

THE REPUBLIC OF UGANDA
THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO. 380 OF 2009

MAKUA NAIRUBA MABEL:.....:PLAINTIFF

VERSUS

CRANE BANK LIMITED:.....:DEFENDANT

BEFORE: HON. LADY JUSTICE HELLEN OBURA

JUDGMENT

The plaintiff sued the defendant bank for recovery of a sum of Shs. 57,000,000/= which was allegedly illegally and negligently debited from her account held in the defendant bank at Iganga Branch on the basis of her forged signature. The savings withdrawal slips which bear her allegedly forged signature were attached to the plaint as annexures “A1” to “A13”. She also claimed for special, general and punitive damages as well as interest and costs of the suit.

The defendant in its written statement of defence denied all the allegations contained in the plaint. It was instead contended that all the said sums of money were paid to the plaintiff who personally signed the disputed savings withdrawal slips. Further that the respondent’s staff always exercised due diligence and care while serving the plaintiff and as such no regulations, ethics or duty was breached.

The brief facts agreed upon at the joint scheduling conference were that the plaintiff opened and operated account number 01410050903500 with the defendant bank at Iganga Branch. The account had a deposit of over Ug shs.70,000,000= by 2nd of May 2008. The balance as at the 30th April 2009 was Shs. 11,583/=.

Three issues for trial were framed at the scheduling, namely:-

1. Whether the monies on account No.0141005093500 were withdrawn by the plaintiff or under her mandate.
2. Whether the defendant acted negligently in making payments based on the disputed payment vouchers thereby wrongly debiting the plaintiff's account with the amounts paid.
3. Whether the plaintiff is entitled to the remedies sought.

At the time of the scheduling conference the originals of the disputed savings withdrawal slips were reported to be with the police. The twelve photocopies were marked for identification as the plaintiff's documents "V1"- "V12" subject to the originals being produced later. The defendant's counsel indicated that he would only rely on the Incident Report written by the Manager Crane Bank Iganga Branch. Other documents were to be tendered with the leave of court.

At the hearing, the plaintiff was represented by Mr. Alex Chandia and the defendant by Mr. Bill Mamawi. The plaintiff produced three witnesses including herself as PW1; Mr. John Baptist Mujuzi, a self-employed Handwriting Expert in a firm called Protectors International Ltd (PW2), and Mr. Ernest Thomas Akol an alleged banking expert who was by then working with Fusion Capital (U) Ltd (PW3).

The defendant produced four witnesses, namely; Ms. Monica Mutesi, a Banking Assistant with the defendant bank (DW1); D/AIP Mafabi Peter the Investigating Officer in the criminal case reported by the plaintiff (DW2); Mr. Olanya Joseph Okwonga, the Handwriting Expert working with the Government Analytical

Laboratory (DW3) and Mr. P.A. Subramanian, the Senior Branch Manager of the defendant bank, Iganga Branch (DW4).

The plaintiff who testified in fluent English stated that she was 61 years old and a primary school teacher by profession with a Diploma in Education obtained from Kyambogo University and a Diploma in Library Information of Makerere University. She testified that she was a customer of Crane Bank Ltd where she was operating two accounts; one personal account number 0141005093500 with the account name Makau Nairuba Mabel (Mrs.) where she was the only signatory and a school account. She further testified that she opened the personal account with Shs. 14,000,000/= and subsequently, Shs. 70,000,000/= was transferred to that account from her other personal account in Mbale.

She alleged that money was withdrawn from her said account without her consent and she wrote a letter of complaint to the defendant bank which was admitted in evidence as exhibit “P2” and subsequently filed a complaint with the police. A bank statement showing a balance of only Shs. 11,583/= as at the 30th April 2009 was admitted in evidence as exhibit “P1”.

She further testified that when she reported loss of her money to the Senior Branch Manager (DW4) he shouted at her in the banking hall in front of other customers, that, “if your money is finished why you don’t get a loan? Do not waste my time”. She also testified that he arrogantly uttered demeaning statements about her when he said, “just look at yourself, you are even looking pale and poor”. She observed that all these statements embarrassed her.

She also testified on the procedure she would always follow whenever she went to the bank to withdraw money but denied that she signed and withdrew money from her account using the twelve disputed withdrawal slips that were tendered for identification as PID 1-12. She further testified that the disputed withdrawal slips were taken for analysis by a handwriting expert but the report was never given to her who initiated the process. Further that she rejected the report which was brought to court by the bank on its letterhead and she got another handwriting expert to analyse them.

She also testified that consequent upon the loss of her money, the schools that she was running both in Mbale and Iganga with a population of about 1200 pupils and an income of about Shs. 65,000,000/= per term closed down and she was rendered jobless.

On cross-examination the plaintiff stated that she only reported to the police loss of money from her school account but this suit is in respect of both accounts. She testified that she lost about 57,000,000/= from her personal account but on the school account she had only Shs. 69,700/= which she went to withdraw and she was told there was no money. She later stated that at first she only reported loss of money without specifying the amount but when they finished going through the withdrawal slips together with the police the total amount on the disputed withdrawal slips came to 40,900,000/= and subsequently 57,000,000/=.

Asked what the total amount for the twelve disputed vouchers was, she stated that it was 29,900,000/= and that the 57,000,000/= included her expenses of Shs. 13,700,000/=. She further stated that the exact amount she had lost from her account was Shs. 40,900,000/=. She also testified that Mr. Simon Makau her son

just escorted her to the bank once when she went to open the account. She denied that he ever again accompanied her to the bank or filled in the withdrawal slips for her.

PW2 testified that he joined Government Analytical Laboratory in 1964 upon obtaining Bachelors of Science Degree from Makerere University and later underwent a number of trainings on examination of handwritings. He further testified that he worked as a handwriting expert both in Kenya and Uganda until 1988 when he resigned and joined private practice.

As regards this case, he testified that he was requested by the plaintiff's lawyers to examine the questioned signatures on twelve photocopies of Crane Bank savings withdrawal slips marked "V1"- "V12" and compare them with two specimens, that is, a handwritten letter dated 21st April 2009 marked "K1" and a sheet of paper bearing handwriting and signatures marked "K2". Further that he was required to give an opinion whether the writer of the specimens was the same person who wrote the questioned signatures or not.

He testified that only seven out of the twelve questioned withdrawal slips were clear enough to be examined but five were not, so he first had to subject them to some photographic techniques which made them visible enough and comparable. He further testified that he then examined and compared the documents as requested and concluded that the questioned documents contained some writing habits in letter structures which were completely different from those found on the specimen signatures which in his opinion could not have existed if the questioned signatures were written by the writer of the specimen signatures.

On cross-examination, he confirmed his findings and conclusion which he said was based on the hidden key/clue which he first searched for and identified in the specimen signatures. He boasted that there was no handwriting expert in Uganda whose training equaled his and that he could not be compromised.

PW3 testified that he was the Business Manager of Fusion Capital (U) Ltd where he had worked for slightly one year but prior to that he had worked as a Personal Banker for one year and Sales Advisor for another one year with Barclays Bank. His banking experience which qualified him to be an expert in banking was therefore two to three years! He testified basically about the banking procedures involved in opening and operating an account. On cross-examination, he confessed that he was the plaintiff's son in law but hastened to add that that relationship did not influence his evidence.

For the defendant, DW1 testified that she used to serve the plaintiff Makau Nairuba Mabel (Mrs.) who was known to the bank staff. Further that on the 16th June 2008 when the disputed Shs. 10,000,000/= was withdrawn from the plaintiff's account she personally served her when she came with her son Simon Makau. She also testified that Simon Makau filled the savings withdrawal slip with the other details after she (DW1) had filled in the account number upon request by the plaintiff. The plaintiff only signed and countersigned that voucher and she was paid after verifying her account number and signature.

She however, conceded during cross-examination that she was required to verify the account name as well and request the customer to correct and countersign if there was a mistake but stated that she did not do so in this case because the plaintiff was well known to her. Further, that with the automated system she was

able to confirm the plaintiff's identity by looking at her picture on the scanned specimen signature card as well as her identity card that she always required her to produce before payment was effected. Further still, that the printer would always give the correct account name even though the customer had not written it correctly.

DW2 testified about his role in investigating the complaint filed at Iganga Police Station by the plaintiff. In brief, he narrated how together with the plaintiff they went to the bank to retrieve the savings withdrawal slips and sorted out the disputed ones which were sixteen in number. He testified that he also took specimen handwritings and signatures from the plaintiff; Mr. Simon Makau, the plaintiff's son; Mr. Subramanian, the Manager of Crane Bank, Iganga Branch as well as some two specimen signature cards and he handed them over to the CID headquarters together with the disputed vouchers for examination.

DW3 testified about his role in examining the specimens and his findings and conclusion that he had observed significant similarities between the standard signatures on Exhibits B1-B4 (plaintiff's specimen signatures which were admitted in evidence as exhibit D1(iii)), F1-F22 (the genuine savings withdrawal slips signed by the plaintiff which were admitted in evidence as Exhibit D1(vii)) and Exhibits A1-A16 (the questioned savings withdrawal slips that were admitted in evidence as Exhibits D1(ii)(a)-(p). He concluded that the author of those signatures was the same person. He also testified that he had observed significant similarities between the specimen handwriting on Exhibits B1-B4 and the rest of the body handwriting on Exhibits A2-A4, A7-A12, A14 and A15 except the entries for the account numbers which made him conclude that the author was the same person.

DW3 further testified that he had also observed very significant similarities between the specimen handwriting on Exhibits C1-C3 and the rest of the body handwritings for the amounts both in words and figures on Exhibits A1, A6 and A16 which led to his conclusion that the author of the body handwriting on those Exhibits was the same person.

He also concluded that the author of the specimen handwriting on Exhibits D1-D3 wrote the body handwritings for the amounts both in words and figures on Exhibits A5 and A13.

On cross-examination, DW3 testified that where two expert opinions conflict with each other, court should be guided by the level of education and training of the experts involved, availability of equipment, truthfulness and ethical conduct of the experts as well as whether a photocopy was used by one and originals by the other.

The last witness for the defendant was DW4 who testified about his responsibility as a Senior Branch Manager and the banking procedures when a customer comes to withdraw money particularly how the bank officials assist illiterate customers to fill in all the details and elderly customers as well as those that forget their account numbers to fill in the account numbers when requested to do so. Further that in all cases the customer is made to sign the withdrawal slip personally.

He further testified that with savings account a 3rd party could only be paid if it is withdrawal by cheque but if it is by withdrawal slip, it is the account holder that is paid in person after verifying the identification, that is, photographs and signature. He also testified that forging was not that easy because when an account is opened

the specimen signature card is scanned and attached to the system and that way it would be impossible to forge another signature card.

He further testified about his role when the plaintiff who was well known to him as a customer of the bank complained about theft of money from her accounts. He stated that he was not at the branch on the day the plaintiff wrote a complaint about fraud on her accounts but he later came to know about it when he returned whereupon he did internal investigations and found that everything was done as per procedure of the bank. He further stated that he made an incident report to the Managing Director of the defendant bank dated 16th June 2009. The report was admitted in evidence as Exhibit D3.

On cross-examination, he conceded that the bank officials must verify the particulars of the customer like signature, account number and account name before paying but hastened to add that they do not bother a customer if there is a small mistake and the customer is well known to them, they just pay. He also conceded that certain times if there was a mistake on the account name they request the customer to fill in another withdrawal slip or cross the mistake and countersign but that they do not always do that where they trust the customer.

He further conceded that they did not have a customer in the names of Makau Mabel. N. (as was written in PID1 whose original was never produced in court and PID2 whose original was admitted as Exhibit D1 (ii) (a)) or Maka Mabel as was written on PID5 whose original was admitted in evidence as Exhibit D1 (ii) (f) or even Makau N. Nairuba as written on PID7 whose original was admitted as Exhibit D1 (ii) (j) and Makau Nairuba Makau (as was written on PID 8 whose original was admitted as Exhibit D1 (ii) (i)). All in all, on the disparity on the account name, he

contended that the bank was not negligent in failing to verify the names because according to him that mistake did not amount to negligence as, according to him, the right customer was paid.

DW4 testified that he remembered assisting the plaintiff only once to fill in the account number and the amount of money on the withdrawal slip which she signed and was paid the money. He identified A5 (Exhibit D1 (ii) (e)) as the withdrawal slip which he filled but denied ever filling A13 (Exhibit D1 (ii) (m)) and stated that DW3's report was not correct to the extent that it stated that he filled the said withdrawal slip.

Upon completion of hearing evidence, both counsels agreed to file written submissions and they did so. The matter was then fixed for judgment. However, in the process of preparing this judgment, I realized that the specimen signature card and other account opening documents for account number 041005093500 which court had directed the defendant to produce had not been tendered in evidence. Given the importance of those documents in assisting this court determine the dispute in this case, I ordered that DW4 be recalled to tender in those documents.

DW4 was then recalled and he gave the background to the opening of account number 041005093500 by first of all testifying on how the plaintiff first opened an ATM account number 0140005093500 in 2005 in Crane Bank Ltd, Mbale Branch. He was shown an account opening form and a request for the ATM card form which he confirmed was in respect of that account. He stated that ATM accounts do not have specimen signature cards because the money is usually withdrawn using ATM card. Further that in the event that a customer wanted over the counter

payment, they would compare the customer's signature with the one on the account opening form and make payments.

He further testified that they do not scan the ATM card form and keep in the system but only scan the savings account form and the specimen signature card. In this case, after opening the ATM account, the forms were kept in a folder in Mbale Branch where the account was opened. He also informed court that whenever they made over the counter payment on an ATM account from another branch where the account is not held, they first of all request the branch where the account was opened to send the account opening form by fax and payment would only be approved after looking at the specimen signature on the faxed form.

The originals of an application form for a Crane Access Visa Electron Debit Card dated 20th August 2007 for account number 0140005093500; an application form for opening a Crane Access Account dated 14th December 2005; and an introduction letter for Mabel N. Makau from the Local Council 1 chairman, Hospital Cell Village, North Central Ward Parish, Northern Division, addressed to the Branch Manager Crane Bank Limited, Mbale dated 15th December 2005 were admitted as exhibits D4 (i)-(iii) respectively. D4 (ii) and D4 (iii) bear the photographs of the plaintiff.

As regards account number 0141005093500, he testified that that was a savings account subsequently opened by the plaintiff in Crane Bank Ltd, Mbale Branch on 28th April 2008. He was shown a document which he identified as the savings account opening form for the plaintiff who was an existing account holder. Attached to that document was a photocopy of the plaintiff's passport. He stated that as an existing customer her base number was 50935 which would not change

even if she opened many types of accounts. It is only the code for account type that would change.

He further testified that since the plaintiff was an existing customer, they did not require a specimen signature card. Her signature on the savings account opening form was scanned and attached to her particulars that were already in the system. Further that they would use the signature on the plaintiff's passport as well to verify her signature. The savings account opening form for account number 0141005093500 with a photocopy of the passport attached thereto were admitted as exhibits D 5 (i) & (ii).

On cross-examination on the additional evidence given, DW4 stated that he was not the Branch Manager Crane Bank Ltd, Mbale Branch in 2005. He was transferred to Mbale in 2006 when the ATM account had already been opened. Further that the plaintiff was not required to be introduced by an account holder because the branch had just started in Mbale by the time she opened the account. All they needed was an introduction letter from the Local Council 1 official. He also testified that the particulars of the customer in the system to which they attach an existing customer's particulars include photograph but hastened to add that if they saw any variations in the photograph (appearance) they would request for another photograph.

With the above summary of evidence, I now turn to consider the written submissions filed by counsel. On issue number one, counsel for the plaintiff submitted that the plaintiff had testified that she did not write or sign the disputed withdrawal slips. Further that her testimony was corroborated by PW2, who is well educated and experienced in the field of examination of handwritings. Further still

that PW2 examined the questioned documents and found that all the disputed withdrawal slips were not signed by the plaintiff.

He attacked the report of DW3 for being unreliable and untruthful. He contended that the specimen signature card which DW3 used to compare the plaintiff's signature was given by MAKAU.N. MABEL and not the plaintiff whose account name is Makau Nairuba Mabel. He therefore, contended that DW3 used a document which was not genuine as specimen to compare the questioned documents which grossly affected the reliability and truthfulness of DW3's report.

He also contended that DW3 was either careless or did not pay attention to the task such that he referred to the plaintiff's name "Nairuba" as "Nairubi" contrary to what was written in Police Form 17A by which the request for examination was submitted. He challenged the report of DW3 where he stated that among other standard documents submitted to him for examination as Exhibits, "B4" was a photocopy of specimen signature card for Crane Bank (Iganga Branch) savings account No. 0141005093500 with Makau Nairubi Mabel as the principal and only signatory when actually the card showed that there were two signatories.

He contended that since the disputed specimen signature card had two signatories, then either DW3 told court a deliberate lie or the plaintiff's specimen signature card was removed by the defendant and replaced with the one which was given to DW3 for analysis in order to complete its fraud against the plaintiff and court should find so.

He further challenged the evidence of DW3 that he had observed significant similarities as well as some minor differences between the questioned documents

and Exhibits B1-B4 (being the genuine signature and handwriting of the plaintiff). He contended that DW3 failed to indicate in his report that he had also observed those minor differences between the said documents. He further contended that DW3 did not compare all the documents submitted for analysis which made the report incomplete. He submitted that DW3's explanation that the work would be voluminous if everything observed during examination was put in the report was untenable as there is no law which prohibits voluminous report.

He further submitted that most importantly, DW3 admitted during cross-examination that the strokes at the terminal end of initial stroke of letter "Z" on Exhibit "F16" as annexed to his report is crisscrossed as opposed to Exhibit "F2" as annexed to the same report with the same strokes parallel to each other. Further that DW3 also agreed during cross examination that the questioned signature in chart photo "A1-1" ends with thick strokes as opposed to specimen signature in chart photo "F10-2" which ends with thin strokes. He submitted that although DW3 admitted these significant differences, which did not appear anywhere in his report, he sought to justify them by testifying that they were minor differences which he inevitably ignored. He contended that DW3 was more interested in searching for the similarities than examining the documents on their merits.

He further contended that it was not surprising therefore that DW4 rejected the evidence of DW3 as contained in his report that DW4 wrote both the amount in figure and words on Exhibit "F13" (I believe he meant A13 as stated in the report) annexed to the report. He submitted that such contradictions and inconsistencies were relevant and admissible under section 10 of the Evidence Act Cap 6. He contended that the inconsistency and contradiction in question was grave in so far as it concerned the author of the said exhibit. He referred to the decision in the

case of *Uganda v George Wilson Simbwa, Supreme Court Criminal Appeal No. 37 of 1995*, to buttress his argument.

He submitted that the worth of DW3's report had been so grossly affected by such serious contradictions both from his own evidence of existing difference in the documents examined by himself and the evidence of other defence witnesses that it ought to be rejected as a whole. He argued that the contradictions could not be regarded as minor because they were deliberate lies. He wondered which of the two witnesses, that is, DW3 and DW4 should be believed as regards the author of the payment voucher attached to the report as Exhibit P.13.

He submitted that from DW3's own testimony, this court which is faced with two conflicting expert opinions should be guided by the level of education and training of the experts involved. To that end he invited court to take into account the formal education and training as well as the vast experience of PW2 which could not be compared with the training and experience of DW3. He submitted that court should on that basis believe the evidence of PW2 and disregard that of DW3 which according to his testimony was first subjected to the view and concurrence of another expert called Mr. EZATI SAMUEL, at CID Headquarters before the final report was printed. He contended that DW3's report was therefore subjective and not conclusive and independent as it ought to have been and so no weight should be attached to it.

On the disputed withdrawal slips, he contended that the name MAKAU MABEL.N on PID1 and PID2, the name MAKA MABEL on PID5, the name MAKAU N. MABEL on PID7 and the name MAKAU NAIRUBA MAKAU on PID8 are all not the plaintiff's account name and yet payments were effected on them. He

contended that this was contrary to the evidence of DW1 and DW4 that the defendant had no customer by those names. Further that payments were made against those withdrawal slips contrary to the evidence of DW1 and DW4 that usually when a customer makes a mistake, the customer is required to either fill a new withdrawal slip or correct the mistake and counter sign which accords with normal banking practice and procedure worldwide which PW3 testified about.

He argued that the justification by DW4 that the errors were minor was unconvincing and calculated to cause massive loss to the depositors of the bank who stand a risk of losing their moneys through incompetent handling of their deposits. He further argued that there was no logically justifiable reason for the plaintiff's withdrawal slips to be filled by three different individuals. He reasoned that even if it could be suggested that the plaintiff would forget her account number, the defendant did not adduce evidence to show that she could not write her name, amount in words, figures and the date. He wondered why in the other transactions that were not questioned the plaintiff was able to recall the account number, name, date and write the amount in words and figures correctly.

He concluded that from the above submission, the plaintiff had proved on a balance of probability that she did not withdraw monies using the disputed withdrawal slips nor were they withdrawn under her mandate. He submitted that the plaintiff's testimony was corroborated by PW2 who found that the plaintiff's signatures on all the disputed withdrawal slips were forged and the moneys fraudulently withdrawn by the defendant/or its servants with its assistance. Further that following the plaintiff's complaint, the defendant closed her account without giving her mandatory notice as a customer thereby confirming its fraudulent intentions.

He contended that although fraud was not specifically pleaded, there are many authorities to the effect that where parties lead evidence on new facts that were not pleaded during trial without any objection, court is entitled to rely on it and make findings accordingly. He referred to the cases of ***Kabu Auctioneers & Court Bailiffs & Muljibhai Madhvani & Co. Ltd v F.K. Motors Ltd*** SCCS No. 19 of 2009 in which Tsekooko, JSC observed as follows:-

“.....Odd Jobs v Mubia [1970] EA 476 and Nkalubo v Kibirige [1973] EA 102 are authorities for the view that a court may base a decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision...”

He contended that in this case, the issue of fraud emerged during the trial when the defendant's witnesses gave evidence and therefore this court should follow the above authority and decide on it although it was not pleaded in the plaint.

On issue number two, counsel submitted that the defendant acted negligently. He submitted that DW1 and DW4 admitted during cross examination that the defendant had no customer known to them as MAKAU N. MABEL, MAKAU MABEL N, MAKA MABEL, AND MAKAU NAIRUBA MAKUA. He contended that these errors which were so apparent did not even arouse the defendant's suspicion that the withdrawal slips were drawn payable to or to the order of a different person other than the plaintiff. He argued that the defendant failed to exercise the duty of care it owed the plaintiff as its customer with whom it had a contractual relationship by virtue of which the defendant had obligation to protect the plaintiff's account from fraudulent transactions.

He submitted that it is trite law that where a banker, such as the defendant, negligently pays out money from the customer's account on a forged signature, the banker is not entitled to debit the customer's account with such payment as the said payment would have been made without the customer's mandate and authorization. He referred to the case of **Stanbic Bank Uganda Limited v Uganda Crocs Limited SCCA No.4 of 2004 [2005] UGSC 16** to buttress that point. He quoted the observation of court to the effect that:

“Legal principles which govern the relationship between a bank and its customers are well settled. The duty is to act in accordance with the lawful request of its customer in normal operation of its customer's account consequently, a banker who has paid a cheque without authority or in contravention of the customer's orders or negligently cannot debit the customer's account with the amount. A banker is under duty of care to its customer which may require him to question payments”.

He contended that in the instant case, the plaintiff's signature was forged which, under section 23 of the Bill of Exchange Act Cap 68, is wholly inoperative. He submitted that in the premises, the defendant acted negligently when it paid out monies from the plaintiff's accounts in the manner it did and therefore it could not charge the plaintiff with payment made without her authority as a result of their apparent negligence.

Counsel for the plaintiff pointed out the duties owed by a customer to a banker as was stated by the Privy Council in **Tai Hing Cotton Mill Ltd v Lui Chong Hing Bank & Ors 1986 A.C.80** that:-

“the duty owed by the customer to the bank in the operation of the account was limited to the duty to refrain from drawing a cheque in such a manner as to facilitate fraud or forgery and duty to inform the bank of any forgery of a cheque purportedly drawn on the account as soon as he becomes aware of it.....”

He also referred to the case of **Kepeatingalla Rubber Estates Ltd V National Bank of India Ltd [1909] 2.K.Z 1010**, where it was held that the bank could not charge the company with amounts paid out on forged cheques and the plaintiff was under no duty to organize their business in such a way that forgeries of cheques could not take place.

On issue number three, counsel submitted that the plaintiff had prayed for several remedies that include; recovery of Ushs.57,000,000 as special damages, general damages, exemplary damages, interest, costs of the suit and any other relief. On special damages, he contended that the plaintiff had proved that Shs. 29,900,000/= had been negligently paid out from her account. Relying on the authority of **Stanbic Bank Uganda Limited** (supra), he submitted that the defendant is liable to pay the plaintiff Shs. 29,900,000/= in special damages.

On general damages, he submitted that its award is discretionary; consequently, the plaintiff must prove the loss, inconvenience and hardship she suffered as a result of the defendant's actions, commissions or omissions. He submitted that the plaintiff

in her testimony had shown that she was subjected to extreme anguish by the defendant's agent in Iganga Branch particularly the Senior Branch Manager who shouted at her and used demeaning words.

He further submitted that the plaintiff had also testified that consequent upon the loss of her money, the school that she was running closed down, she became unemployed, lost her source of income and generally the public including the parents and guardians of the pupils who were in her school regarded her as a dishonest person who had mismanaged and misappropriated the school funds. Further that she had also testified that she was inconvenienced by going to Iganga Police almost on a daily basis to follow up her case and in the process incurred some financial expenses that included the 62,000/= she paid as examination fees for the handwriting analysis.

He concluded that taking into account all these factors the plaintiff is entitled to general damages of Shs. 90,000,000/=. He cited the case of **Julius Rwabinumi v Hope Bahimbisombe C.A.C.A No. 30 PF 2007, [2008] UGCA 19** as per **Twinomujuni.JA** to support his submission.

On exemplary damages, counsel for the plaintiff submitted that the legal principles which govern its award are well settled, namely; that the plaintiff must show that the defendants conduct is unconstitutional, arbitrary or oppressive or that the defendants conduct is calculated to derive profits from it to the detriment of the plaintiff. He referred to the cases of **Fredrick.J.K Zaabwe v Orient Bank & Ors SCCA No.4 of 2006 [2007] UGSC 21** which stated that principle as well as the case of **Ahmed Ibrahim Bholm v Car & General Ltd SCCA No. 12 of 2002 [2004] UGSC 8**, where the Supreme Court awarded exemplary damages.

He contended that the plaintiff's evidence that she was insulted and humiliated in the open banking hall and the manner in which money was negligently paid out from her account which subsequently closed without giving her notice warranted an award of exemplary damages of Shs. 10,000,000/=.

As regards interest, counsel for the plaintiff submitted that under section 26 (2) of the Civil Procedure Act court has power to award interest on the decretal sum at such rate as it deems fit. He submitted that the plaintiff had testified that she was the proprietor of Kalondu Academy which closed down following fraud on her account. He contended that this was a commercial transaction and as such, the plaintiff was entitled to an interest on the special damages of Shs. 29,900,000/= at the rate of 22% per annum from the date of filing the suit till payment in full. On general damages, he submitted that the plaintiff was entitled to interest at 10% per annum from the date of judgment till payment in full.

As regards costs, counsel for the plaintiff submitted that section 27 of the CPA permits award of costs by court. He further submitted that award of costs is discretionary and it is based on the legal principle that it follows the event, that is to say, the successful party should be awarded costs of the suit unless the suit could have been avoided but due to that party's conduct. He submitted that the plaintiff is entitled to costs of the suit in the event that she succeeds in this suit since the defendant's conduct rendered the suit inevitable.

On the prayer for any other relief, counsel for the plaintiff submitted that this is purely a matter for the courts discretion. He observed that the general rule is that the plaintiff should state the remedy sought specifically in the plaint and such

remedies which court awards at its discretion as a consequential relief should not be pleaded. He left it to the discretion of this court to award to the plaintiff such other reliefs as may be deemed appropriate in the circumstances.

Counsel for the defendant commenced his submission by noting with concern that counsel for the plaintiff was seeking to sneak in new matters which were not included in the plaintiff's pleadings and was seeking to rely on them. He submitted that Order 6 rule 7 of the CPR provides that:-

“No pleading shall, not being a petition or application, except by way of amendment raise any new grounds of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading” .

He referred to the case of **Opika Opoka Vs Munno Newspaper & Anor [1988-90]HCB 91**, where Ouma, J held that:-

“New facts were raised by the 1st and 2nd objections which were not pleaded. Accordingly, they were inconsistent with the pleadings. If it was intended that new facts or matters would be raised at the trial of the suit. They should have been pleaded or set out in the written statement of defence.....”

He also referred to **Interfreight Forwarders (U) Ltd v East African Development Bank SCCA 33/1993** and **Remmy Kasule v Makerere University [1975] HCB 391** which state principles against departure from pleadings.

He submitted that counsel for the plaintiff was seeking to depart from his pleadings by raising the issue of fraud at that stage when it was never pleaded. He submitted that allegations of fraud are serious matters which could not be merely alluded to but particulars thereof must be specifically pleaded and proved. He cited the case of **Kampala Bottlers Ltd v Damanico (U) Ltd [1009-1994] EA 141** where the Supreme Court held that the particulars of fraud must always be pleaded since it is a very serious allegation to make and the burden of proof of fraud must be heavier than a balance of probabilities generally applied in civil matters.

Basing on the above submission, he prayed that this court should disregard all the submissions by counsel for the plaintiff relating/ and or alluding to fraud as it had neither been pleaded nor proved.

In response to counsel for the plaintiff's submissions on issue number one, particularly the contention that the specimen signature card (Exhibit B4) was forged, counsel for the defendant submitted that it was imperative to critically analyse that document which was exhibited in Court as **D1⁽ⁱⁱⁱ⁾B₄** annexed to DW3's report as exhibit B4. He submitted that the document showed that the account number mentioned therein is **01450060929000**, the title of the account/account name is **Kalonde Academy**, and it has Makau N. Mabel as the principal signatory only.

In his explanation on the way DW3 described the said specimen signature card that was submitted to him for examination as exhibit B4, counsel for the defendant submitted that it was their view that there must have been a mistake in the naming of this particular document. He explained that in paragraph 2 of the report made by DW3, he stated that it was a photocopy of a specimen signature card for Crane

Bank Ltd Iganga Branch Account No. 0141005093500 with Makau Nairuba Mabel as the principal and only signatory. He further explained that on looking at the document, it was actually a specimen signature for account No. 0145060929000 and the account name is Kalondu Academy at Crane Bank Ltd, Iganga Branch.

He argued that since it was the evidence of the plaintiff that the account in dispute which gave rise to this suit is No. 0141005093500 in the names of Makau Nairuba Mabel then it would mean that account No.014506092900 belonging to Kalondu Academy was not in dispute and hence Exhibit B4 should be disregarded to that extent. He contended that from the report of DW3, the said exhibit B4 was only relevant for the purposes of verifying the plaintiff's signature. He contended that consequently, counsel for the plaintiff's explanation of the meaning of principal and only signatory did not hold water and should also be disregarded.

On the filling of the withdrawal slips by three different people, counsel submitted that evidence had been adduced by the defendant to prove that on a number of occasions the plaintiff was accompanied to the bank by her son Simon Makau. Further that it had also been proved that the said son would fill in the withdrawal slip with at least the account name and the amount then the bank official would fill in the account number and the plaintiff would just sign the same and personally present it to the counter for payment whereupon she would countersign the same.

He referred to the questioned withdrawal slips whose photocopies were submitted by the plaintiff and marked as PID2, PID5 and PID10 and the originals were examined by DW3 and admitted in evidence as exhibits DE (ii) A1, A6 and A16. (I wish to point out that the numbering of these exhibits was not correctly stated by counsel for the defendant. The correct exhibit numbers are- D1 (ii) (a), D1 (ii) (f)

and D1 (ii) (P) respectively). He submitted that DW3's report confirmed that Simon Makau wrote the account name and the amount in figure and in words on those withdrawal slips.

He further submitted that as regards the role played by the bank officials in filling the withdrawal slips, it was proved by the evidence of DW1 and DW4 that in principle bank officials are allowed to assist customers who do not remember their account number as well as illiterate and elderly ones. He further submitted that to that end, it was the evidence of DW1 that she filled in the account number of the plaintiff in her withdrawal slip on a number of occasions upon her request and that DW4 also assisted her twice upon her request.

Further that DW1 had testified that on that particular day, the 16th June 2008, the plaintiff came with her son and withdrew Shs. 10,000,000/= and DW1 paid out the money to the plaintiff personally. He contended that there was no contradiction on the evidence of DW1 and DW4 regarding the report of DW3 that exhibit A₅ and A₁₃ were written by DW4, but rather that that evidence was corroborated by both DW1 and DW4.

He challenged the evidence of PW3 as not being credible for two reasons. Firstly, that he lacked the requisite qualification and experience to make him a banking expert and secondly, that his objectivity could have been compromised by the fact that he is the plaintiff's son in law.

On counsel for the plaintiff's contention that PID10 (Exhibit D1 (ii) (o) dated 6th September 2008 for Shs. 400,000/= was disputed because the amount in words was written as four hundred only instead of four hundred thousand only, he pointed out

that even among the genuine withdrawal slips admitted in court, the one dated 14th November 2008 for Shs. 300,000/= the amount in words was written as three hundred only. Similarly, the one dated 5th November 2008 for Shs. 700,000/= was written in words as seven hundred only just like the one dated 6th August 2008 for Shs. 500,000= which was written in words as five hundred only.

He argued that this shows that the plaintiff is a completely an untruthful person in that she does not even remember how she wrote on some of the withdrawal slips. He also pointed out that the plaintiff's evidence that she opened the account in dispute in Iganga and not in Mbale was disapproved by the evidence of DW4.

Counsel for the defendant also challenged the evidence of PW2 as being subjective and lacking impartiality.

On issue number two, he contended that the defendant through the evidence of DW1 and DW4 had proved that proper identification of the plaintiff would always be done and her signature would be verified before payments were made to her personally. He therefore submitted that there was no negligence by the defendant. He also submitted that counsel for the plaintiff had relied on authorities that relate to bills of exchange which were irrelevant to the dispute in this suit that concern withdrawal slips.

He prayed that this issue be determined in favour of the defendant.

On the 3rd and last issue, he contended that the plaintiff had failed to adduce evidence to prove that a sum of Shs. 57,000,000/= was negligently paid out from her account. Further that she had also failed to prove her claim for special

damages of Shs. 13, 400,000/= that was pleaded and the claim for general damages as well as exemplary damages.

He concluded that the plaintiff had failed to prove her claim against the defendant on a balance of probabilities and prayed that the suit be dismissed with costs.

Before I deal with the three issues agreed upon by both counsel at the scheduling, I wish to first determine the point raised by counsel for the defendant that fraud was not pleaded and as such it should not be submitted upon. It is indeed a general principle of law that a party is bound to prove his case as alleged by him and as covered in the issues framed. See the case of **Interfreight Forwarders (U) Ltd v East African Development Bank** (supra) as per Oder, JSC who stated that:-

“A party is expected and is bound to prove his case as alleged by him and as covered in the issues framed. He will not be allowed to succeed on a case not set up by him and be allowed at the trial to change his case or set up a case inconsistent with what is alleged in his pleadings except by way of amendment of pleadings”.

See also **Remmy Kasule vs. Makerere University [1975] HCB 391** as per **Sekandi J.**

When it comes to allegation of fraud, the requirement is even more stringent because by its very nature it is a serious allegation which must be specifically pleaded with particulars given and strictly proved. In fact, the standard of proof is higher than on a balance of probabilities generally applied in civil matters. See **Bullen & Leake & Jacob’s Precedents of Pleadings, Fourteenth Edition, Volume**

2, at page 809 where the authors referred to a number of cases including the decision of **Lord Denning in Bater v Bater [1951] P.35** to the effect that:-

“.....A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, but it still does require a degree of probability which is commensurate with the occasion”.

See also **Kampala Bottlers Ltd v Damanico (U) Ltd** (supra). In that case fraud was pleaded but its particulars were not given and Platt, JSC stated in his brief judgment in concurrence with Wambuzi, CJ who wrote the lead judgment that:-

*“In the first place, I strongly deprecate the manner in which the respondent alleged fraud in his written statement of defence. Fraud is very serious allegation to make; and it is; as always, wise to abide by the Civil Procedure Rules Order VI Rule 2 **and plead fraud properly giving particulars of the fraud alleged**. Had that been done, and the Appellant had been implicated, then on the Judge’s findings that would have been the end of the defence”.* (Emphasis added).

I also found very instructive the observation of Katureebe, JSC in **Fredrick J.K. Zaabwe v Orient Bank Ltd and 5 Others SCCA No. 4 of 2006 [2007] UGSC 21**.

He stated that:-

“In my view, an allegation of fraud needs to be fully and carefully inquired into. Fraud is a serious matter, particularly

where it is alleged that a person lost his property as a result of fraud committed upon him by others”.

In the context of these authorities, it is only logical that fraud must be specifically alleged with particulars clearly stated to enable the other party respond to it and court to fully and carefully inquire into it.

This position was also expounded by the authors of ***Bullen & Leake & Jacob’s Precedents of Pleadings*** (supra) who stated at page 809 that:-

“Before pleading fraud the pleader should have regard to the material and evidence available.....Where he wishes to rely on them in support of his claim, a claimant is required to specifically set out in his particulars of claim any allegation of fraud, details of any misrepresentation, details of all breaches of trust and notice or knowledge of facts...The facts must be so stated as to show distinctly that fraud is charged”.

In the instant case, what was pleaded and particulars thereof given is negligence but not fraud. Counsel for the plaintiff conceded to this in his rejoinder but contended that there was an exception to the general rule on departure from pleadings. He relied on the authority of ***Kabu Auctioneers & Court Bailiffs & Muljibhai Madhvani & Co. Ltd v F.K. Motors Ltd*** (supra) to strengthen his argument. He argued that the issue of fraud came up during trial and as such this court should determine it in this judgment.

First of all, I believe the exceptions to the general rule on departure from pleadings stated by counsel for the plaintiff do not apply to fraud. Secondly, I wish to point out that the plaintiff had all the opportunity to plead fraud if she so wished. This is because in the plaintiff's complaint letter addressed to the Branch Manager, Crane Bank Iganga Branch, dated 21st April 2009 which was admitted in evidence as exhibit P2, the subject was, "***Fraud on My Accounts (0141005093500, 0145060929000, and 0140005093500)***". The content of that letter indicated that the plaintiff was complaining of suspicious transactions on her accounts without her consent. My understanding of that letter is that from the outset the plaintiff was suspicious that fraud had been committed on her account. The contention of her counsel that fraud only came up during the trial is therefore not true.

I do not know why fraud was never pleaded when there was every opportunity to do so. I suspect that the requirement for particulars of fraud to be pleaded and strictly proved could have led the plaintiff's then counsel to evaluate the evidence available at the time and conclude that it would be an uphill task. For as it is stated in ***Bullen & Leake & Jacob's Precedents of Pleadings*** (supra); "*it is the duty of counsel not to put a plea of fraud on the record "unless he has clear and sufficient evidence to support it"*".

Thirdly, even if for the sake of argument, I were to believe that fraud could be raised at a later stage when it comes up during hearing though not pleaded (which position I do not agree with as stated above), in the instant case I did not seem to have heard any evidence of fraud on the plaintiff's account apart from the allegations that the plaintiff did not sign the withdrawal vouchers. That evidence alone would not lead me to make a finding on fraud in this case. The evidence of DW1 and DW4 that counsel for the plaintiff is basing his arguments on, in my

opinion would be relevant to prove negligence as opposed to fraud. However, since one of the main issues to be determined in this suit is negligence I would not wish to delve into that matter now. I will reserve my comments for now and give them when I am dealing with that issue.

Since fraud was not pleaded, I decline to make any finding on it. What counsel was inviting this court to do is exactly what was criticized by the Supreme Court in **Kampala Bottlers Ltd v Damanico (U) Ltd** (supra) as per Platt, JSC who stated that:-

“The Learned Judge held that the vagueness of the pleadings allowed him to find fraud wherever he might see it. That, with respect, was allowing himself too great a latitude”.

I am not at all willing to allow myself any latitude of making a decision on allegation of fraud which was never pleaded and I accordingly decline to do so. Consequently, all the submissions of counsel for the plaintiff on fraud will be ignored.

I now turn to consider the first issue as to whether the monies on account No. 0141005093500 were withdrawn by the plaintiff or under her mandate. The plaintiff testified that she neither filled nor signed any of the twelve questioned withdrawal slips that were examined by PW2. She also testified that she had disputed more than twelve withdrawal slips but she was able to photocopy only the twelve that were examined. This, in my view, was sorted out by the evidence of DW2 who testified that he retrieved a total of 38 withdrawal slips out of which 16 were questioned by the plaintiff.

I personally compared the twelve photocopies of the withdrawal slips (that were marked during scheduling as V1-V12 and at the hearing they were marked for identification as PID1-PID12) with the 16 original withdrawal slips that were examined by DW3 and attached to his report. I found that the originals of eleven out of the twelve slips (V2-V12) were examined by DW3 together with five others that the plaintiff did not have.

One withdrawal slip dated 5/5/2008 for Shs. 2,000,000/= (V1) was in respect of a separate account No. 0140005093500 stated by the defendant to be the ATM account. I believe that its original was never submitted to DW3 for examination because the plaintiff's complaint to the police according to her testimony and that of DW2 was in respect of only two accounts. One personal account and the school account. A copy of the complaint was never availed to court but from the way all efforts were concentrated on account No. 0141005093500 and even the bank statement was exhibited, I believe that was the personal account in dispute.

The plaintiff is relying on her evidence and that of the handwriting expert to prove that she did not withdraw the money. However, I wish to point out from the onset that I found the plaintiff to be a very inconsistent and unreliable witness.

First of all, up to the time she left the witness box she could not state how much money she had lost from the account. She testified that at first in her complaint to the bank she indicated that there were suspicious transactions on all her accounts without stating any amount of money because she had not yet established the same. During cross-examination she testified that when she went through the questioned vouchers and added the sums involved, she found that Shs. 40,900,000/= was

fraudulently withdrawn and later it turned out that Shs. 57,000,000 was actually missing.

Asked whether the amounts on the twelve vouchers added up to 57,000,000/= she stated that the total sum of what appears on the vouchers was Shs. 29,900,000/=. She however, explained that the Shs. 57,000,000/= she was claiming included her expenses of 13,400,000/=. Even then, a simple arithmetic of adding 29,900,000/= to 13,400,000/= gives a total of 43,300,000/= and not 57,000,000/=!

Secondly, the plaintiff also testified that she had only two accounts with the defendant bank; a personal account and a school account. She even denied knowledge of account No. 0140005093500 and stated that the account number was either forged or written wrongly instead of 0141005093500. However, according to the evidence availed to court in the form of an application form to open a Crane Access Account and Application form for a Crane Access Visa Electronic Card (Exhibits D4(i) and D4 (ii) respectively), it turned out that the plaintiff opened the said personal ATM Account in Mbale Branch in 2005.

Thirdly, the plaintiff testified that whenever she went to withdraw money from her account, she always personally filled in all the account particulars like the account number and name plus the amount both in words and figure by herself. However, a critical look at the genuine withdrawal slips admitted in evidence as exhibit D1 (vii) reveal that the account number in fifteen out of the twenty one genuine withdrawal slips were not filled in by the plaintiff. This is evident in the genuine withdrawal slips that were marked by the investigating officer as F3, F4, F5, F7, F8, F10, F11, F12, F14, F15, F16, F17, F18, F19 and F21.

I wish to note that one of the obvious distinctive features of the plaintiff's handwriting is that she presses the pen on paper with so much emphasis and therefore her strokes are thick as seen on the genuine vouchers as well as the specimen handwriting and signatures marked as B1-B3 (Court Exhibit D1 (iii)). I based my above conclusion on this distinctive feature. This finding contradicts the evidence of the plaintiff and the submission of her counsel that in the other transactions that were not questioned the plaintiff was able to recall the account number. In view of the above inconsistencies, I will treat the plaintiff's evidence with a lot of caution and to that end mainly rely on the documents on record.

It is noteworthy that matters are not helped by the fact that this court is faced with two conflicting reports of the handwriting experts who analysed the questioned withdrawal slips. The report of PW2 was admitted as exhibit P3 and that of DW3 was admitted in evidence as exhibit D1 (i).

I wish to point out that I found that both reports have some limitations that I wish to highlight at this point. I will start with DW3's report since it was prepared first and circumstances surrounding it led the plaintiff to seek another expert's opinion. The manner in which this report was handled left a lot to be desired.

First of all, from the testimony of both the plaintiff and DW2, the plaintiff was actively involved in retrieving the vouchers and even played a role as the complainant including giving financial support to facilitate the investigating officer's travel to Kampala to deliver the specimen. However, from the plaintiff's testimony she was denied access to that report despite numerous demands. According to her testimony, she only saw a copy of that report in court but it was

even on the defendant's letterhead which she rejected and opted to get another expert's opinion.

The plaintiff as the complainant should have been readily availed a copy of that report. DW2 testified that when he got the report, he submitted it to the Resident State Attorney's Office without giving a copy to the plaintiff. This conduct in my view raises suspicion on the credibility of that report.

Secondly, DW3 as a handwriting expert seemed not to have paid close attention to the documents he was examining. Surely to have described exhibit B4 in the manner he did as observed above was very disappointing. If he could even fail to critically look at the documents he was examining and describe them correctly then how does one expect him to do the actual analysis which I believe require a lot of care and due diligence?

Thirdly, DW3 in both his report and oral evidence stated that DW4 wrote the body handwritings for amounts in words and figures on Exhibits A5 (Court Exhibit D1 (ii) (e)) and A13 (Court Exhibit D1 (ii) (m)). PW 4 on his part denied that he wrote the amounts in words and figures on A13 and stated that the report was wrong to that extent.

Fourthly, even if for some reason known to the plaintiff and her counsel alone, Mr. Simon Makau was not called to testify, I believe if he had testified, he would have most likely denied that he wrote the rest of the body handwritings for the amounts both in words and figures on Exhibits A1, A6 and A16 as alleged in paragraph 4 of the findings in DW3's report.

Exhibits C1-C4 were attached to DW3's report so they were admitted in evidence and marked as court Ex. D1 (iv). I had the benefit of looking at this very exhibit critically. With all due respect to DW3 whose competence as a handwriting expert I am not in any way questioning, I think if DW3 had properly addressed his mind to the way Mr. Simon Makau wrote capital "E" on Exhibits C1-C3, he would not have come to that conclusion. Even to an ordinary eye the letter "E" as written on A6 (Exhibit D1 (ii) (f) and A16 (Exhibit D1 (ii) (p) is clearly different from the way it was written on C1-C3. To me that is a very unique feature that should have not escaped DW3's critical eye as an expert if he was being objective.

Fifthly, DW3 was not very thorough in his report. For example, he did not give his opinion in the report as to the person who wrote the account name on A1, A5, A6, A13 and A16 yet this would be a critical finding in this case.

The above observations led to my conclusion, with due respect, that DW3's analysis could have been done with a preconceived result in mind which influenced the findings and conclusions as contained in the report. This casts a lot of doubt on the credibility of his report which I will not out-rightly reject as requested by counsel for the plaintiff but rather will treat with a lot of caution and will not rely much on it. I will instead consider it along with other evidence.

As regards PW2's report, my view is that it had some limitations that include use of a photocopy as opposed to originals and concentration on signatures alone without looking at the rest of the body handwritings that are also in issue. As explained above, PW2 analysed only the signatures on photocopies of eleven out of the sixteen questioned withdrawal slips marked V2-V12 and compared it with the plaintiff's specimen signatures. V1 which he also analysed was in respect of an

account that is not in dispute. DW3 on the other hand examined both the handwritings and signatures on the sixteen originals of the questioned withdrawal slips and compared them with the specimen handwritings and signatures of the plaintiff, her son Simon Makau and that of PW4 as well as the plaintiff's signatures on the genuine withdrawal slips.

Although the critical issue here is whether or not the plaintiff signed the questioned vouchers, I believe it was important for her handwriting to be examined as well. This, in my view was an oversight on the part of the plaintiff's counsel who submitted the specimens to the handwriting expert with the request that only the plaintiff's signatures should be examined. The plaintiff's handwriting specimen should have also been taken for examination and comparison with what appears on the questioned vouchers.

PW2 also did not have the advantage of looking at the genuine withdrawal slips which could have assisted him to compare the plaintiff's signatures better. Some of the features he observed in the questioned withdrawal slips and put in his report are actually on the genuine withdrawal slips. I believe if he had looked at the originals of the questioned withdrawal slips and compared them with the originals of the genuine ones he would have probably had a different view if he was being objective.

For example, taking into account the hidden clue that PW2 testified about, my own observation of the genuine withdrawal slips marked as F1, F7, F12, F13, F18 and F19 show that they are not any different from A3 (Exhibit. D1 (ii) (c)), A13 (Exhibit.D1 (ii) (m) and A16 (D1 (ii) (p)). His findings and conclusion that all the questioned vouchers were forged is therefore not convincing.

In analyzing both reports as I did above, I was fortified by the Kenyan Court of Appeal decision in ***Kimani v Republic [2000] EA 417 (CAK)*** where their Lordships quoted with approval their earlier decisions in the cases of ***Dhalay v Republic [1997] LLR 514 (CAK)*** and ***Ndolo v Ndolo [1995] LLR 399 (CAK)*** that:-

“.....It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence, and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so.....”.

Be that as it may, as regards the issue under consideration in this case, that is whether the monies on account number 0141005093500 were withdrawn by the plaintiff or under her mandate, the plaintiff contended that she did not sign any of the questioned withdrawal slips. On the other hand it is contended for the defendant that the plaintiff withdrew the monies personally.

I have considered all the evidence on record and critically analysed all the signatures that appear on the genuine as well as questioned withdrawal slips and my conclusion is that the plaintiff signed all the questioned vouchers except one. I find the signature on Exhibit D 1 (ii) (f), particularly how the 3rd last letter on the signature was written, distinct from the rest of the signatures on all the questioned vouchers as well as the ones on the genuine vouchers. That particular voucher has

other issues that I will consider at length when dealing with the 2nd issue on negligence. However, as I already observed earlier in this judgment, it can also not be true that Mr. Simon Makau wrote the amount in figure on A6 (Exhibit D1 (ii) (f) because the way he wrote capital “E” on his specimen handwriting marked as Exhibits C1-C3 (Court Exhibit D1 (iv)) is clearly different from the way it was written on A6.

Given my finding on this issue, the only logical conclusion would be that since the plaintiff did not sign this voucher, she could not have presented it personally to the counter for payment. This therefore implies that she did not withdraw the Shs. Ten Million indicated on that voucher. The defendant as the plaintiff’s banker owes her a duty to explain how that money was paid on the basis of a forged signature. Since fraud was not pleaded and proved, I desist from discussing this matter beyond this finding and conclusion. This answers the 1st issue in the negative in so far as this particular voucher is concerned and in the affirmative for the rest of the questioned withdrawal slips.

Regarding the 2nd issue, it was contended for the plaintiff that the defendant acted negligently in making payments based on disputed withdrawal slips even when some of them had errors in the account name which were so apparent. It was argued for the plaintiff that the defendant failed to exercise the duty of care it owed the plaintiff as its customer with whom it had a contractual relationship by virtue of which the defendant had obligation to protect the plaintiff’s account from fraudulent transactions. On the other hand it was contended for the defendant that its staff exercised due diligence and care in handling her transactions and therefore there was no negligence.

The noun negligence is defined by **Black's Law Dictionary Eighth Edition** at page 1061 as:-

“The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregarding of others’ rights. The term denotes culpable carelessness”.

It is stated under that definition that a tort grounded in this failure is usually expressed in terms of the following elements; duty, breach of duty, causation and damages. Further at page 1062 it is stated that:-

“Negligence is a matter of risk-that is to say, of recognizable danger of injury.....in most instances, it is caused by heedlessness or inadvertence, by which the negligent party is unaware of the result which may follow from his act. But it may also arise where the negligent party has considered the possible consequences carefully, and has exercised his own best judgment. The almost universal use of the phrase ‘due care’ to describe conduct which is not negligent should not obscure the fact that the essence of negligence is not necessarily the absence of solicitude for those who may be adversely affected by one’s actions but is instead behavior which should be recognized as involving unreasonable danger to others”.

Upon looking at the authorities relied upon by counsel for the plaintiff to support his argument on this issue, I wish to observe that ordinarily it would appear that he misdirected himself by relying on the principles that govern bills of exchange generally and cheques as contended for the defendant. A cheque is defined under section 72 (1) of the Bills of Exchange Act as a bill of exchange drawn on a banker payable on demand. Meanwhile, a bill of exchange is defined under section 2 (1) of the Bills of Exchange Act as; “*an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand at a fixed or determinable future time a sum certain in money to or to the order of a specified person or to bearer*”.

Section 2 (2) of the same act provides that an instrument which does not comply with the conditions in subsection one above, or which orders any act to be done in addition to the payment of money is not a bill of exchange.

From the samples of savings withdrawal slips admitted in evidence, it is clear that instead of an order to pay as it is in cheques, it is an acknowledgment of receipt of money. It states thus: “*Received from CRANE BANK LIMITED the sum of shillings.....to the debit of my/ our Account with them*”.

From the above definition and looking at the content of a savings withdrawal slip which is normally filled by the account holder or his/her authorized agent and presented for payment at the counter, it is clearly not a bill of exchange. It was argued for the defendant that all the principles that apply to bills of exchange generally and cheques in particular do not apply to payments over the counter using withdrawal slips.

Indeed all the authorities that counsel for the plaintiff relied upon relate to cheques as opposed to withdrawals over the counter using withdrawal slips. To that extent as argued by counsel for the defendant all the cases counsel relied upon are distinguishable from the instant case.

For example, it is true that in **Stanbic Bank Uganda Limited** (supra) and **Tai Hing Cotton Mill Ltd** (supra) the facts were completely different from the facts of the instant case and the court's observations were made in the context of those facts.

I wish to note at this point that my personal research has revealed that there is not much literature on savings accounts generally and over the counter withdrawals on such accounts using withdrawal slips. However, the general legal principles which govern the relationship between a bank and its customers are well settled that a bank has a duty to act in accordance with the lawful request of its customer in normal operation of its customers account. For that matter, I believe that each case that involve allegation of breach of the fiduciary relationship between banker and customer must be determined on its own merit.

It has been held that the relationship between a banker and customer is contractual. Much as this relationship was stated in ***Joachimson v Swiss Bank Corporation, [1921] 3 K.B. 110*** in the context of a current account, I am of the view that the same principal is applicable where a customer operates a savings account.

In ***Paget's Law of Banking, Eleventh Edition*** the relationship between banker and customer is stated in more general terms without restricting it to current accounts. In the ***"Law of Banking"*** (supra) it is stated at page 169 that a deposit account is

essentially a savings account, through which day-to-day transactions are not intended to pass. It is further stated that the whole situation in respect of deposit/savings accounts has changed radically in recent times, and important divergences of practice appear to have developed between the practices of the big commercial banks, that is, rigidity has given place to elasticity. Current modern banking practices have changed the elements that were regarded as the indicia of a savings account.

For instance, there is now no need to give notice of withdrawal as was previously required and payments can be made in and out without production of the pass book. In some instances, customers are issued with a cheque book unlike previously and loose-leaf statements are given to the customer instead of the deposit/pass book.

I also wish to note that with the advance of information technology the banking practices concerning savings accounts have changed to the extent that the specimen signature cards can now be scanned and kept in the automated system and just with a click of a button all the particulars of a customer are displayed on the computer screen. DW1 and DW4 testified to this modern banking practice in their bank.

As regards the duty of banker to customer, it is stated in a book titled ***“The Law Relating to Domestic Banking” Volume 1*** by G.A. Penn, A.M. Shea and A. Arora at page 65 that:-

“It is not the case that a banker has a duty to honour all his customer’s instructions. Rather, there is a duty to honour all instructions which the banker has, at the time of the original contract,

or subsequently, undertaken to honour, and this depends on any specific undertakings in a particular case, and on the general “holding out” of those things which the banker will do, which arises from the nature of the bankers business....”

The nature of the banker’s duty is also stated at page 66 of the same book to the effect that:-

“The duty is to obey the mandate, and in obeying it to do so with reasonable care so as not to cause loss to the customer. Negligence is not only a direct and actionable breach of duty, but may also deprive the banker of statutory protection against his customer (in debt or damages) or a third party (in conversion) where he pays the wrong person”.

Although the footnote to the above passage refers to the United Kingdom Cheques Act 1957 and other chapters in the book that discuss cheques, I believe the same duty is required of a banker even in respect of savings accounts.

I wish to emphasize that a banker also owes a duty to its customer in transactions using withdrawal slips like in the instant case. I was not able to find any authority in Uganda or in the region to support this conclusion but I was fortified by some two major decisions from other jurisdictions. One by the Second Division of the Supreme Court of Philippine in the case of ***Philippine National Bank v Norman***

Y. Pike G.R. No. 157845 and another by the Supreme Court of Nebraska in ***John Maddox and Carol Maddox v. First West Roads Bank A Corporation***¹

In ***Philippine National Bank*** (supra) Mr. Pike had filed a complaint before the Regional Trial Court (RTC), Branch 07 of Manila seeking for a refund of \$7,500 which he alleged had been paid out from his dollar savings account held in Philippine National Bank (PNB) using forged withdrawal slips. He also prayed for moral and exemplary damages, attorney's fees plus honorarium per court appearance and cost of suit plus litigation expenses.

The bank's defence was that it exercised due diligence in the handling of the said account and that Mr. Pike had personally introduced to a Senior Bank Official (An Assistant Vice President) a one Joy Davasol and made verbal instructions that the bank should honour all withdrawals to be transmitted by him (Davasol) upon presentation of pre-signed withdrawal slips bearing Mr. Pike's signature. The bank contended that it was on the basis of that verbal instruction that they paid out the said amount from the plaintiff's account.

The trial court rejected the defence of the bank and entered judgment for the plaintiff. In its judgment, the trial court stated that it compared the signatures in the questioned withdrawal slips with the known signature of the depositor and was convinced that the signatures in the unauthorized withdrawal slips do not correspond to the true signature of the depositor. It then concluded that the bank

¹ See: <http://ne.findacase.com/research/wfrmDocViewer.aspx/xq/fac.19770720-0002.NE.ht...> accessed on 10/04/2012

was negligent in the performance of its duties such that unauthorized withdrawals were made in the deposit of the plaintiff.

On appeal, the Court of Appeal affirmed the findings of the RTC that *“indeed the defendant/appellant bank was negligent in exercising of the diligence required of a business imbued with public interest such as that of the banking industry.....Certainly, appellant lacked the due care and caution required of managers and employees of a firm engaged in so sensitive and demanding business as banking...”*.

Appellant bank subsequently filed a motion for reconsideration, I believe in accordance with the provisions of the Philippine laws and the Court of Appeals denied the said motion hence the petition before the Supreme Court.

The Supreme Court affirmed the finding of the trial court and the Court of Appeals and stated thus:-

“At this juncture, it bears emphasizing that negligence of banking institutions should never be countenanced. The negligence here lies in the lackadaisical attitude exhibited by employees of petitioner PNB in their treatment of respondent Pike’s US Dollar Savings Account that resulted in the unauthorized withdrawal of \$7,500.00. Nevertheless, though its employees may be the ones negligent, a bank’s liability as an obligor is not merely vicarious but primary, as banks are expected to exercise the highest degree of diligence in the selection and supervision of their employees and having such obligation, this Court cannot ignore the circumstances surrounding the case at bar-how the

employees of petitioner PNB turned their heads, nay, closed their eyes to the suspicious circumstances enfolding the two withdrawals subject of the case at bar. It may even be said that they went out of their ways to disregard standard operating procedures formulated to ensure the security of each and every account that they are handling”.

That Supreme Court referred to its earlier decision in the case of **Simex International, Inc. v. Court of Appeals**² where it 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*”.

It also referred to its earlier decision in the case of **The Consolidated Bank and Trust Corporation v Court of Appeals**³ where it clarified that:-

“fiduciary relationship means that the bank’s obligation to observe “highest standards of integrity and performance” is deemed written into every deposit agreement between a bank and its depositor. The fiduciary nature of banking requires banks to assume a degree of diligence higher than that of a good father of a family”.

In the case of **John Maddox and Carol Maddox** (supra), Mr. Richard Maddox died in May 1973, leaving life insurance policy in which the plaintiffs were named as beneficiaries. “Barbara Jean Maddox” was appointed guardian of the plaintiffs on May 31, 1973. On October 22, 1973, Joseph Savin, representing himself as the attorney for Barbara opened two savings accounts at West roads. The accounts

² G.R. No. 88013, 19 March 1990, 183 SCRA 360

³ G.R. No.138569, 11 September 2003, 410 SCRA 562

were opened in the name of “Barbara J. Maddox,” as guardian of each of the plaintiffs. Savin deposited an insurance check in the amount of \$7,500 in each account, the checks bearing the typewritten endorsement of Barbara as guardian of each plaintiff. On November 14, 1973, the additional sum of \$1,500 was deposited in each account. It was admitted that West roads never obtained a signature card from Barbara at any time relevant to that case.

On May 6, 1974, Savin presented to West roads two withdrawal slips which bore the forged signature of Barbara, stating that he wished to withdraw all the funds in plaintiffs’ account. West roads issued two cashier’s checks for the entire sum of \$18,364.22 payable to Barbara as guardian of each of the plaintiffs which were given to Savin who presented them to Center Bank with an endorsement “Pay to the Order of JOSEPH SAVIN” with forged signature of Barbara as guardian of each plaintiff.

The plaintiffs by their guardian filed a petition in the District Court by which they sought damages against the defendants First Westroads Bank and Center Bank on the grounds that the defendants had unlawfully permitted improper charges to be made against their savings accounts; and that the depletion of the savings account was a result of the forgery. In their reply both defendants denied the forgeries and they filed cross-claims against each other.

The trial court entered summary judgment in favour of the plaintiffs against Westroads. Westroads appealed to the Supreme Court from the judgment of the trial court, and the plaintiffs cross-appealed from the dismissal of their claim against Center Bank.

The Supreme Court affirmed the judgment in favor of the plaintiffs against Westroads and while rejecting the argument of Westroads that it was not negligent stated as follows:-

*“Such an argument is without merit, as Westroads’ liability to plaintiffs rest on several grounds. First, Westroads charged the plaintiffs’ accounts without receiving a valid order to do so. **It is elementary that a bank is held bound to know the genuine signature of its customers.** United States Fidelity & Guaranty Co.Vs. First Nat. Bank of Omaha, 129 Neb. 102, 260 N. W. 789 (1935). **A bank may not permit withdrawal of funds from a savings account absent of an order of its depositor.** Where a savings bank grants withdrawal payments to a person not representing himself to be the depositor and who obtains payment upon the strength of an order purported to be signed by the depositor, the same rule should apply as are applicable to banks with respect to forged checks.....Those rules provide that a bank paying forged checks may not charge the amount of the check against the account of the person whose name is forged.....Therefore Westroads could not properly charge the plaintiffs’ account on the basis of the forged withdrawal slips”.*

I am fully persuaded by the above authorities that clearly state the standard of care, caution and diligence expected of banks when handling customer’s account. In the instant case, I found the evidence of Mr. Subramanian the Senior Branch Manager concerning how the account in dispute was opened and operated rather interesting. He testified that there was no specimen signature card for that account because the plaintiff was an existing customer having earlier opened an ATM account No. 0140005093500.

He also testified that for an ATM account there is no requirement for specimen signature card because the money is withdrawn using ATM card but in the event that a customer wants an over the counter payment, they would verify the signature using the one on the account opening form which the customer normally fills at the time of opening the account together with the request for ATM card form.

However, he also categorically stated that:-

“We do not scan ATM card forms and keep in the system. We scan savings account forms and the specimen signature card. After opening the ATM account the forms were not scanned. They were kept in a folder in Mbale Branch where the account was opened”.

DW4 then testified about the opening of the plaintiff’s savings account that is in dispute as follows:-

“The plaintiff also opened another account-savings account in Mbale Branch. This was on 28/04/2008 and the account number was 0141005093500”.

Upon being shown a document he confirmed that it was the plaintiff’s savings account opening form for an existing account holder and testified further that:-

“Her existing customer number was 50935. She could open as many types of accounts as possible but the digits 50935 would not change since it is a base number. The code for the account type is the one that

changes. Mrs. Makau also signed on these documents. The customer does not sign any other form. Since she is an existing customer we do require a specimen signature card. We only scanned the signature on the savings account opening form and attached to the customer's particulars that are already in the system. The document attached to the savings account opening form is a photocopy of Mrs. Makau's passport which we use to verify the signature therein and that on the account opening form".

I found this evidence rather contradictory because if the ATM account opening form was not scanned then where did the particulars in the system that DW 1 also testified about come from? Could it be that the information from the form was just entered in the system? If so, does it mean that the plaintiff's photograph is not among the particulars in the system.

Since the plaintiff was able to access her money using the ATM card I want to believe that her particulars must have been in the system otherwise how would her card be recognized and accepted by the system? But does it include her photograph for verification when she was making withdrawals over the counter from her savings account? There are definitely some doubts in my mind that the evidence of DW4 as the Senior Branch Manager of the defendant bank did not assist to clarify.

I wish to observe that from the evidence of DW4, the defendant bank appears not to be having stringent internal banking policy and standard operating procedures to safeguard customers' money from fraudulent transactions. I believe the procedure for opening an account by an existing account holder could still be strengthened to make it more fool-proof.

As regards the specific issue of negligence, I have carefully looked at all the withdrawal slips (the genuine ones and the disputed ones) and I found that there was consistency in the order in which the plaintiff's name was written in all the genuine withdrawal slips except only one. In twenty out of the twenty one genuine withdrawal slips, the plaintiff's account name was written as Makau Nairuba Mabel. It is only on the withdrawal slip dated 8th November 2008 for Shs. One Million only (F3) where the account name was written as Makau Nairuba Makau and a correction made on the last name Makau by writing the correct name Mabel above it and countersigning below it.

My observation is that the plaintiff personally wrote her name on all the twenty one genuine vouchers. I find that this documentary evidence corroborates the plaintiff's oral evidence that she always consistently wrote her account name in the order in which she wrote her name when opening the account.

To my mind, this casts doubt on the evidence of PW1 and PW4 that they would pay the plaintiff even if there were mistakes on the payment voucher because they knew her very well as a regular customer. First of all, the fact that she was made to correct her name on F3 and countersign contradicts that evidence. This was a much later transaction done on 8th November 2008 almost seven months after opening of the account in dispute. I believe the plaintiff was better known to the bank staff by then than when the transaction on the questioned withdrawal slip dated 16th June 2008 was made just six weeks after the account was opened. It is therefore not at all logical that the withdrawal slip of 16th June 2008 which was presented six weeks after opening of the account could just be passed for payment despite the

glaring fact that the account name was not tallying with the plaintiff's account name.

I am not at all convinced with the evidence and argument that where a customer is well known to the bank staff the standard operating procedures of the bank should be relaxed or completely disregarded. That, in my view is what constitutes negligence of the bank staff in this case. This court cannot sanction such conduct as doing so would amount to condoning ineptitude with the undesirable effect of undermining the highest degree of due care, caution and diligence expected of managers and employees of banks.

At this juncture, I also wish to observe that there was no justification whatsoever, for the manner in which some of the questioned withdrawal slips were filled. I do not see any logic in three people filling in a withdrawal slip for a literate person. I do understand instances where a customer forgets her account number and the bank staff assist to provide the number which in my opinion should then be filled in by the customer.

In this case there are instances where according to the report of DW3, a bank staff filled in the account number and sometimes wrote the amount in figure and in words and another person sometimes fill in the account name and the plaintiff only signed. Surely, was all that necessary especially given that the plaintiff is a teacher by profession with a Diploma in Library Information and a Diploma in Education? Indeed the *laissez-faire* manner in which the defendant's staff handled transactions in respect of the plaintiff's account gave her the opportunity to question all the disputed transactions as she did.

These observations notwithstanding, I am of the view that payment of vouchers A1 (Exhibit D1 (ii) (a)) and A10 (Exhibit D1 (ii) (j)) could be excused as the plaintiff's name was correctly written except that the middle name was abbreviated. I therefore find no negligence on the part of the defendant's staff in paying those vouchers particularly in view of my findings and conclusion on issue number one that the plaintiff signed all of them.

However, I find that payment of withdrawal slip A9 (Exhibit D1 (ii) (i)) where the account name was written as Makau Nairuba Makau and A6 (Exhibit D1 (ii) (f)) where the plaintiff's account name was wrongly written as "MAKA MABEL" was simply gross negligence on the part of the defendant's servants. Any prudent banker exercising due care, caution and diligence would have noticed that there was a problem and not made any payment against those withdrawal slips without requiring correction to be made just as it was done on F3.

I know it could be argued, as was testified by DW1 and DW4 and submitted by counsel for the defendant that all the plaintiff's correct particulars were in the system. However, in a country like ours where fraud and malpractices are the order of the day, due care and diligence must always be exercised when dealing with customer's account. If that was done this suit would have been avoided. No chance should be taken so as to leave room for doubt and unnecessary litigation.

In view of my finding that there was negligence, the second issue is also answered in the affirmative generally in the manner in which transactions on the plaintiff's account were handled and specifically in so far as payment of (Exhibit D1 (ii) (i)) and Exhibit D1 (ii) (f) are concerned.

On the third issue, the plaintiff sought a number of remedies and her counsel made very lengthy submission to justify them. In the plaint she prayed for Shs. 57,000,000/= being money that was negligently paid out from her account without her mandate, special damages of Shs. 10,400,000/= being the expenses she incurred arising from the defendant's breach of duty, general damages, exemplary damages, interests, costs of the suit and any other relief.

The plaintiff's counsel submitted that the plaintiff was entitled to Shs.29,900,000/= which allegedly had been proved, general damages of Shs. 90,000,000/=, exemplary damages of Shs. 10,000,000/=, interest of 22% p.a on the special damages from the date of filing the suit till payment in full, interest of 10% p.a. on the general damages from date of judgment till payment in full, costs of the suit and any other relief.

The principle that governs special damages is that it must be specifically pleaded and strictly proved. See **Musoke v Departed Asians Property Custodian Board & Anor** [1990-1994] 1 EA 419 where it was stated that special damages must always be explicitly claimed on the pleadings, and at the trial it must be proved by evidence both that the loss was incurred and that it was the direct result of the defendant's conduct.

From my finding on issues number one and two, the plaintiff only managed to prove on a balance of probability that Shs. 10,000,000/= was negligently paid out from her account without her mandate, albeit on the basis of her forged signature. She is therefore only entitled to a refund of the Shs. 10,000,000/= from the defendant.

As regards claim for her expenses, the plaintiff pleaded Shs. 10,400,000/= but it was never proved in evidence. I believe that is why her counsel did not address it in his submission. For that matter, the plaintiff is not entitled to that amount or any lesser amount because it was never proved.

On general damages, counsel for the plaintiff submitted at length that given the loss, inconvenience and hardship that the plaintiff suffered she is entitled to general damages. He prayed for general damages of Shs. 90,000,000/=.

According to ***Black's Law Dictionary 7th Edition*** at **page 182**;

“Every breach gives rise to a claim for damages, and may give rise to other remedies. Even if the injured party sustains no pecuniary loss or is unable to show such loss with sufficient certainty, he has at least a claim for nominal damages”.

I have already made a finding that the defendant breached its duty of care and due diligence as the plaintiff's banker by negligently paying out money from her account. This in my view would entitle the plaintiff to an award of damages. However, I find the prayer for general damages of Shs. 90,000,000/= too exorbitant and unjustified. I will instead award her general damages of Shs. 20,000,000/=.

As regards interest, the rationale for awarding it was stated in the case of ***Masembe v Sugar Corporation and Another [2002] EA 434*** where ***Oder JSC*** quoting ***Lord Denning in Hambutt's Plasticine Limited v Wayne Tank and Pump Company Ltd [1970] 1 QB 447*** stated that:-

“It seems to me that the basis of an award of interest is that the defendant has kept the plaintiff out of his money, and the defendant has had use of it himself. So he ought to compensate the plaintiff accordingly”.

Similarly, in the case of ***Ruth Aliu and 136 others v Attorney General, Civil Suit No.1100 of 1998, Tabaro J***, stated that it is apparent that nowadays interest is payable for the deprivation suffered by the person to whom payment should have been made.

Considering that the plaintiff was deprived use of her money from 7th May 2008 when the Shs. 10,000,000/= was negligently paid out of her account, I find that she is entitled to an award of interest on the said amount from the date of filing the suit until payment in full. I therefore award her interest at 22% per annum from the date of filing the suit until payment in full as prayed.

As for exemplary damages, their object is entirely punitive and the circumstances envisaged for an award of such damages were stated by ***SPRY-VP in Obongo v Kisumu Council [1971] EA 91***. It is usually awarded where the conduct of the defendant is oppressive, arbitrary or unconstitutional action by the servants of the government. Secondly, it is awarded where the defendant’s conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff. For the actual award to be made when the plaintiff has suffered as a result of the defendant’s punishable behavior and the means of the parties is taken into account.

See also *Frederick J.K. Zaabwe v Orient Bank & Others SCCA No. 4 of 2006 [2007] UGSC 21* and *Ahmed Ibrahim Bholm v Car & General Ltd SCCA No. 12 of 2002 [2004] UGSC 8*.

With due respect to counsel for the plaintiff's submission, I do not find any conduct of the defendant that would warrant an award of exemplary damages in this case. The alleged mistreatment of the plaintiff by the defendant's Senior Branch Manager was never proved in evidence. Apart from the plaintiff's evidence that she was insulted at the banking hall, there was no other independent evidence to corroborate it. That evidence was even controverted by DW4's evidence that he was not present at the branch at the time of the incident so there was no proof that the plaintiff was insulted or mistreated.

Consequently, I find no basis for awarding exemplary damages and I decline to award any. I believe the negligent payment of money out of the plaintiff's account is well taken care of by an award of general damages.

On the prayer for costs, I find it justifiable because costs must follow events. Since the plaintiff is the successful party, I will award the costs of this suit to her.

In the result, judgment is entered for the plaintiff against the defendant for orders that:-

- (a) The defendant pays the plaintiff the Shs. 10,000,000/= (Ten million shillings only) that was negligently paid out of her account.
- (b) The defendants pays general damages of Shs. 20,000,000/= (Twenty million shillings only).

- (c) The defendant pays interest on (a) above at the rate of 22% per annum from the date of filing the suit until payment in full.
- (d) The defendant pays interest on (b) above at court rate from the date of this judgment until payment in full.
- (e) The defendant pays to the plaintiff costs of this suit.

I so order.

Dated this 13th day of April 2012

Hellen Obura

JUDGE

Judgment delivered in chambers at 3.30 pm in the presence of Mr. David Oundo Wandera for the plaintiff who was present and Mr. Bill Mamawi for the defendant whose representative was also present.

JUDGE

13/04/2012