

THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO 688 OF 2003

NORTH BUKEDI CO-OPERATIVE UNION LTD}..... PLAINTIFF

VERSUS

BANK OF BARODA (U) LIMITED}..... DEFENDANT

BEFORE HON. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff filed this suit on the 5th of November 2003 to recover Uganda shillings 6,000,000/= for negligence on the part of the defendant, interest, damages and costs of the suit. The facts disclosed in the plaintiff's plaint are that the plaintiff opened several accounts with the defendant bank on the 7th of May 2002 which accounts included a current account and a fixed deposit account. The plaintiff deposited Uganda shillings 7,000,000/= in its fixed deposit account which was for a fixed period of three months commencing on 8th May 2002 and expiring on 8th August 2002. In September 2002 the plaintiff alleges that it discovered while checking on its statement of accounts that Uganda shillings 6,000,000/= had been paid out by the defendant from its fixed deposit account on the 1 July 2002 and 9th of July 2002. The plaintiff immediately notified the defendant and complained in writing that the monies had been wrongfully drawn off its fixed deposit account before it had expired. The particulars of negligence alleged are that the money was paid out on the basis of forged instruments without duly scrutinising the signatures. Secondly the money was transferred from a fixed deposit account to a current account without formal written instructions. It was paid without notifying the plaintiff and the transaction was concealed from the plaintiff.

By transferring the money from its fixed deposit account to its current account the plaintiff was denied interest on the money. Consequently the plaintiff claims Uganda shillings 6,000,000/=,

general damages, interest on the decreed amount at court rate from the date of judgement until payment in full and costs of the suit.

The defendant's response is that prior to maturity of the fixed deposit account the plaintiff terminated the fixed deposit account by requesting for payment there from. The defendant complied with the request by crediting Uganda shillings 7,012,965/= inclusive of interest to the plaintiffs account number 12287 at the defendants branch at Mbale. Money was drawn by the plaintiff's cheques in accordance with the instructions for operation of the account and the defendant honoured the cheques. The defendant denies that it acted negligently and disputes liability to the plaintiffs. In rejoinder the plaintiff avers that payments to any third party from the plaintiffs account had to be sanctioned by a letter of authority from the plaintiff which was not done. Secondly the debiting and crediting of the plaintiffs account was done simultaneously in the same transaction which indicated collusion by the defendant. Lastly that the signature of the plaintiff's treasurer Mr John Kidimu was forged and the plaintiff would rely on a handwriting expert report at the trial.

The suit was initially handled by Honourable Justice E.S Lugayizi in 2004. Subsequently it continued before Honourable Justice Lameck Mukasa. The Hon. Judge conducted a conference inter parties on 23 November 2006 when the following facts were agreed upon:

1. On the 7th of May 2002 the plaintiff opened a fixed deposit account with the defendant bank.
2. A sum of Uganda shillings 7 million was deposited for a fixed period of three months with effect from the 9th of May 2002.
3. The money was subsequently withdrawn as follows:
 - a. By cheque number 561268 dated 1st of July 2002 for the sum of Uganda shillings 5,000,000/=.
 - b. By cheque number 561269 dated 9th of July 2002 in the sum of Uganda shillings 1,000,000/=
4. On 3 September 2002 the plaintiff wrote to the defendant inquiring about the circumstances of the above withdrawals.

The agreed issues for trial were as follows:

1. Whether there was a breach of the terms of the fixed deposit by the defendant bank.
2. Whether the two cheques were purportedly drawn as per the plaintiffs mandate to the defendant bank?
3. Whether the defendant acted negligently?
4. What remedies are available to the plaintiff/parties

The following documents were exhibited by consent of the parties:

1. Plaintiffs letter to the defendant dated 7th of May 2002 exhibit P1.
2. The plaintiff's letter to the defendant dated 3rd of September 2002 as exhibit P2.
3. The defendant's letter to the plaintiff dated 9th of September 2002 exhibit P3.
4. Laboratory report by Ezati Samuel exhibit D4

The defendant's documents were admitted as listed in the written statement of defence and additionally was included the mandate, the report of the handwriting expert dated 6 July 2004 and the two cheques. They were exhibited as follows:

1. Fixed deposit receipt exhibited D1.
2. Bank statement of the plaintiff's current account exhibit D2
3. Letter of change of signatories dated 30th of September 1997 exhibit D3.
4. Specimen signature card exhibit D4
5. The two cheques exhibits D5 A and B.
6. Laboratory report by A Ntarirwa dated 6th of July 2004 exhibit D6

Hearing commenced on 21st of February 2007 and up to 2009 when the trial judge was transferred.

Counsels opted to file written submissions.

Plaintiff's submissions:

The brief background is that the plaintiff operated current account number 12287 under its corporate name. The plaintiff's notified signatories of the account were Mr Jack Mulabi Davis, the Secretary Manager of the plaintiff and the principal signatory of the account, Mr Mukyali William the Chairman and Mr Kidimu John, the Treasurer who were alternate signatories. All

transactions on the account and all instruments for and on behalf of the plaintiff were to be signed by the Secretary Manager with either the Chairman or the Treasurer. Specimen signatures of the three officers were provided to the bank.

The plaintiff's case is that on 7th May 2002 the plaintiff deposited Uganda Shillings 7,000,000/= on its fixed deposit account number 12287 payable on or after 9th of August 2002 with interest at the rate of 3.5% per annum. Condition number 4 printed overleaf on the deposit receipts provided that funds therein are not transferable by endorsement in the absence of special instructions and the amount deposited is payable only to the depositor on the due date or thereafter upon surrendering the receipt duly discharged. Payment to a third party has to be sanctioned by a letter of authority accompanying the deposit slip. According to DW 2 Eva Nagwonu that the Secretary Manager of the plaintiff on the 1 July 2002 instructed the bank to transfer Uganda shillings 7,012,965/= to the plaintiff's current account number 12287 by endorsing on the back of the fixed deposit receipt. Counsel submitted that the principal question was whether there were special instructions by letter of authority to accompany the deposit receipt endorsement.

Counsel submitted that the plaintiff gave the bank special instructions in writing that all instruments are to be signed by the Secretary Manager together with either the Chairman or the Treasurer. The transaction in question was based on the instructions of only the Secretary Manager in breach of the instructions to the bank. Counsel submitted that the bank was not cautious because the date of maturity was 9th of August 2002 and withdrawal effected before the maturity date. Secondly the defendant never requested for a letter closing the deposit account when prior instructions to open a fixed deposit account were given on the basis of a letter signed by two persons. Consequently the bank had itself to blame for being duped by one of the officers of the plaintiff. PW2 the Secretary Treasurer denied having signed the disputed cheques and this testimony held during cross-examination. Counsel relied on the case of **Commercial Micro Finance Ltd versus Standard Chartered Bank Uganda High Court civil suit number 199 of 2002** where it was held that the bank owed a duty of care to ensure that instruments withdrawing money from its customer's account are scrutinised to verify specimen signatures. Secondly the customer quickly notified the bank in writing upon discovery of the forgery by letter of 3 September 2002 upon noticing the transaction in its bank statement of 30th of July 2002. Because

the plaintiffs account was not a personal account, there was a need for extra caution in the operation of the account. Counsel submitted that it was highly irresponsible of the bank to conduct business the way it did by an endorsement behind the receipt from a single person. The signature behind the receipt is not accompanied by the name of the person who signed whereas in the letter of instructions of 30th of September 1997 the Secretary Manager was described as Jack Mulabi Davis. In the case of **Standard Bank Uganda Ltd versus Cyno Africa Health High Court civil suit number 137 of 2004** Justice Lamech Mukasa held that the basic obligation of a bank is to honour his customer's cheques provided there are sufficient funds on the account and the equally basic obligation of the bank to obey his customer's instructions. Under section 74 of the Bills of Exchange Act, a banker who pays a cheque in defiance of instructions of a client does so without authority or mandate. In **Stanbic Bank versus Uganda Crocs Ltd SCCA number 4 of 2004** it was held by the Supreme Court that the duty of a bank is to act in accordance with lawful request of the customers in normal operation of its customers account. Payment of a cheque without authority or in contravention of the customer's orders or negligently cannot debit the customer's account. A banker owes a duty of care to his customer requiring him or her to question payments where there is cause for suspicion. For obligation of the bank to operate the customer's account in strict conformity with instructions of the customer, counsel relied on the case of **Esso Petroleum Company versus Uganda Commercial Bank SCCA number 14 of 1992** where the Supreme Court held that the relationship between the bank and the customer is contractual and breach thereof gives rise to a claim in damages. In **Mobile Uganda Ltd versus Uganda Commercial Bank [1982] HCB 64; Commercial Micro Finance Ltd versus Standard Chartered Bank Uganda Limited HCCS number 199 of 2002**, it was stressed that the bank owes a duty of care to its customer when transferring money from the customer's account. Counsel contended that it was irrelevant that the defendant bank was crediting the money onto the plaintiffs on current account.

Evidence on record proves that as soon as the money was transferred to the plaintiffs current account from the fixed deposit, Uganda Shillings 5,000,000/= was withdrawn on the same day that is 1 July 2002 and subsequently Uganda shillings 1,000,000/= withdrawn on 9th of July 2002. The cheques were in the personal names of Mulabi Jack. It is the same person who similarly instructed the termination of the fixed deposit account prematurely. These activities of the single person ought to have raised the suspicion of the defendant's officials. Evidence shows

that one of the signatures purporting to be that of the plaintiff was actually fraudulent. PW1 and PW2 testified that the purported signature of John Kidimu was forged. Report of the handwriting expert dated 21st of August 2004 by Ezati Samuel forensic examiner of the Scientific Aids Laboratory Police Headquarters exhibit P4 shows that one of the signatures on the cheques were fundamentally different from the specimen signatures provided to the bank.

The defence produced its own report dated 6 July 2004 signed by one A.M. Ntarirwa and exhibited as exhibit D6. The report shows similarities between the questioned signatures on the cheques and the specimen signature of John Kidimu. Cheque number 561269 dated 9th of July 2002 purportedly of Uganda shillings 2,000,000/= was not attached to the report for the examination of the court and is obviously false. On 19 November 2012 Mr Ntarirwa produced yet another report and his conclusion is that the writer is probably the same. The report is exhibit D7.

The plaintiff's counsel submitted that the plaintiff has discharged the burden of proof on the balance of probabilities.

The report on 19 November 2012 was made by an analyst who had the benefit of the previous report filed by a colleague on 21st of August 2004 and does not indicate why the first report was wrong. Counsel submitted that it is up to the court to make up its own mind about the conflicting reports. The plaintiff has demonstrated that it was more than probable that the signatures on the cheques were forgeries.

The defendant's witnesses DW1 and DW2 also DW3 banking officials of the defendant bank testified in a casual manner on the similarities of the signatures. They could not explain the reason given for the alleged termination before maturity of the fixed deposit of the plaintiff. They were swayed by the fact that Jack Mulabi was the principal signatory. DW1 conceded that the bank did not follow instructions. Counsel relied on the case of **Makua Nairuba Marble versus Crane Bank Ltd HCCS No 380 of 2009** where Honourable Justice Helen criticised the bank for gross negligence.

Remedies available to the plaintiff

Counsel submitted that the court should find on all issues in the affirmative to the effect that the defendant owed the plaintiff a duty of care. The defendant breached that duty by negligently and improperly allowing withdrawal of money its fixed deposit account before the due date in breach of written instructions and subsequently in failing to question and allowing the principal signatory more latitude than due. Counsel prayed for an order for the defendant to return/credit the plaintiffs account with Uganda shillings 6,000,000/= together with interest at 26% from the date of withdrawal the 1 July 2002 until payment in full and general damages.

Defendant's Submissions

In reply the defendants counsel submitted that there was no serious dispute on questions of fact. It is agreed that all instruments on the said account were to be signed on the plaintiff's behalf by at least two signatories i.e. one Jack Mulabi the plaintiffs Secretary/Manager as the principal signatory on the one hand and the plaintiffs Chairman or Treasurer and particularly for the transaction at the material time John Kidimu PW2. The specimen signature card was exhibited as DE D4. Sometime in July 2002 the fixed deposit account was prematurely terminated and a sum of Uganda shillings 7,000,000/= together with accrued interest of Uganda shillings 12,965/= was transferred back to the plaintiffs current account by two cheques as contained in the submissions of the plaintiff's counsel. The cheques had the signatures of Jack Mulabi and John Kidimu. PW2 John denied signing the two cheques. The two cheques were submitted to handwriting experts for analysis.

On the one hand is the report of Samuel Ezati PW3 and the report exhibit P4. On the other hand is the report of Apollo Ntarirwa DW4. The report of PW3 is to the effect that the cheques were not signed by the writer of the specimen signature namely PW 2 while DW4 Apollo Ntarirwa gave a contrary opinion that the cheques were signed by the writer of this specimen signature PW2 in his report exhibit D7 and D6. The defendant called additional two witnesses Eva Nangwomu DW2 and Martin Wamono, DW3 employees of the defendant and the defendant's branch in Mbale. They had examined the two cheques together with the specimen signature in exhibit D4 and concluded that the signatures were genuine and authorised the honour of the said cheques.

The plaintiff subsequently carried out an investigation on the matter and on the basis of the investigation terminated the employment of Jack Mulabi. The plaintiff withheld the personal gratuity and other terminal benefits due to alleged loss of funds on the basis of the two cheques.

On the first issue of whether the defendant breached the terms of the fixed deposit account counsel submitted that the terms as spelt out in the fixed deposit receipt exhibited D1 were breached by the defendant. After premature termination, the funds on the fixed deposit account were transferred directly onto the plaintiff's current account. Condition number 4 was not breached. Counsel submitted that the condition relates to circumstances under which the deposit receipts are transferable to third parties. There was no need for the defendant to procure a letter of authority from the plaintiff before the fixed deposit account was terminated. Secondly it was erroneous to submit that two signatories were required to give the defendant special instructions. Special instructions were issued to the defendant in the respect of the plaintiff's current account and not the fixed deposit account. No such instructions were issued by the plaintiff to the defendant in respect of the fixed deposit account. The evidence of DW 1 is to the effect that the fixed deposit account is terminated upon the return of the deposit receipt to the defendant. On the basis of the above submissions, the defendant's counsel submitted that the plaintiff had not met of the case of negligence or breach of contract against the defendant would respect of the termination of the fixed deposit account. Upon the release of the deposit receipt to the defendant, the defendant terminated the fixed deposit account. There was no requirement in the conditions of the fixed deposit account to terminate the fixed deposit account upon receiving formal written instructions or notification of the plaintiff prior to the termination. Finally none of the six conditions stipulated in the back of exhibit D1 were breached by the defendant.

On whether the two cheques were properly drawn according to the plaintiffs mandate to the defendant, counsel submitted that the matter is well-settled as far as the law is concerned. Counsel agreed with the general principles of law submitted on by the plaintiffs counsel's. He submitted that the determination of the issue should be restricted to the examination of the specimen signatures filed with the defendant in exhibit D1 and the purported signatures of PW2 on the two cheques.

The defendant's witnesses DW 2 and DW 3 had examined the signatures on the cheques and testified that they were signed by the plaintiff's authorised signatories Jack Mulabi and John

Kidimu. Counsel prayed that this testimony is upheld by the court. Counsel further relied on the testimony of Apollo Ntarirwa DW4 that the signature on the cheques and that of PW2 were similar. Thirdly counsel prayed that the following factors are taking into account in evaluating the evidence of Samuel Ezati vis-a-vis that of Apollo Ntarirwa. Firstly PW2 was less experienced than DW4 with PW3 having 14 years experience while DW4 had 35 years experience. Secondly the report of PW3 exhibit D4 was made on 21st of August 2004 after that of Apollo Ntarirwa consequently the report of PW3 was an afterthought after the defendant had secured a handwriting report confirming the authenticity of the signatures of PW2 on the two cheques. Thirdly the report was premised on an alleged specimen signature of PW2 availed to him by the plaintiff. This was wrong because the officials verifying the signatures from the defendant were not looking at the same specimen signatures as that of the handwriting expert PW3. Consequently his report is not useful in determining issue number 2. Fourthly PW3 was too busy to reconcile his findings with those of DW4 despite requests from the parties and after being summoned by the registrar to re-examine the documents relating to the matter. He's evidence should therefore not reliable as he could not even abide by the directions of the court to review the questioned signatures. DW4 submitted an additional report exhibit D7 with the same conclusion.

The testimony of PW2 was incoherent for the court to find that he did not sign the two cheques. At one time he testified that he does not remember signing the two cheques. Counsel submitted that the court should not rely on the evidence of a witness whose memory was unreliable. The testimony of PW1 was not useful on the question of whether the disputed signatures were forged. Counsel submitted that the plaintiff had failed to prove on the balance of probabilities that the defendant breached the terms of the account operating mandate or that the two cheques were not properly honoured by the defendant. The third issue should also be answered in the negative.

On the question of remedies the defendants counsel submitted that the plaintiff was not entitled to any remedies.

Alternatively that the plaintiff was in a position to recover any loss suffered by the payment of the two cheques by withholding the gratuity and other terminal benefits due to Jack Mulabi in whose names the cheques were drawn. It would be unjust and an abuse of the process of court if the plaintiff was to obtain Uganda shillings 6,000,000/= from Jack Mulabi on the one hand and at

the same time from the defendant. The plaintiff appropriated the alleged tortfeasor's terminal benefits and was not entitled to Uganda shillings 6,000,000/= prayed for and the suit should be dismissed with costs.

Judgment

I have tried my best to peruse the record of proceedings and the documentary evidence in support of the plaintiff's case as well as the defendant's respective cases. I have not had the advantage of listening to the witnesses and can only read a transcript of the proceedings.

Before delving into the evidence adduced by the parties, the defendant does not dispute the legal doctrine as far as the duty of care of a bank is concerned. The submission of learned counsel for the defendant is that the issue revolves around the question of whether the cheques were properly honoured or not.

I will start with the submission of the plaintiff to the effect that the defendant breached condition 4 of the fixed/short deposit receipt exhibit D1. Condition 4 provides as follows:

"Deposit Receipts are not transferable by endorsement. In the absence of special instructions the amount of deposit can be paid only to the depositor in person on the due date or thereafter on surrendering the receipt duly discharged. The payment to any third party must be sanctioned by a letter of authority which should accompany the Deposit Receipt."

Interpretation of condition 4 is that deposit receipts are not transferable by endorsement consequently it cannot be endorsed to another party. Secondly the amount of the deposit can only be paid to the depositor in person on the due date or thereafter and upon surrendering the receipt. The first element of the second aspect is that the amount of the deposit can only be paid to the depositor and not another person unless there are special instructions to that effect. Secondly it is to be paid on the due date or thereafter. Thirdly payment is made upon surrendering the receipt duly discharged. The third element of condition 4 is that any payment to a third party must be sanctioned by a letter of authority which should accompany the deposit receipt.

It is not in dispute that the fixed deposit arrangement was terminated before the due date and the money therein transferred to the plaintiff's current account. Firstly the deposit is in the names of

the plaintiff North Bukedi Co-operative Union Ltd. It was issued on the 9th of May 2002 and the due dates indicated as 9th of August 2002. Exhibit P1 is a letter addressed to the Manager Bank of Baroda requesting that the sum of Uganda shillings 7,000,000/= be deposited on a fixed deposit account for three months. The money was transferred from current account number 1228 and the letter was signed by the Chairman Mukyali William and Jack Mulabi Secretary Manager. Exhibit P2 dated 3 September 2002 is a letter by the Secretary Manager Mr James Okoboi and addressed to the Manager Bank of Baroda inquiring about withdrawals in the bank statement of the plaintiff of 30th of July 2002 showing that Uganda shillings 5 million was withdrawn on 1 July 2002 and another sum of Uganda shillings 1,000,000/= was withdrawn on 9 July 2002 before the lapse of the three months period. The letter reads in part:

"The Management and the Board Members of North Bukedi Co-operative Union would be grateful if you could avail the document cancelling the fixed deposit order. Needless to emphasise that withdrawal of the 6 million shillings has become contentious issue in the Board and needs to be resolved soon."

Apparently the tone of the letter emphasises the document cancelling the fixed deposit order and not the withdrawal per se though the withdrawal was a contentious issue in the board. It is an agreed fact that the order terminating the fixed deposit is contained in exhibit D1 which is the receipt for the fixed/short deposit. The overleaf of the receipt has endorsed on it instructions to the effect that the current account number 12287 of the plaintiff be credited with the amount on the fixed deposit. The bank statement of the plaintiff exhibit D2 is for current account number 01101/012287. It shows that on 1 July 2002 a sum of Uganda shillings 7,012,965/= was transferred from the fixed deposit receipt account to the plaintiff's current account. On the same day under reference 0056 1268 a sum of Uganda shillings 5,000,000/= was withdrawn or paid to Jack Mulabi. Subsequently on 9 July 2002 under reference number 0056 1269 a sum of Uganda shillings 1,000,000/= was again paid to Jack Mulabi. Further evidences prove that the payments were made by two cheques. The first cheque is number 561268 corresponding with the reference in the bank statement and is for Uganda shillings 5,000,000/= the cheque is dated 1st of July 2002. The second cheque, Uganda shillings 1 million dated 9th of July 2002 is cheque number 561269. The defendant responded to the plaintiffs letter of enquiry exhibit P2 in a letter dated 9th of September 2002 exhibit P3 with explanations of the transaction.

The letter explains to the plaintiff that the fixed deposit of Uganda shillings 7,000,000/= was credited to the current account of the plaintiff account number 12287 on 1 July 2002 at the specific request of the principal signatory Mr Jack Mulabi according to his discharge on the fixed deposit receipt. The defendant's case is that a fixed deposit is discharged among other things by handing over the original of the deposit receipt to the bank. Exhibit D1 overleaf shows the endorsement to transfer the amount to the current account of the plaintiff.

The contention of the plaintiff is that the instructions to liquidate the fixed deposit account and transfer it to the plaintiff's current account ought to have been given by at least two signatories of the plaintiff according to the mandate for operation of the account. Evidence of the mandate is exhibit P3 which is the letter of the defendant to the plaintiff dated 9th of September 2002 and the second last paragraph thereof wherein defendant writes as follows:

"The withdrawals of shillings 5 million on the 1 July 2002 and shillings 1 million on 9 July 2002 were made by the cheque numbers 0056 1268 and 0056 1269, both cheques been signed and discharged by the principal signatory Mr Jack Mulabi and Mr John Kidimu – Treasurer as per mandate to operate upon the current account.

The copies of these cheques are enclosed for your reference."

Exhibit D1 governs the terms of the fixed deposit. The first condition is that receipts are issued for sums of Uganda shillings 500,000/= and above. The second condition is that interest will be allowed on deposit on terms which can be ascertained on application. In other words the rate of interest payable on the fixed deposit is negotiable. The third condition is very relevant and will be quoted in full. It provides as follows:

"The FULL names, addresses and specimen signatures of the depositors should be lodged with the Bank at the time of making the deposit. Failing this the Bank will require suitable identification at the time of repayment of the deposit."

Both counsels have not indicated whether specimen signatures of the depositors had been lodged with the bank at the time of making the deposit in terms of condition number 3. The specimen signatures of the depositors are to be lodged at the time of making the deposit. The plaintiff relied on the mandate for operation of its account to make the submission that the mandate was

applicable to the operation of the fixed deposit. However, the plaintiff chose to submit on condition number 4 on the question of premature termination of the fixed deposit before the period of three months had expired. There is no evidence of compliance with condition 3 concerning the names, addresses and specimen signatures of the depositors at the time of depositing money on the fixed deposit account. Exhibit D3 is a notice to the defendant of the change of signatories on the plaintiff's current account 12287. It is a letter dated 30th of September 1997 signed by the three contemporary signatories at the time of the questioned transaction. Paragraph 1 of the letter reads that there were changes in the top management of the Union and pursuant to that it stipulates as follows:

"(a) Mr Jack Mulabi Davies has been appointed Secretary Manager of the Union replacing Mr Sabila and stepping in as a new principal signatory to our account with you and has the mandate of the Union in handling all officio transactions with you on behalf of the Union.

(b) Mr Kidimu John and Mr Mukyali William have been appointed Treasurer & Chairman respectively, and appointed signatories too.

(c) We wish to change the signatories to our current account above to be only honoured signatories with effect from the date of this letter.

(d) The Secretary Manager to sign with one of the two above."

It is proven that the Secretary Manager Mr Jack Mulabi Davies was the principal signatory to the current account of the plaintiff. The Treasurer and Chairman respectively were alternate signatories at the time of the questioned transaction.

The first point to be made is that the mandate quoted above relates to the operation of the plaintiff's current account number 12287. The operation of the fixed deposit account is supposed to comply with conditions three of the conditions contained in the fixed deposit receipt overleaf. The operation of the fixed deposit account is supposed to have its own mandate. Consequently it is material to examine the covering letter for the opening of the fixed deposit account. The letter for the fixed deposit is dated 7th of May 2002 and addressed to the Manager Bank of Baroda

Mbale Branch. It is signed by the principal signatory Mr Jack Mulabi/Secretary Manager and the Chairman Mr William Mukyali. The letter reads as follows:

"This is to deposit Uganda shillings 7,000,000 = (Read Uganda shillings 7 million only) current account number 1228 for a fixed period of three months starting from 8th of May 2002 as fixed deposit.

This is for your Information and Action...

The material question in controversy is to establish who actually physically went to the bank to work out the details of the fixed deposit account indicated in the covering letter. No clear details have emerged from the witness testimonies. It is apparent from the bank statement that no instrument has been described for transfer of 7,000,000/= Uganda shillings to a fixed deposit account. The bank statement is exhibit D2. Consequently it can be assumed that Uganda shillings 7,000,000/= was drawn and deposited to fulfil accounting procedures pursuant to the letter dated 7th of May 2002 exhibit P1. This is because the amount remained in the bank and was credited to a fixed deposit account of the plaintiff. The plaintiff was issued with a receipt for the fixed deposit. The narrative in the statement shows that an amount to SDR 867738 for three months. The face of exhibit D1 which is the fixed/short deposit receipt does not have any endorsement of the client. It is signed by the manager and accountant of the defendant bank. It is stamped with the words "Not transferable".

PW1 James Okobi testified that exhibit P1 is a letter from the plaintiff to the defendant to receive a deposit of Uganda shillings 7,000,000/=. He does not give details. The purpose of opening a fixed deposit account was to cater for the annual general meeting of the union which was due in August/September 2002. He testified that one of the signatories to the cheques who used to withdraw the money from the current account of the plaintiff had informed the board that he had not signed as indicated in the cheque. John Kidimu disputed his signatures on the cheques. His testimony was that the bank did not exercise prudence in the payment of the two cheques. The only relevant testimony was that the withdrawal is one made before the maturity date of the fixed deposit. He further testified that Jack Mulabi who was responsible for the withdrawal of the money passed away in July 2002 sometime after the withdrawal using the second cheque.

PW2 Mr John Kidimu disputed his signature. He however did not dispute the signature of Jack Mulabi the deceased. He further testified that the cheque was kept in the custody of the Secretary Manager Mr Mulabi Jack (deceased). He further testified on re-examination that Mr Jack Mulabi had advanced himself some union money which was also discovered during the takeover by Mr James Okobi. DW1 the manager of the defendant on cross examination testified that the money was transferred from the fixed deposit account to the current account on the 1 July 2002. There were no separate instructions on the fixed deposit and the principal signatory was taken as the sole signatory. The instructions were given on the original fixed deposit receipt by the principal signatory Jack Mulabi. Perusal of the fixed deposit receipt has the signature with the instructions "***Please credit our current account 12287.***" signed on 1 July 2002. The case of the plaintiff in paragraph 6 (ii) of the plaint in the particulars of negligence is that the money was transferred off the fixed deposit account to a current account number 12287 without formal written instructions. Secondly, the defendant's servants paid money from the fixed deposit account without notifying the plaintiff. Thirdly, they concealed the transaction from the plaintiff. In paragraph 7 of the plaint it is averred that by transferring the money off the fixed deposit account, the plaintiff was denied interest on the amount. As far as the allegation that the money was transferred from the fixed deposit account without formal written instructions is concerned, there is no evidence that it was a formal requirement and that there was an arrangement for the plaintiff to write a formal letter. Secondly the evidence shows in the overleaf page of the fixed deposit receipt that written instructions were given by Jack Mulabi for the money to be transferred to the plaintiffs current account. The defendant has not denied that the money was transferred from the fixed deposit account on the instructions of Jack Mulabi the principal signatory to the plaintiff's current account. Exhibit D3 which is the letter informing the bank of the change of signatories on account number 12287 clearly indicates that Jack Mulabi Davies had been appointed Secretary Manager of the Union and was designated officer of the Union in handling all official transactions with the bank on behalf of the Union. The mandate of the late Jack Mulabi Davies is more elaborate than that of his co-signatories. He had the right to handle all official transactions with the bank on behalf of the union. In the circumstances, the written instructions on the receipt overleaf exhibit D1 can be deemed to be within his authority as indicated in the mandate to operate the plaintiffs account number 12287. The conclusion is that the transfer of the money to the plaintiff from the plaintiffs fixed deposit account on instructions of Jack Mulabi was not in

breach of condition 4 governing the fixed deposit. Secondly the amount could be transferred upon the special instructions of the depositor before the due date under condition 4. Thirdly written instructions are only relevant when the money is being transferred to a third party. In this particular case the instructions were to transfer the money to the plaintiff who is also the owner of the fixed deposit account.

I further agree with the defendants counsel that the question of the duty of care and the legal doctrine thereof can be addressed after establishing whether the signature of John Kidimu had been forged. Starting with the DW 2 Eva Nangwomu that she dealt with the plaintiff company when working with the defendant's bank at Mbale branch in 2002. She identified the signatories to the current account number 12287 and exhibit D4 which is the specimen signature card. Her testimony is that the cheque was presented for payment by Jack Mulabi and she verified and established that the signature on the cheque was the same as that on the specimen card.

Three reports from forensic experts were tendered in evidence. I would deal with the reports in a chronological order according to the dates indicated in the reports. The first report is dated 6th of July 2004 by Apollo Ntarirwa the Government Analyst from the Scientific Aids Laboratory Police Headquarters. He was requested to determine whether the questioned signatures on the cheques were written by the writer whose specimen samples were given. The specimens used were the bank of Baroda specimen signature card for current account 12287 and secondly a typewritten letter from the plaintiff dated 30th of September 1997. After examining the similarities between the specimens and questioned signatures of cheque number 561268 dated 1 July 2002 for Uganda shillings 5,000,000/= and cheque number 561269 of 9 July 2002 for 2,000,000/= his findings and opinion are that the evidence was consistent with the writer of the specimens Mr. John Kidimu having written the questioned signatures attributed to him on the front and backs of the cheques. This report was tendered in evidence as exhibit D6.

The second report from the same Scientific Aids Laboratory Police Headquarters is that of Ezati Samuel. He examined the same questioned cheques namely cheque number 561268 dated 1st of July 2002 for Uganda shillings 5,000,000/= and also cheque number 561269 dated 9th of July 2002 for Uganda shillings 1,000,000/= all payable to Jack Mulabi. The specimen examined is the specimen signatures with the Bank of Baroda/Defendant. Particularly the specimen signature he compared was that of John Kidimu. His conclusion is that there were fundamental differences

and taken in totality came to the opinion that the questioned signatures were not made by the writer of the specimen signatures.

Attempts were made for the government analysts to reconcile the reports and come up with a joint report. Subsequently Apollo Ntarirwa in a letter dated 19th of November 2012 re-examined the documents. He again found that it was probable that the writer of the specimen could have written the questioned signatures. He further concluded that he would need a lot more samples to make a more conclusive opinion as they were only two samples.

I have carefully considered the question of the conflicting reports. The standard used and the aim of the Scientific Aids Laboratory Staff of the Police Headquarters is to establish something with scientific accuracy. Yet the question of reasonable care to be exercised by the defendant's servants is more subjective and cannot be expected to be as rigorous and scientifically accurate as that of the forensic experts. The question should be whether a reasonable banker in the course of the ordinary business of the bank would have come to the conclusion that the cheques were duly endorsed by the writer of the specimen signatures and honoured the cheques. DW 2 testified that the signatures on the cheques were the same as that in the specimen card and she cleared them. Secondly the cheques were presented by the principal signatory Mr Jack Mulabi Davies (deceased). No evidence has been led to show that no reasonable care was taken to establish that the alleged signature of John Kidimu was the same as that on the specimen signature card in the possession of the defendant. The evidence is that DW 2 actually examined these signatures on the cheques and compared them with the specimen signatures in the possession of the bank. The duty of DW2 was to establish whether the cheque was duly issued by the plaintiff. The cheque purported on the face of it that it was issued by two signatories authorised to do so. Apparently she was not suspicious that there could have been any forgery. The question is therefore whether she ought to have become suspicious. The expert witnesses did not testify specifically whether any reasonable banker could have been misled by the signatures so as to conclude that they were written by John Kidimu. Secondly DW3 Apollo Ntarirwa came to the opinion that John Kidimu had actually signed the questioned cheques. Ezati Samuel's report is a very critical appraisal of the signatures. It is the kind of appraisal that cannot be attributed to an ordinary banker who handles several cheques a day. What is even more material is the fact that this cheque was presented by the principal signatory, who was particularly a representative of the plaintiff to the

bank as opposed to the other alternate signatories to the plaintiff's current account. The specific mandate of the principal signatory in the letter of instruction of the plaintiff dated 30th September 1997 and Exhibit D3 reads as follows:

"(a) Mr Jack Mulabi Davies has been appointed Secretary Manager of the Union replacing Mr Sabila and stepping in as a new principal signatory to our account with you and has the mandate of the Union in handling all officio transactions with you on behalf of the Union." (Emphasis added)

The letter clearly indicates that apart from being the new principal signatory, Mr Jack Mulabi Davies had the mandate of the Union in handling all officio transactions with the Bank on behalf of the Union.

There is the question in the mandate for operation of the plaintiff's current account which is being reviewed above in which the bank was clearly notified that Jack Mulabi was the official representative of the plaintiff. He is the one who presented the cheque for payment with the signature or purported signature of his colleague Mr. John Kidimu. It is a strange situation in which the plaintiff is trying to make a third party liable for the fraud or purported fraud of its officials or official. It is normally third parties who try to make the principal liable for the fraud or acts of the agent. The general principle of vicarious liability is that a master is liable for every wrong of the servant or agent committed in the course of employment. The operation of the plaintiffs account is deemed to be in the course of the employment of Jack Mulabi Davies. This is because the banker does not ask what the money is going to be used for but only needs to know whether the instrument requesting for withdrawal is duly issued by the right authority according to the specimen signatures in its possession. Authorities on the liability of the master for the acts of the servant mainly deal with liability to third parties of the master for the acts of the servants. Nonetheless, a master can be held liable for the fraud of the servant committed in the course of employment.

In one case the House of Lords held in the circumstances of that case the principal was liable for the fraud of its agent even if the fraud was committed for the benefit of the agent. This was in the case of **Lloyd versus Grace Smith and Company [1912] AC 716**. The facts of the case were that the Solicitors Grace and Smith left the clerk with a free hand to conduct the business of the

firm. In the course of conducting such business Mrs Lloyd entrusted the clerk with her title deeds and signed some documents presented to her by the clerk who fraudulently disposed of her property for his own benefit. Mrs Lloyd believed the clerk and endorsed whatever documents he presented to her without reading through. Lord MacNaughten found that Mrs Lloyd had put herself in the hands of the firm and she was unable to know the exact position Mr Sandles (the clerk) was in. The question was who was to suffer for the fraud of the clerk? The principal could be liable for ensuring the honesty of the persons they employ. The court examined the way Mrs Lloyd was tricked by the clerk who had a free hand in handling the business of the firm to the extent that Mrs Lloyd believed him. However the case dealt with the liability of the master to a third party for the acts or frauds of the agent. The plaintiff's case is peculiar because it is trying to fix liability on a third party for the acts of its servant. The plaintiff alleges that the bank was negligent to honour cheques issued by the plaintiff through the plaintiff's servants. The plaintiff is a Corporation and therefore a legal fiction and can only act through its directors. The plaintiff is a cooperative society registered under the Cooperative Societies Act cap 112. Under section 6 (5) of the said Act, a probationary Society is a body corporate. The section provides as follows:

“(5) Any society registered under subsection (1) shall become a body corporate by the name under which it is registered probationary, with perpetual succession and a common seal, and with power to hold movable and immovable property of every description, to enter into contracts, to institute and defend suits and other legal proceedings and to do all things necessary for the purpose of its constitution; and any reference in any written law to a registered society shall include a society which is registered under this section.”

Furthermore societies permanently registered are also corporations capable of owning property and suing and being sued. Section 28 of the Cooperative Societies Act provides as follows:

“28. Societies to be bodies corporate.

A society on registration shall become a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold movable and immovable property of every description, to enter into contracts, to

institute and defend suits and other legal proceedings and to do all things necessary for the purpose of its constitution.”

Furthermore section 1 interprets an Officer to mean:

(n) “officer” includes a chairperson, secretary, treasurer, member of a committee, employee, or other person empowered under any regulations made under this Act or the byelaws of a registered society to give directions in regard to the business of a registered society;”

It is allegedly one of those directors/officers of the plaintiff society who cashed the cheque fraudulently. The general rule is that the veil of incorporation will only be lifted in special circumstances. Generally the acts of a director of a corporation are the acts of the corporation as discussed in the case of **H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd [1956] 3 All ER 624**, Lord Denning said at page 630:

“A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such.”

The plaintiff’s case is unique because it is the plaintiff and not a third party who was defrauded by its own official. It is the plaintiff’s own official who presented cheques of the plaintiff duly signed by himself as the principal signatory and a representative of the plaintiff under the mandate together with the signature of his colleague who was a co-signatory. The level of suspicion of the defendant’s officials was unlikely going to be raised by the fact that the principal signatory namely the very person who operated the account presented a cheque he was authorised to issue together with signature of a fellow operator of the account. The suspicion of the defendant’s official that something fishy was going on was even more unlikely in light of the evidence of the handwriting expert. Mr. Apollo Ntarirwa a handwriting expert of 35 years

experience established that there were similarities between the questioned signature of John Kidimu on the questioned cheques and the specimen signatures. I would not go as far as the submission of the defendant's counsel that the plaintiff had retained the terminal benefits of the deceased John Mulabi which was sufficient for compensation of the plaintiff. Jack Mulabi “mysteriously” passed away soon after issuing and cashing the two questioned cheques. There is no explanation as to the day when he actually died and the cause of death. The only evidence is that he died in July 2002 after issuing the last cheque of Uganda shillings 1,000,000/= on the 9th of July 2002. Whatever the remedy of the plaintiff, Jack Mulabi the principal signatory of the account and who unfortunately passed away before the matter came up could have been held liable for the alleged fraud on the plaintiff through withdrawal of the total of Uganda shillings 6,000,000/= using the plaintiffs own cheques and presented by the authorised signatory to the account. It was a case of breach of fiduciary duties of a director/officer to a company/corporation.

In those circumstances I find that the defendant cannot be held liable for the fraud of the plaintiff's own official and representative. The plaintiff ought to have proceeded against its own officer and it is no excuse that he passed away soon thereafter. It could have been a case of breach of trust or contract. It was the testimony of John Kidimu in cross examination that the terminal benefits of Jack Mulabi Davies were much more than the money withdrawn. Could not that have been used to offset the money owing to the plaintiff? Could the withdrawn money have been traced from Jack Mulabi's estate? It is further very much to be regretted that such a suit has taken about 10 years before resolution. The situation may well be without a remedy for the plaintiff and proves the value of the Constitutional principle under article 126 (2) of the Constitution that justice shall not be relayed. Whatever the case may be, the plaintiff has not proved any case of negligence or fraud against the defendant. The defendant exercised reasonable care and the presenter of the cheques which form the basis of the suit was the representative of the plaintiff to the bank. Secondly the fixed deposit account belonged to the plaintiff and was liquidated and paid to the plaintiffs account. Furthermore the hand written instructions to the defendant on the overleaf side of the fixed deposit receipt exhibit D1 were given by the plaintiff's representative to the bank according to the mandate for operation of the plaintiffs account. In those circumstances the plaintiff's suit has no merit and is dismissed with costs.

Judgment delivered in open court this 5th of April 2013

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Joseph Mwenyi for the plaintiff

Michael Balimukuubo holding brief for Dennis Wamala for the defendant

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge