His Eminence Cardinal Nsubuga and Rev. Dr. Father Kyeyune, each in their representative capacity. On the same day, the company also filed an application asking for permission of the court to sue the respondents in their representative capacity, as it is a legal requirement that before you sue a person in their representative capacity, you must seek first the permission of court.

Two days after the filing of the suit and the application (15th of December 1978), Judge Benjamin Odoki (as he then was) allowed the company's request to sue the respondents in their representative capacity. But this was a little too late, as six months later, the case would be dismissed on grounds that it was illegal for Makula International Ltd to have filed a case against the respondents in their representative capacity (two days) before getting the permission to do so. It did not matter whether the company had a legitimate claim against the respondents, or how the two parties got to the stalemate that resulted into the court case. All the court cared about was the fact that there are certain sets of rules that were supposed to be followed, and that Makula International Ltd did not follow those rules. PERIOD...!! The import of the above case law to the Ham V DTB case is that once an illegality is discovered and is brought to court's attention, then

whatever actions which were accruing therefrom collapse along with it.

## Brief Facts of the Ham V DTB Case

Mr. Hamis Kiggundu had for a very long time been a client of Diamond Trust Bank Uganda. Over the course of their Bank-Customer relationship, Ham took different facilities from the Bank and both parties were working harmoniously. In the course of this relationship, Ham expressed interest in borrowing more money than Diamond Trust Bank – Uganda could lend because of the limitations on the Credit exposure for Commercial Banks in Uganda (also known as the legal lending limit i.e. the most a bank can lend to a single borrower). It is at this point that DTB Uganda introduced Ham to DTB Kenya, to borrow from them the amount in excess of legal lending limit.

Following this relationship, it is alleged that between 2011 and 2016, Mr. Kiggundu acquired loans totaling to 41 Billion Shillings from DTB Uganda and Kenya to finance his real estate businesses. All was well until Ham (allegedly) discovered that monies to the tune of 85 billion Shillings and 34 billion Shillings were illegally deducted from his accounts without his knowledge and consent. He then filed a case, against the respondents seeking among others the recovery of monies unjustly obtained from his bank accounts and for various breaches of contractual, fiduciary and statutory duties by the DTB Uganda and Kenya.

However, upon discovering that DTB Kenya did not have a license to operate in Uganda, Mr. Kiggundu's legal team filed an amended plaint, where they specifically raised the question of the illegality of the DTB Kenya conducting financial institutions

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business in Uganda without a license to do so under the Financial Institutions Act, 2004. In its statement of defense, DTB Uganda and DTB Kenya simply admitted that indeed, the Kenyan Bank did not have the said license. At this point, all the Judge had to do was to rely on the legal doctrine of precedent by referring to the *locus classicus* case of Makula International Ltd Versus His Eminence Cardinal Nsubuga. It is upon the grounds of the legality of DTB Kenya operating in Uganda without a permit that the Judge immediately entered a Ruling in favor of Mr. Hamis Kiggundu.

## The implications of this decision on Uganda's Banking Sector

My humble opinion it that just as the decision was on the face of it legally sound (as described above), the court decision was also economically sound. When you step back and look at the risk posed by banks and other financial institutions that operate in the country without a license from Bank of Uganda (BoU), you discover that the court decision in this matter was not only protecting the banking sector but the Ugandan economy at large. The rationale for the Financial Institutions Act providing for the regulation, control and discipline of financial institutions by the Central Bank, is to ensure protection of consumers of banking services and monetary policy. With this therefore, below are three reasons why I strongly believe that notwithstanding the character of the parties (especially the plaintiff and his lawyers) and the need for creditors to pay their debts in full, the court decision was good for the economy.

**Consumer Protection for users of financial institutions services:** The rationale for which the Financial Institutions Act gave bank of Uganda regulatory mandate was the power asymmetry that exists in the relationship between Financial Institution and their Customer. Given the position of power that financial institutions hold in this relationship, leaving the parties to relate without any regulator is to “throw the customer under the bus. In this case, the court was thus right, in finding that a foreign bank doing Financial Institutions Business in Uganda without a license from the regulator was in breach of the law.

I am therefore of the view that Bank of Uganda “*threw a customer under the bus*” by publically declaring that the nature of the transaction Mr. Kiggundu entered into with Diamond Trust Bank Kenya, was not one of those regulated under the Financial Institutions Act. In this case, the outstanding questions include; who then regulates that space which neither Uganda nor Kenya regulates? To which authority should a Ugandan consumer seek redress in the event they need it? Why shouldn't other banks that seek to lend beyond the legal lending limit opt to use the same lacuna?

For this matter therefore, insofar as court sought to protect Ugandan Consumers of Financial Institutions services, the court decision was as good as they come.

**Monitory Policy considerations:** The International Monetary Fund defines Monetary policy as a course of action adopted by the monetary authority of a nation (in this case BoU) to control either the interest rate payable for very short-term borrowing (borrowing by banks from each other to meet their short-term needs) or the money supply, often as an attempt to reduce inflation or the interest rate to ensure price stability and general trust of the value and stability of the nation's currency. In this case, Bank of Uganda's day-to-day job includes keeping an eye on the money supply in the economy for the reasons stated above. So if that is the case, what is wrong with a court of law finding that anyone who brings money into the Uganda, and does so outside the regulatory oversight of Bank of Uganda does so illegally?

In view of the facts at hand, DTB Uganda did not have enough money to lend its customer, Mr. Kiggundu Hamis. It resorted to reach out to its sister bank DTB Kenya to establish an arrangement through which the customer would borrow the money it could not lend him. For all intents and purposes, this transaction squarely fell within the Monetary Policy regulatory mandate of Bank of Uganda. Any attempt to say that such transactions of infinite amounts of money can freely be done without a license from Bank of Uganda, exposes the Ugandan economy to the very risks that the Financial Institutions Act and the Bank of Uganda Act sought to protect the economy from. Therefore, for the sake of ensuring that Bank of Uganda continues to manage the rate of inflation, price stability and stability of the Uganda Shilling, the realm in which Mr. Kiggundu and DTB Kenya operated in ought to be regulated by the Financial Institutions Act.

**Illicit Financial Flows (IFFs) and money laundering risks:** In the wake of the global war against terror, governments across the world started pay more attention to the movement of money into, out of and through their territories. Whereas this had always been an area of concern due to drug trade and corruption, it is the practice of financing acts of terrorism that got everyone acting. In Uganda's case, we not only have the Anti-Money Laundering Act, 2013 (as Amended), but have also established the Financial Intelligence Authority as an extra safeguard, alongside Bank of Uganda.

Given the amount of money that the Ham Vs DTB case was dealing with, it is clear that this transaction out to have been subjected to, and brought to the attention of, all the relevant regulatory bodies. It is the failure to do so that brought the legality of

this transaction in issue. When Bank of Uganda published its statement declaring that DTB Kenya needed not to have obtained a license prior to operating in the country, it exposed major IFFs and money laundering loopholes in Uganda financial regulatory framework. One of the major IFF risk factors is loans between parent companies and their subsidiaries against which unnecessarily high interests can be paid (higher than the lending rates) so as to reduce incomes liable to taxation for the company in question. BoU's admission simply means that this has likely been happening and will continue happening if the ruling in this case is set aside.

I note that many pundits discussed this case based on emotions, the character of parties involved and morality. They argued that Ham, having received the money cannot go scot free without refunding it, even if Diamond Trust Bank (K) Ltd did not have a license to lend to him. This argument is supported by the Contracts Act of Uganda and a famous English case of *Fibrosa Spolka Akcyjna vs Fairbran Lawson Combe Barbour Ltd*. Basing on the doctrine of unjust enrichment and the remedy of restitution, anyone who derives benefit from an illegal or frustrated contract must restore the other party to the position in which they were before the contract.

Notwithstanding the fact that I believe the court decision was right insofar as legality is concerned, I agree that in the event Mr. Kiggundu got any unjust enrichment from the transaction, he must pay his outstanding debt, if any. But the fact that he could have benefited from the loan does not make an otherwise illegal dealing of DTB Kenya, legal.

Finally, I also opine that the fears that this ruling will constrain the flow of credit into the economy are unfounded. Obtaining a license is supposed to be a matter of hours if the applicant's paper work is in order. It will only be a problem if BoU makes this unnecessarily long. Additionally, the costs involved are so negligible that they would not increase the cost of credit. Finally, such licenses cannot be a

deterrent because the profits maximizing financial institutions still need Uganda's market just like Uganda's market needs them. So I ask, if the ruling is set aside, who will protect the Ugandan consumer from the profit maximizing financial institution?