

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO 569 OF 2002**

TROPICAL AFRICAN BANK LTD}.....PLAINTIFF

VERSUS

ALI HAJJI ABDI}DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

This suit against the Defendant was reinstated after judgment was set aside. By the amended plaint of the reinstated suit, the Plaintiff's claim against the Defendant is for payment of Uganda shillings 921,883,306/= allegedly fraudulently siphoned from the Plaintiff's bank account through various accounts, with the participation and/or collusion of the Defendant. It is also for interest on the amount claimed, compensation in damages for breach by the Defendant of the fiduciary duty owed to the Plaintiff and for costs of the suit.

The Plaintiff's case in the pleadings is that the Defendant was at all material times the acting branch manager of the Plaintiff's Kampala branch and his duties included receiving cheques presented for payment by the Plaintiff's customers and by other banks on the behalf of their customers. The case is that on various occasions in the year 2001 the Defendant authorised direct credit entries into Account No. 446230 operated by Hussein Ali (a son of the Defendant) on the basis of cheques issued by Hussein Ali to the tune of Uganda shillings 166,130,209/= that had not been cleared. Furthermore, on various occasions in the year 2001 the Defendant further authorised direct credit entries into account number 447181 operated by Raphael Drichi (a customer of the Plaintiff) against cheques that had not been cleared. The cheques were later dishonoured and at the time of filing this suit, the said account was in debit in the amount of Uganda shillings 171,194,949/=. Between February 2001 and April 2002 the Defendant received several cheques drawn on account number 44630 in the names of Hussein Ali Abdi totalling to Uganda shillings 360,889,500/=. The Defendant further received cheques totalling Uganda shillings 15,548,640/= drawn on account number 224302 in the names of Hussein Ali trading as New Kireka Agip Petrol Station. All the cheques were not arranged for and the Defendant was to have returned them unpaid within three days but instead held them at his office beyond the period and as a result the clearing account was debited with the said amount to the detriment and loss of the Plaintiff.

Additionally between February 2001 and April 2002, the Defendant received several cheques drawn against account number 477146 in the names of Bosi Ali (son of the Defendant/Counterclaimant) totalling to Uganda shillings 156,357,000/=.

The Defendant suspended the said cheques in the suspension account and as a result, the Plaintiff's suspense clearing account was debited with the said amount and the cheques later returned unpaid. On or around 26th of March 2002, the Defendant received two cheques drawn on account number 2501606400 with the Development Finance Company Uganda in the names of Raphael Drichi and operated by Lucky & Sons Ltd totalling Uganda shillings 59,500,000/= and for the benefit of New Agip Nateete Service Station. The Defendant authorised the said cheque numbers 207540 and 207535 (DFCU) to be credited directly to the account of the said New Agip Nateete Service Station but the cheques were later returned unpaid when actually the funds had already been withdrawn from the beneficiary's account. The Plaintiff's staff discovered the above irregularities sometime in May 2002 and on the 2nd of May 2002 the Defendant bound himself by a memorandum of understanding with the Plaintiff to make good the losses that had been incurred by the Plaintiff according to the copy of the memorandum of understanding attached to the plaint.

Following the MOU the Plaintiff's staff discovered that there were other losses that had been caused by the Defendant and the Defendant admitted that he was liable and was to compensate the Plaintiff according to a statement made before the manager for legal services on the 13th of May 2002. Sometime in June 2002, the Defendant did pay a sum of Uganda shillings 25,000,000/= in partial satisfaction of his undertaking but he later failed or neglected or refused to honour his undertaking. Consequently the Plaintiff filed HCCS No. 569 of 2002 for payment of the outstanding amount lost through the Defendant's activities. On 8th November, 2005 the Defendant was terminated from service by the Plaintiff and the amount of Uganda shillings 921,883,305/= has never been paid to date.

In reply the Defendant denied the Plaintiff's claim. He contended that his duties as the branch manager did not in any way include receiving cheques presented for payment by customers of the Plaintiff and other banks on behalf of their customers because it was the head of current accounts who kept the cheques and had a register for it. Cheques are received by the teller and handed to the rectifying clerk to confirm if they are in order and protect the balance on the account to ensure that there are enough funds to cover the cheques. For cheques of over Uganda shillings 10,000,000/=, the branch manager had to pass the same with his signature. But in this case the Defendant never appended his signature on the questioned cheques in issue as they were not brought to his attention. It was Kigongo Patrick the in charge current accounts who was responsible for failing to present the said cheques and kept them beyond the three authorised to days contrary to bank regulations governing the clearing of cheques. He further contended that it was Kigongo Patrick who suspended the cheques in issue and not referring them to the

Defendant. He was the one directly interested in the cheques and he was prosecuted for causing financial loss to the bank.

Furthermore, the Defendant asserted that he never breached his fiduciary duty to the Plaintiff or defrauded the Plaintiff or colluded with any person to defraud the Plaintiff of Uganda shillings and hundred and 12,883,306/= or any amount at all. He was cleared by the court of the alleged fraud and causing financial loss to the bank according to the judgment of the court in criminal case number 723 of 2002

The Defendant filed a counterclaim for declaration that the continued suspension of the counter claimant by the counter Respondent/Plaintiff without pay was illegal; the dismissal was unlawful and a violation of the Defendants rights; payment of the Counterclaimant's salary arrears and fringe benefits; general damages; interest and costs of the counterclaim.

There are several other averments which do not need to be repeated here. In the joint scheduling memorandum executed by Counsels of the parties on 23rd March, 2015, the agreed facts are as follows:

The Defendant was employed by the Plaintiff bank in various positions and at the time of these suspensions, he was employed as the acting manager, Kampala branch. Secondly, whilst in the Plaintiff's employment, the Defendant was charged with the offences of causing financial loss under Criminal Case No 723 of 2002 – Uganda versus Al Hajj Abdi and was later acquitted of the offences. Thirdly, the Plaintiff filed civil suit number 569 of 2002 demanding from the Defendant payment of Uganda shillings 912,883,306/=. Ex parte judgment entered in the case on 1st November, 2005 was set aside and an order given for the case to be heard inter partes.

The Plaintiff was represented in the proceedings by Counsel George Mike Musisi while the Defendant was represented by Counsel Joseph Kiryowa and upon adducing evidence on both sides; Counsels addressed the court in written submissions which capture the gist of the facts adduced in evidence.

The Plaintiff's submission on facts:

Between 2001 and 2002 large amounts of money amounting to Uganda shillings 912,883,306/= were paid out to the Plaintiff's bank customers in a fraudulent way that caused financial loss to the Plaintiff. The withdrawals of this money were effected using accounts some of which belonged to the Defendant's children Hussein Ali Abdi, holder of Account number No. 446230 and also operating account No. 224302 under the title, New Kireka Agip Petrol Station, another account No. 447146 operated by Bosi Ali and another Account No. 447181 operated by Raphael Drichi which was found to have been overdrawn. The Plaintiff's case is that the fraudulent acts of the Defendant who was the Branch manager of the Plaintiff led to the loss now claimed by the Plaintiff at its Kampala branch at the time. As manager, the Defendant's duties included the

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control of the banking affairs within the branch, supervision of cash transactions, foreign business and inward and out ward clearing and controlling the suspense account. The Defendant allowed direct entries to be made on the customers' accounts in question and by the time the cheques would be returned to show that the money was not arranged for, the customers had already taken the money. In the alternative, the Defendant authorized for payment of money against cheques when there was no money on the accounts of the customers concerned and this caused the accounts to go into debit balance. The branch manager took it upon himself to authorize these transactions and as a result, caused financial loss to the Plaintiff.

ISSUES.

1. Whether the Defendant caused financial loss to the Plaintiff?
2. Whether the Defendant was lawfully suspended and/or dismissed by the Plaintiff?
3. What are the remedies available to the parties?

ISSUE 1

Whether the Defendant caused financial loss to the Plaintiff?

PLAINTIFF'S SUBMISSIONS

The Plaintiff's Counsel submitted that in order to resolve this issue, it was necessary to establish what duties and obligations the Defendant had as branch manager. The Defendant owed a fiduciary duty to the Plaintiff as a branch manager of the Plaintiff's bank. According to **Black's Law Dictionary 8th Edition** 'fiduciary duty' means a duty of utmost good faith, trust, confidence, and candour owed by a fiduciary (such as a lawyer or corporate officer) to the beneficiary (such as a lawyer's client or a shareholder); a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person (such as the duty that one partner owes to another). This means a person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence, and candour; the corporate officer is a fiduciary to the corporation; one who must exercise a high standard of care in managing another's money or property. In the premises the Defendant was a fiduciary to the Plaintiff.

MALAFIDES ON THE ACCOUNTS

The Plaintiff's Counsel submitted that account number 446230 in the names of the Defendant shows by the memorandum of understanding Ex P1 presented to court that the Defendant acknowledged that he authorized direct credit entries on the above mentioned account amounting to Uganda shillings 166,130,209/=. It was evident in the statement of account No. 446230 of Hussein Abdi (Ex P8) that the said money amounting to Uganda shillings 166,130,209/= was overdrawn. PW3, Addah T. Wegulo in re-examination based her testimony on Ex P8 at page 103 of the trial bundle, line 49 that the account of Hussein All Abdi was overdrawn by Uganda
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shillings 166,130,209/= . This is the amount that was admitted in the Memorandum of Understanding Ex P1.

Account No. 447181 in Names of RAPHEAL DRICHI

In exhibit P1 (MOU) the Defendant admitted authorizing direct entries on the above mentioned account which was now in debit of Uganda shillings 171,194,949/=. The said debit appears on the statement of Account of Raphael Drichi **Exp11** PW3 testified that in May 2002 in Ex P1 the Defendant came up with an agreed schedule to pay the balance. He made payment on the 30th May 2002 to the tune of Uganda shillings 25,000,000/=. Out of that sum Uganda shillings 10,000,000/= was banked on the account no. 446230 of Hussein Ali Abdi and Uganda shillings 15,000,000/= was paid on Account No. 447181 of Raphael Drichi. These two credits are clearly shown on the individual statements of Account **Exhibit P8** and **Exhibit P 11**. In the MOU, the Defendant offered to pay Uganda shillings 30 million on account No. 446230 of Hussein Ali Abdi and 447181 of Raphael Drichi by Friday 10th May 2002, after which he was supposed to negotiate with the Plaintiff bank a schedule of paying the balance. The Defendant undertook to bear responsibility in case it was discovered that similar direct credit entries were effected on other accounts while he was in office. Indeed other anomalies were discovered leading to another statement by the Defendant **EX P 12**. In Ex P12, a statement signed by the Defendant on the 13th day of May 2002, he accepted to have received several cheques drawn on Account No. 446230 in the names of Hussein Ali Abdi totaling Uganda shillings 368,889,500/=. The Defendant further accepted that he should have returned the unpaid cheques within three (3) days as they were not arranged for, but he suspended them instead in the Suspense Account. As a result, the Plaintiff's clearing account was debited with the said amount of Uganda shillings 368,889,500/=

The Defendant further admitted receiving DFCU cheques N0207540 of Uganda shillings 28,500,0001= and No. 207535 of Uganda shillings 31,000,0001= drawn on Account No. 2501606400 in the names of Lucky & Sons Ltd, operated by Mr. Bosi Ali (son of the Defendant) for the benefit of the Plaintiff's customer New Agip Natete Service Station. The cheques were directly credited on the customer's account and were later returned unpaid but the funds had already been withdrawn thereby leaving the bank to bear the loss. All in all, the Defendant acknowledged in Exhibit P12, to have been responsible for the loss of Uganda shillings 600,295,140/= and pledged to agree on a schedule to make good the loss. The Defendant further offered to sell some of his properties to pay the Plaintiff. Though the Defendant accepted signing these documents, EX P1 and EX P 12 he denied liability on the ground that he was tortured into signing them. His testimony is that he was made to sign both documents at gun point after the Plaintiff's managing director called in operatives of the Chieftaincy of Military Intelligence and accused the Defendant of being a terrorist. The Plaintiff does not agree with the defence of duress in execution of Exhibit P1 and P2. PW3 was present in the Managing Director's office at

the different times both documents were signed, and truthfully testified that there was no torture or duress on the Plaintiff's part. The first statement Exhibit P1 was signed by the Defendant in a free office environment without the involvement of any forces. It was an understanding reduced into writing. It was typed out and studied by the Defendant. He confirmed that it was a true reflection of what was agreed upon. The Defendant signed all the pages of the memorandum and PW3 witnessed. The second statement, Exhibit P 12 made eleven (11) days later on the 13th May 2002 was also signed on all pages by the Defendant and even witnessed by the Defendant's son, Hussein Ali Abdi.

Counsel prayed that the allegations of torture and duress alleged by the Defendant during the signing of Exhibits P1 and P12 be disregarded because:

- i. The two documents were signed on separate dates, eleven (11) days apart. It was not possible that the Defendant was coerced to sign one document at gun point and went home and then came back to his workplace eleven days later to sign another document at gun point and under torture. Between the first and second document signed, the Defendant had ample time to report to the relevant authorities that he had been forced to sign a document implicating him in a serious criminal matter.
- ii. The Defendant does not show that he was forced into the Plaintiff's managing director's office on any of the two occasions. He was invited and attended voluntarily. He did not in his pleadings or testimony disclose how he got to know that the personnel who forced him to sign the documents were from CMI as he alleged, or that he knew them earlier as such.
- iii. In Exhibit P12, the Defendant visibly corrected mistakes in the document and countersign it.
- iv. On the 2nd occasion, when the Defendant signed Exhibit P12, he came with his son, Hussein Ali Abdi who signed on the statement as a witness. There was no evidence produced by the Defendant to show that Hussein Ali Abdi was himself tortured or in any other way was put under duress to witness his father's statement. He notably kept away from testifying in this case.
- v. The contents of the statements Exhibit P1 and Exhibit P12 were true amounts of money admitted by the Defendant to have been lost in direct credits and the suspense account and are reflected in the bank statements of the concerned customers and the audit report (report of reconciliation of the inward clearing account) Exhibit P13, It should be noted that the findings of the Auditor were made on 12th June, 2002 long after the Defendant's statement Exhibit P12 was signed. However, the amount of money Uganda shillings 600,295,140/= admitted by the Defendant in Exhibit P 12 as being the loss occasioned is reflected also in EXP 13. The Defendant's admission in Exhibit P12 that the cheques in question were handed over to him by Mr. Kigongo (PW1) in March 2002 is corroborated by the evidence of PW1 himself. There was an attempt by the Defendant to fulfill his

promise in the memorandum Exhibit P1 when deposits of Uganda shillings 25,000,000/= were made on the accounts in issue.

- vi. The Defendant's son, Hussein Ali Abdi, made a statement himself Exhibit P9 where he made an admission that cheques amounting to Uganda shillings 384,438,140/= were issued by him, on his account no. 446230 and 224302 in the business name of New Kireka Agip Petrol Station and that the said cheques were honored when there were no funds on those accounts. In Exhibit P12, the Defendant admits that he suspended the cheques in the Suspense Account beyond the three days when they should have been returned, thus occasioning the loss.
- vii. The Defendant's admission in ExP12 that the cheques in question were handed over to him by Mr. Kigongo (PW1) in March 2002, is corroborated by the evidence of PW1 himself.
- viii. Further, having alleged duress, the Defendant did not plead any particulars as required by Order 6 rule 3 of the Civil Procedure Rules which requires particulars of duress to be pleaded.

Counsel submitted that PW4 testified that the Defendant had supervisory roles in the Plaintiff bank and this included the control of the banking affairs within the branch, supervision of cash transactions, foreign business, inward and outward clearing. He also controlled the Suspense Account. The Suspense Account would be debited when a customer's cheque is issued for payment with no corresponding funds on his or her account. Where there are not enough funds with respect to cheques drawn on customer's accounts, the Defendant would determine whether to return the cheque unpaid (dishonor it) or to keep the cheque for later payment (on the suspense account). PW1 Kigongo Patrick testified in elaboration how the outward and inward clearing system worked in paragraph 6 of his testimony. "Cheques, deposited over the counter (on the authorization of the branch manager) could be given / credited directly into the depositor's account before the cheque itself is sent for collection." In paragraph 11, "It was routine that every evening all cheques suspended on Account 1725 would be taken to the branch manager for him to see the position and decide which cheques should be dishonored or retained. Even during the day, at times he would call, to get the position. So at all times, the Defendant was in a position to know the balance on the account. If he wanted he would add up the cheques and compare with the balance on the account. "

PW3 was the assistant branch manager and testified about the duties of the Defendant with regard to one way of handling a cheque deposited by a customer. A branch manager is supposed to control all departments within the branch, including cash, foreign business and current accounts which covers clearing. The branch manager can give "direct credit" which means that he can order that value be given to the cheque before maturity, thereby allowing the customer access to the funds before the cheque is cleared. PW3 further testified that given the risky nature of this facility, only the branch manager could authorize it. The branch

Manager uses his best judgment when granting the facility taking into consideration the party on which the cheque is drawn and the account to which the cheque is being deposited. In case of non-payment the branch manager is fully responsible for the recovery of the funds should there be insufficient funds on the account to cover the payment/credit. PW3 testified that in the case of inward clearing cheques or cheques received by the Plaintiff bank from other banks through the clearing house drawn on its customers, the amounts are debited immediately on the date of receipt if funds are available. In case of insufficient funds or technical reasons warranting nonpayment the cheque is debited to a suspense account pending further action. Cheques should not be held on this account for more than two (2) working days. They must be paid or returned to the collecting bank, giving reasons for nonpayment. It is the branch manager's responsibility to ensure that this is done.

The Defendant breached the duties bestowed on him when he allowed direct credit onto customer accounts while there were no funds to support such credit and also suspended cheques on the suspense account beyond the period when the cheques were to clear and by the time they were returned, it was discovered that there were no funds on the requisite accounts, while the Plaintiff's account had been debited with such funds. The cases in point include 26 cheques which the Defendant suspended on the suspense account No. 1725 beyond the requisite period. All the cheques were tendered in evidence as Exhibit P4. However, the cheques in Exhibit P4 amounted to 36 cheques. There was a cheque which was not found but whose number (207535) and amount of Uganda shillings 31,000, 000/= are shown on page 47 of the trial bundle. According to PW3 this cheque could have been misplaced due to the lapse of time but is in the records. It is also one of those included in the report Exhibit P12 being the reconciliation report of PW5 Anne Nandaula.

PW1 testified in paragraphs 7, 8, 9 and 10 that he received the unreturned cheques Exhibit P4 and other cheques and found that they did not have sufficient balance on the respective accounts to meet the amounts written on them. He referred the cheques to the Defendant as branch manager to decide whether to pay them, dishonor them or suspend them for future payment. He determined that they should be for future payment since they were not dishonored. The cheques in issue stayed for long and were not paid while the presenting banks had already paid their customers who had presented them. PW1 later realized that the account holders of the cheques were the Defendant's sons. The Defendant insisted that he would clear the cheques but he kept them until the new manager took office. According to PW1 and PW2 the total amount of money on the cheques found with the Defendant was Uganda shillings 540,795,000/=. The Defendant contended that he did not know anything about the cheques and that the cheques were actually held and kept by PW1 who the Defendant accuses of suspending them. It is however clear from the two Plaintiff's witnesses PW1 and PW2, who have since retired from the employment of the bank that the cheques were

found with the Defendant in his drawer.

PW2 in particular testified about the Defendant's attempt to evade the opening of the drawer the first time he brought the keys, pretending that he was in a hurry. It is further clear from this testimony that the Defendant refused to go to the General Manager to report the incidence of the cheques whereupon PW2, did it himself. The Defendant was also able to identify his signature on some of the cheques when asked to do so. The same signature of the Defendant appears against some of the cheques in Exhibit P6 being the list of cheques returned through the clearing system for non availability of funds. The Defendant's signature appears on Exhibit P6 in the following places;

- (a) Cheque No. 3233785 of Uganda shillings 50, 000, 000/= INO (IN THE NAMES OF) Hussein Ali Abdi Page 53
- (b) Cheque No. 466686 of Uganda shillings 50,000,000/= INO. New Natete Agip Page 56.
- (c) Cheque No. 3541352 of Uganda shillings 30,000,000/= INO. New Natete Station at page 58
- (d) Cheque No. 35441353 and 01466091 both of Uganda shillings 50,000,000/= INO Hussein Ali Abdi at page 61.
- (e) Cheque Nos. 3541365 and 3541364 both of Uganda shillings 50,000,000/= INO Hussein Ali Abdi at page 62 (g) Many other dishonored cheques where the Defendant signed that he had handed them over to his son Hussein Ali Abdi appear in Exhibit P6 at pages 63, 64, 65, 66, 67 of the trial bundle .

TOTAL LOSS

It was established through an internal audit where a report was made of the reconciliation of the inward clearing account. This report Exhibit P 13 which was produced by Anne Nandawula, PW5, who was the Manager Internal Audit, revealed that cheques covering a total figure of Uganda shillings 600,292,148/= were found not reconciled for the period January 2000 to April 2002. These included the 26 cheques worth Uganda shillings **540, 792, 148/=** which were recovered from the Defendant, most of which were for the two sons of the Defendant. The last two cheques of Uganda shillings **28, 500, 000/=** and Uganda shillings **31, 000, 000/=** have also been referred to earlier above. This makes the total of Uganda shillings **600,292,148/=** according to Exhibit P 13. The same amount of money was admitted by the Defendant in Exhibit P 12. Further to the above figure is the amount admitted by the Defendant in Exhibit P1 of Uganda shillings **166,130,209** on the account of Hussein Ali Abdi and Uganda shillings 171,194,949/= on the account of Raphael Drichi. This would make a total loss of Uganda shillings 937, 620, 298/= . It was shown by the evidence of PW4, Addah T Wegulo that the Defendant paid back to the bank an amount of Uganda shillings 25,000,000/=, Uganda shillings 10,000,000/= on A/c No 446230, of Hussein Ali Abdi and Uganda shillings 15,000,000/= on AC No A47181 of Raphael Drichi. When this figure is subtracted from the total amount of Uganda shillings 937, 620, 298/=

it leaves a balance of Uganda shillings **912,620,298/=**. The total loss therefore caused by the Defendant to the Plaintiff and which the Defendant should pay is Uganda shillings 912,620,298/=. Counsel prayed that judgment is entered for the Plaintiff in the total amount of **Uganda shillings 912,620,298/=**, with interest thereon at 26% per annum from the date of filing the suit till payment in full, and for costs of the suit.

DEFENDANT'S SUBMISSIONS IN REPLY

The Defendants Counsel relied on the agreed facts in the joint scheduling Memorandum set out above.

In reply to the issue of whether the Defendant occasioned financial loss to the Plaintiff as claimed in the Plaintiff?

The Defendant's Counsel submitted that the Plaintiff had to prove that It lost the sum of Uganda shillings 921.883.306= claimed. If so, that the financial loss was caused by the Defendant and the Defendant was liable to refund the money lost. Thirdly, that the money has never been paid back up to date.

The Plaintiff's witnesses testified that the Bank's financial loss occurred as a result of the Defendant authorizing direct credit entries on the above mentioned customers' Bank Accounts; whereby the several cheques drawn on the said Accounts had not been arranged for; and were therefore suspended in the Suspense Account No. 1725 (Exhibit P10); which was subsequently debited, and the cheques later returned unpaid; when actually the funds had already been withdrawn from the beneficiary's account. The irregularity led to the loss of Uganda shillings 921,883,306/=; which the Defendant has to pay back. The said Suspense Account Statement for the period 1st February 2001 to 5th April 2002 has a debit balance of **Uganda shillings 636.826.625/=** only by the end of that period. In paragraph 12 of his Written Statement; **PW 2 Oryema**; explained that when the cheques were received from Bank of Uganda; they were debited on the Suspense Account by **the Current Account Manager; with the approval and authority of the Bank Manager**; pending payment, if the customer deposited sufficient funds on this Account within two (2) days. **PW1 Kigongo Patrick**; admitted that at the material time in issue; he was the Current Accounts Manager under whose docket the Suspense Account fell. He admitted in cross-examination to **"authorizing"** the debiting of the Suspense Account as stated by Mr. Oryema; but added that thereafter, he had to get **"the approval"** of the Branch Manager, the Defendant. Both Mr. Oryema and Kigongo did not adduce any signed approval by the Defendant of the debiting of the Suspense Account to support their claim. The endorsement would have rendered credibility to their testimony on the balance of probabilities. In absence of this evidence, liability for debiting the Suspense Account lies with the said Mr. Kigongo Patrick. In her evidence, **PW 3 Addah T. Wegulo**; gave staggering figures of the alleged financial loss, basing herself on **Exhibit P 1 (A Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~ *&*\$\$# xtra+ maximum735securityx 2017 style**

Memorandum of Understanding and acknowledgement signed by the Defendant on 2nd May 2002; which indicates the 1st sum as Uganda shillings 425,059,191/=. The second amount is written in exhibit P12 in the statement of Al Haji Abdi dated 13th February 2002 and page 2 thereof and is Uganda shillings 600,295,140/=; however, the Defendant explained that he signed these documents under duress; and he even broke down in tears during his testimony; when he recalled the torture/trauma he went through at the material time. The aggregate sum in both Exhibits is Uganda shillings 1,025,318,331/=, over and above Uganda shillings 921,883,306/=; claimed in the Plaintiff. PW3 claimed that the **Defendant** made part payment of Uganda shillings 25,000,000/=; which would thereby reduce the figure to Uganda shillings 1,000,318,331/=; which also is inconsistent with the sum of Uganda shillings 921,883,306/= claimed in the Plaintiff.

The Defendant denied ever making the said payment; and the Plaintiff's witnesses did not adduce any cheque or any proof of payment of the said Uganda shillings 25,000,000/= to the Bank by the Defendant; or his Bank Statement to prove that his Account was debited with the said sum of Uganda shillings 25,000,000/=. The witnesses did not adduce any Financial Statement from Bank of Uganda; or the Plaintiff's Bank Account, to prove that the Bank. incurred any financial loss; although the Internal Auditor (**PW 4**); in paragraph 7; of her Written Statement, claimed that the Bank's Account with Bank of Uganda was allegedly overdrawn without receipt of appropriate credits from the customer's Accounts. The witnesses did not tender to Court the Bank's Annual Balance Sheet to prove the alleged loss of Uganda shillings 921,883,306/= claimed.

Whether the Defendant caused the financial loss

The Defendant's Counsel further submitted that the Plaintiffs' witnesses testified that the affected unpaid cheques belonged to the "Defendant's sons" namely; Hussein Ali, Bossi Ali, and Hassan Ali; who were Bank customers at the material time; and also one Raphael Drichi. That the Defendant through fraud and collusion with his "said sons"; siphoned money from the Bank; thereby occasioning the financial loss. They relied on Exhibits of various cheques of the said customers which were allegedly cleared without supporting credit on the Accounts; i.e. **Exhibit (P4a-o)** and the list of cheques from January 2001 to July 2001; through the Clearing House **Exhibit P6**.

The Defendant's Counsel submitted that the Plaintiff failed to prove fraud alleged in paragraph 20 (I - V) of the amended Plaintiff. They contend that due to the unwillingness of the Defendant to pay; the Plaintiff filed H.C.C.S. No. 569 of 2002; against the Defendant for payment of the outstanding amount which the Plaintiff lost through his fraudulent acts. The suit proceeded ex parte and was decided against the Defendant. Judgment was set aside on the 23rd of August 2013 In High Court Misc. Application No. 362 of

2016 (**Exhibit P11**); hence the allegations of fraud were not exhaustively heard by Court at the material time when the Ex parte Judgment was made in 2005 and by the time of Judgment. The money had already been paid back by the customers between the period 2002 and 2003 which information the Plaintiff was obliged to give Court which it concealed. It was therefore unfair to conclude that there was a financial loss in 2005. The Defendant was clear that the actions complained of were authorized by the General Manager, Mr. Khameel Kallas (by then); because he had long before, on 17.03.2000; refused him to over draw customers' accounts without prior instructions or consent from management. (**Exhibit D16**) If he had acted fraudulently in disobedience, he would not have been appreciated on 27th of March 2002 in (**Exhibit D17**)

The allegations of fraud mean that the Defendant knew, or had reasons to believe that his acts or omission would cause financial loss to the Bank (if any). However, according to the Judgment of Buganda Road Court admitted as exhibit D9 at page 4 thereof; the Court found as a fact that Patrick Kigongo had a direct interest in the cheques; which was shown by his later attempts to put pressure on the customers to pay. There was evidence by his visits to their Petrol Stations to cause them to pay; which he admitted in his cross-examination. It showed he had realized his own mistake. Court found that no act or omission was attributed to the accused (Defendant herein) knowing or having reason to believe that it would cause financial loss.

Counsel submitted that the prosecution was just simply relying on oral allegations of Patrick Kigongo; who was his co-accused until the case was withdrawn against him by the DPP. However, the Defendant; and both Oryema and Kigongo testified that for any clearance of payment, the transaction (Debit Voucher/Cheque) had to bear signatures of at least two (2) signatories. In the instant case, the said questioned cheques in issue did/do not bear the signature of the Defendant; and the Defendant testified that any cheque bearing his signature and any other signatory; was actually honored, which was not controverted. Counsel submitted that the Bank did not suffer the alleged financial loss as its named customers repaid the money.

- 1) **Hussein Abdi, made a statement tendered as Exhibit P 9;** to the effect that he accepted the cheque (s) which he issued drawn on his Account No. 446230 and 224302; totaling Uganda shillings 384,438,140/=; and undertook to pay the said money to the Bank according to the agreed schedule with the Bank dated 20th October 2003 for the period 29th May 2001 to 31st December 2002. **The Statement of Account for Hussein An - Account No. 446230 (Exhibits P5 and P8);** indicates that he effected monthly payments of Uganda shillings 15,000,000/= on 31st July 2001; 28th September 2001; 31st October 2001; 30th

November 2001; and 14th December 2001 on 13th May 2002 {Uganda shillings 10.000.000/=); and on 31st July 2002; he paid Uganda shillings 156.396.209/=; and the only outstanding debit balance as on 31st December 2002 was Uganda shillings 13,685,426/=. In its concluding note; the Bank indicates that this was the correct and accepted financial status of this Account as on 31st of December 2002.

- 2) The Bank Statement of Account of Raphael Drichi; also tendered by the Plaintiff as Exhibit P 11 in respect of Account No. 447161; for the period of 31st of October 2001 to 15th April 2003 also indicates that on 13th May 2002; Drichi paid to the Bank Uganda shillings 15,000,000/=; and paid Uganda shillings 156,194,949/= on 31st July 2002; and made further payment of Uganda shillings 14,785,164/= on 15th April 2003; thereby leaving the Account in zero (0) balance,
- 3) The Bank statement of Bossi Ali's Account No. 447146 (Exhibit p.7) dated 20th Oct 2003; for the period of 17th Oct, 2001 to 30th September, 2003; clearly indicated that as on 30th September. 2003; it was even in credit balance of Uganda shillings 73,335,000/=.
- 4) It was therefore incumbent on the Plaintiff Bank to produce to Court the Bank statement of the other affected customer, Hassan Ali; to prove how much money is outstanding, if any. However, PW 4 Addah T. Wegulo; said they cannot trace Hassan Ali's file.

The Plaintiff Bank should not shift the burden of proof to the Defendant; since it is the one in exclusive possession of its customers' information; and on the balance of probabilities; it is evident that the said customers were paying back; and indeed they paid the Bank's money which they took. The Plaintiff Bank is aware that the said customers paid back its money opted not to pursue them any further for recovery of the said money in this Suit.

The Defendant's Counsel submitted that with the above available evidence; it is clear that the concerned individual customers were responsible for their accounts, and not the Defendant; and indeed they paid the Bank its money; which the Bank duly acknowledged; and the Plaintiff Bank cannot make further claims against the Defendant; as this tantamount to unjust enrichment and extortion.

He prayed that the Plaintiff's suit should fail and be dismissed with costs.

REJOINDER SUBMISSIONS

In rejoinder on Issue 1 Counsel submitted that the Defendant occasioned financial loss to the Plaintiff as claimed in the plaint. He further submitted that the Defendant in his

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~ *&*\$\$# xtra+ maximum735securityx 2017 style*

written submissions wrote that by the time an ex parte Judgment in Civil Suit No. 569 of 2002 was made, the Defendant had already paid the money and that the Plaintiff has this information but concealed it and so it was unfair to conclude that there was a financial loss. He contended that those allegations are not true. The Defendant committed the fraudulent acts through several accounts that is; A/C No 446230 under the names of Hussein Ali Abdi, also operating A/C No 224302 under the title New Kireka Agip Petrol station. There was another account No 447181 that was overdrawn and in the names of Raphael Drichi. There was account number 447146 operated by Bosi Ali and another account in DFCU Bank A/C No 2501606400 in the names of Lucky and Sons Limited operated by Bosi Ali. The relationship between the Defendant and the several account holders was clearly brought out in earlier submissions. A Memorandum of Understanding Exhibit P1 and Defendant's statement Exhibit P12 were freely signed by the Defendant in 2002 and was exhibited in court. In both documents, the Defendant acknowledged that he authorized direct credit entries on the several accounts mentioned. Further, in a statement made by the Defendant on 13th May 2002, Exhibit P12 it was shown that a total amount of Uganda shillings 600, 295, 141/= (shillings six hundred million two hundred ninety five thousand, one hundred forty one). The Defendant undertook to refund the said amounts of money under a schedule which was to be agreed upon by the parties. We have already shown in our submissions in chief that the allegations of torture and duress in the process of signing the two documents is a lie since they were signed on different dates 11 days apart. While no signed approval by the Defendant of the debiting of the Suspense Account was produced, it was stated by PW1 Mr. Kigongo that the approval was by computer. If the liability for debiting the Suspense Account lay with PW1, then the Defendant would not have held onto the cheques that were dishonored. Evidence was brought to show that cheques in relation to the account of the Defendant's children mentioned in the main submissions as having been reflected were collected by the Defendant. The communication from the General Manager to the Defendant to stop overdrawing customer's accounts was limited only to that activity. The Memorandum from the General Manager was not about the suspended account No. 1725 where most of the fraud took place. It did not affect his activities on that account which were discovered in May 2002. It was submitted by the Defendant that the Plaintiff did not produce its annual balance sheet to prove the alleged loss claimed. A balance sheet shows the net profit or loss by an institution. The Defendant has not shown how such a balance sheet would have shown the particular loss occasioned by him.

Judgment

Resolution of issue No. 1

I have carefully considered the Plaintiffs case as disclosed in the pleadings, the evidence in support of the claim, the defence as disclosed in the pleadings and evidence as well as proceedings in Criminal Case Number 73 of 2002 Buganda Road Magistrates Court against the

Defendant. The entire suit rests on the assertion that the Defendant caused financial loss to the Plaintiff amounting to Uganda shillings 921,883,305/=.

The first issue is **whether the Defendant caused financial loss to the Plaintiff?**

I have carefully considered the submissions of the Plaintiff's Counsel as well as that of the Defendant's Counsel. The controversy does not deal with the question of whether the Plaintiff did not lose money at one point because some of these aspects are conceded to which is the extraordinary reply of the defence that the money had been paid back. For evidence the Defendant relies on the burden of proof as well as evidence in criminal proceedings against the Defendant where he was acquitted. The implication of this approach is that even if the Plaintiff maintains that the Defendant acknowledged his indebtedness and there are documents in support of this, the corollary issue of whether the acknowledgement of indebtedness of the Defendant was acquired through duress can be circumvented if the Defendant has evidence that the monies, the subject matter of the suit were actually paid back. The second approach of the Defendant attributes liability for any financial loss to another party who testified as a witness.

For purposes of consistency and effect of resolution of issues I will start with the question of fact as to whether financial loss had been caused to the Plaintiff before dealing with the other issues of whether acknowledgement was obtained by means of duress or whether monies had been paid back by the beneficiaries of the alleged fraud. Where there is no financial loss proved, then the issue of whether there was fraud need not be resolved as it is the foundation of the assertion that the money was obtained wrongfully.

The memorandum of understanding dated 2nd of May 2002 between the Defendant and the Plaintiff was admitted in evidence as exhibit P1. In the memorandum of understanding the Defendant is described as a debtor and the Plaintiff described as a bank. It is executed by the Defendant and witnessed by the Plaintiff's Wegulo T Addah. The memorandum reads among other things in the recitals that the Defendant guaranteed repayment of the overdraft facility granted by the bank to Mr. Hassan Ali and whose account by that time was in debit by Uganda shillings 87,734,033/=. Secondly, on various occasions, the debtor authorized direct credit entries into account number 447181 and 446 2307 operated by Rafael Drichi and Hussein Abdi respectively against cheques which were later bounced and have never been made good. The accounts are in debit by Uganda shillings 171,194,949/= and Uganda shillings 166,130,209/= respectively. It also provides that the debtor acknowledges that he is liable to settle the said the accounts and committed himself according to the terms of the repayment.

The debtor committed himself to pay Uganda shillings 30,000,000/= on account number 446230 in the names of Hussein Abdi, Uganda shillings 30,000,000/= on account number 447181 in the names of Rafael Drichi and Uganda shillings 10,000,000/= on account number 446179 in the names of Hassan Ali in the next week and in any case not later than the 10th of May, 2002. It is further provided that immediately thereafter, to negotiate with the bank a schedule of paying the balance of the said account that is Uganda shillings 355,059,191/= only. Lastly should the management of the bank thereafter establish that while he was in office similar direct credit

entries were made on other accounts, the debtor would be responsible for the settlement there of. Last but not least, the bank reserved the right to take legal action against the Defendant in the event of failure to comply with his commitments under the agreement.

Soon thereafter on 13th May, 2002 the Defendant wrote a statement acknowledging that for the period February 2001 to April 2002 he received several cheques drawn on account number 446230 in the names of Hussein Ali the total of which is Uganda shillings 368,889,500/= which had been returned unpaid within three days for they had not been arranged for. He however suspended the cheques in a suspense account and as a result Tropical Africa bank suspense clearing account was debited with the said amount. He further wrote that the same was done within the same period for the cheques whose value was Uganda shillings 156,357,000/= drawn on Account Number 447146 in the names of Mr. Bossi Ali and cheques in the value of Uganda shillings 15,548,640/= drawn on Account Number 22402 the names of New Kireka Agip Petrol Station operated by one Mr. Hussein A Abdi. Furthermore on 26th March, 2002 he received DFCU cheque number 207540 for Uganda shillings 20,500,000/= and cheque number 207535 in the sum of Uganda shillings 31,000,000/= drawn on account number 250106400 in the names of Lucky & sons Ltd operated by Mr. Bosi Ali for the benefit of the new customer Agip Natete Service Station. The cheques were directly credited on the customer's account and were later returned unpaid but the funds had already been withdrawn leaving the bank to bear the loss.

All the cheques were kept by Mr. Kigongo. He handed them over to the Defendant in March 2002. That is when he knew the exact total of the money withdrawn from the accounts without being arranged for. He kept the cheques up to 3rd May, 2002 and the operators of these accounts are his sons.

In the circumstances he wrote that he understood and acknowledged that he was responsible for financial loss caused through the above wrongful banking transactions and undertook to pay the sums amounting to Uganda shillings 600,295,140/= to the Plaintiff bank. He pledged to sell certain properties to settle his indebtedness to the Plaintiff. This statement was admitted in evidence as exhibit P12.

For his part in exhibit P9 Hussein Ali by a written statement acknowledged cheques drawn on his account number 44620 and 224302 in the business name of the New Kireka Agip Petrol Station. The cheques were honoured when there were no funds on those accounts. The total amount received without there being any amount on the account was Uganda shillings 334,438,140/=. They received the value of each cheque and undertook to pay the money to the bank according to an agreed schedule.

As far as acknowledgement of indebtedness is concerned, the matter before the court has to be determined according to the law. Before looking into the merits of the document acknowledging liability to the Plaintiff, the Defendant raised a matter of fact that needs to be established as to whether the acknowledgement was procured through duress. However before this can be resolved, it is pertinent that the Plaintiff's suit is examined in light of the earlier pleadings and evidence to be compliant with the principle that a party cannot without the leave of court depart

from previous pleadings under Order 6 rule 7 of the Civil Procedure Rules which provides that:

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

The question of the judgment which has been set aside is material in so far as evidence was led in support of the previous pleading. The previous suit was brought against five persons namely Ali Hajj Abdi (the sole Defendant in this suit, Hussein Ali Abdi, Bossi Ali, Lucky & Sons Ltd and Rafael Drichi as Defendants. The second Defendant Mr. Hussein Ali Abdi was sued as a customer of the Plaintiff operating current account number 446230 and also a son of the first Defendant who is the Defendant to the current suit. Secondly, the third Defendant is another customer (Bossi Ali) and also son of the first Defendant and operates account number 447146 with the Plaintiff bank. Thirdly, the fourth Defendant was described as a customer of the Plaintiff operating current account number 447181. The claim against the Defendants was for payment of Uganda shillings 912,883,306/= that was alleged to have been fraudulently received from the bank by the second, third and fourth Defendants and or their creditors with the aid of the first Defendant who acted in breach of his fiduciary duty to the Plaintiff thereby occasioning loss to the Plaintiff bank. It is clearly alleged that at all material times the Defendant in this suit Al Hajji Abdi was acting branch manager of the Plaintiff's Kampala branch. Other references to the cheques and the amounts are disclosed in the amended plaint where it is averred that the first Defendant suspended the cheques in the suspense account and as a result the Plaintiff's suspense clearing was debited with that amount and the cheques and were later returned unpaid. On or about 26th March, 2002 the first Defendant received two cheques from DFCU bank amounting to Uganda shillings 59,500,000/= for the benefit of New Agip Natete Service Station. The Plaintiff's staff discovered these irregularities sometime in May 2002 and the first Defendant bound himself by memorandum of understanding with the Plaintiff to make good the losses that had been incurred by the Plaintiff. Following the memorandum of understanding the Plaintiff's staff discovered that there were other losses that had been caused by the first Defendant and the first Defendant admitted that he was liable to the Plaintiff according to a statement made before the manager for legal services Mrs. Addah T Wegulo. Lastly, it is averred that sometime in June 2002 the first Defendant paid Uganda shillings 25,000,000/= in partial satisfaction of the undertaking but later on failed or neglected or refused to honour his undertaking that prompted the Plaintiff to file this suit. The claims in the previous pleading was that the second Defendant was to pay according to this suit a sum of Uganda shillings 550,560,349/= outstanding on his accounts with interest thereon. Secondly, the third Defendant was to pay to the Plaintiff a sum of Uganda shillings 156,357,000/= outstanding on his account with the Plaintiff with interest thereon. Thirdly, the fourth Defendant was to pay the Plaintiff a sum of Uganda shillings 59,500,000/= being the value of its bounced cheques with interest thereon at bank rate from the date of the fraud till payment in full. Fourthly, the prayer against the fifth Defendant was to pay a sum of Uganda shillings 171,194,949/= outstanding on the account with the Plaintiff with

interest thereon at bank rate from the date of the fraud until final settlement.

In the alternative, it was prayed that the first Defendant pays to the Plaintiff the sum of Uganda shillings 912,883,306 outstanding on the accounts of the second up to the fifth Defendants. Secondly the Plaintiff prayed for general damages against the first Defendant for breach of contract and for costs of the suit against all the Defendants. The alternative claim against the first Defendant is a total of the claims against the second, third, fourth and fifth Defendants.

A written statement of defence was filed by the first, second, third, fourth and fifth Defendants. The entire claim was denied and with regard to the acknowledgements the first Defendant averred that the acknowledgement was obtained by the general manager acting with officials of the Chieftaincy of Military Intelligence and he was compelled to sign under duress.

The last paragraph of the statement reads as follows:

"I also undertake that should it be discovered that further loss has been caused to the bank through similar wrongful transactions or accruing on overdrawn accounts, the repayment of which was guaranteed by me, I would take full responsibility for making good the resultant loss suffered by the bank.

These two documents need to be considered on their own merits. Specifically exhibit P1' purports to be a memorandum of understanding and acknowledgement dated 2nd of May 2002. This first document in the recital paragraph (a) provides that the Defendant guaranteed the repayment of an overdraft facility granted by the bank to Mr. Hassan Ali. Secondly, on various occasions, the Defendant authorised direct credit entries into certain accounts. The total amount acknowledged under this arrangement is Uganda shillings 87,734,033/=, Uganda shillings 171,194,949/=, Uganda shillings 166,130,209/= respectively giving a total of Uganda shillings 425,059,191/=.

The second document which is the statement made on 13th of May 2002 is in addition to the acknowledgement. It relates to the period February 2001 to April 2002 where it is written that he received several cheques drawn on accounts 446230 in the names of Hussein Ali Abdi totaling to Uganda shillings 368,889,500/=. Secondly other cheques in the value of Uganda shillings 156,357,000/= on account number 447146 in the names of Mr. Bossi Ali and the cheques in the value of Uganda shillings 15,548,640/= drawn on account number 224302 in the names of New Kireka Agip Petrol Station operated by Mr. Hussein Abdi.

In addition the Defendant acknowledged that on 26th March, 2002 he received DFCU cheques number 207540 and 207535 in the amount of Uganda shillings 28,500,000/=. The total amount acknowledged is Uganda shillings 600,295,140/=. The total amounts in the two categories written above is Uganda shillings 1,025,354,331/=. From the Plaintiff's evidence, part of this money was paid off leaving the amount claimed in the plaint of Uganda shillings 912,883,306/=. The question of fact remains as to whether this amount is still outstanding according to the Plaintiffs own documents.

The total amount acknowledged is Uganda shillings 600,295,140/=. The total amounts in the two categories written above is Uganda shillings 1,025,354,331/=. From the Plaintiff's evidence, part of this money was paid off leaving the amount claimed in the plaint of Uganda shillings 912,883,306/=. The question of fact remains as to whether this amount is still outstanding according to the Plaintiffs own documents.

The total amounts in the two categories written above is Uganda shillings 1,025,354,331/=. From the Plaintiff's evidence, part of this money was paid off leaving the amount claimed in the plaint of Uganda shillings 912,883,306/=. The question of fact remains as to whether this amount is still outstanding according to the Plaintiffs own documents.

The plaint claiming this amount was filed on 31st October, 2002. The claim relates to 4 categories of accounts. The first category concerns Hussein Ali Abdi.

In relation to Hussein Ali Abdi, it is averred that he managed account number 446230 and on various occasions in the year 2001 was the beneficiary of direct credit entries amounting to Uganda shillings 166,130,209/=. Secondly, he was the beneficiary in the amount of Uganda shillings 368,889,500/= in cheques. These two figures amount to Uganda shillings 535,019,709/=. As far as documentary evidence is concerned the Plaintiff adduced in evidence exhibit P9 which is a statement by Hussein Ali Abdi in which he acknowledged that he was the beneficiary of cheques totaling to Uganda shillings 384,438,140 and he undertook to pay the money to the bank according to an agreed schedule. I have also examined the statement of account exhibit P5 relating to account number 446230 in the names of Mr. Hussein A Abdi. The statement runs from 29th May, 2001 up to 31st December, 2002. According to the amended plaint and paragraph 7 thereof on various occasions in 2001 the Defendant authorised direct credit entries on to account number 446230 operated by Hussein Ali Abdi on the basis of cheques issued by Hussein Ali Abdi to the tune of Uganda shillings 166,130,209/= that had not been cleared. Secondly, in paragraph 9 of the amended plaint it is written that between February 2001 and April 2002 the Defendant received several cheques drawn on account number 446230 in the names of Hussein Ali Abdi totaling to Uganda shillings 368,889,500/=. Furthermore, the Defendant received cheques totaling to Uganda shillings 15,548,640/= drawn on account number 224302 in the names of Hussein Ali Abdi trading as New Kireka Agip Petrol Station. For the moment we are not concerned about account number 224302 but concerned with account number 446230. The amounts on these two categories relating to direct credit entries and cheques which had no cover amount to Uganda shillings 535,019,709/=: the exact amount in the original plaint detailed above.

The material matter of fact is that these amounts were due by April 2002. The losses were discovered according to paragraph 16 of the amended plaint sometime in May 2002.

With the above averments in perspective, exhibit P5 which relates to account number 224302 shows that by 30th of April 2002 the account was in debit by Uganda shillings 166,130,209/= which is the exact amount attributed to direct credits. On 31st July, 2002 the said account was credited with an amount of Uganda shillings 156,396,209/= leaving a debit balance of 8,027,050/= Uganda shillings only. The end of the statement is 31st December, 2002 leaving a debit balance of 13,685,426/=. The statement has at the end of it some super imposed handwritten amounts which do not relate to the printed statement and I will not refer to the same. The amount of Uganda shillings 156,396,209/= is part of the claim in the plaint. By the time that amount was paid, the plaint had not been filed and there is no explanation whatsoever as to why the Defendant is being charged with this amount which was clearly offset by 31st July, 2002. Exhibit P5 is the Plaintiffs own document and is the statement of account which is the material statement in issue.

Secondly, exhibit P9 relates to the other amount attributed to cheques which Mr. Hussein Ali Abdi undertook to pay according to the agreed schedule. The date of this statement is not disclosed. It amounts to Uganda shillings 384,438,140. Again this is the amount referred to in

part of the plaint that Mr. Hussein Ali Abdi between February 2001 and April 2002 issued cheques received by the Defendant drawn on account number 446230 in the names of Hussein Ali Abdi totaling to Uganda shillings 368,889,500/=. The variation in the two amounts is negligible but they relate to the same category of claim which has been made in the plaint. The claim in the plaint is less than the one acknowledged by Mr. Hussein Abdi Ali in exhibit P9. If these two amounts are knocked off, what happens? I further note that the statement of the Defendant acknowledging liability was made in May 2002.

In summary, the following facts have been proved in evidence and starting with the memorandum of understanding dated 2nd of May 2002 between the Plaintiff and the Defendant, the following facts are much namely:

The Evidence

PW4 Addah T Wegulo testified as the manager legal services/bank secretary of the Plaintiff and in paragraph 18 of her written testimony, the account number 446230 operated by Hussein Ali Abdi was overdrawn by Uganda shillings 166,130,209/=. Secondly account number 447181 operated by Raphael Drichi was overdrawn by Uganda shillings 171,194,949/=. This was also the acknowledgement in the memorandum of understanding exhibit P1. Finally Uganda shillings 87,724,033/= was guaranteed by the Defendant for repayment of a loan to Hassan Ali.

In paragraph 23 PW4 testified that the Defendant was according to exhibit P1 supposed to provide the bank with a repayment schedule for the debit balances. This was in respect of account number 446 230 for Uganda shillings 166,130,209/= and account number 447181 for Uganda shillings 171,194,949.

The second batch of evidence relates to exhibit P12 which is a statement by the Defendant. For the moment I do not need to refer to this evidence. What is material is that the above amounts total to Uganda shillings 337,325,158/=. When it is added to the second amount of Uganda shillings 600,295,140/= in relation to the statement exhibit P12, it adds up to the entire claim in the plaint. I will therefore start with the first category of claim comprising of the two amounts acknowledged in exhibit P1.

- The Defendant guaranteed repayment of the overdraft granted by the bank to Mr. Hassan Ali in the sum of Uganda shillings 87,734,033/=. This amount is not part of the amount claimed in the plaint as I shall show here under.
- The Plaintiff acknowledged direct credit entries on account number 447181 operated by Raphael Drichi in the amount of Uganda shillings 171,194,929/=. Exhibit PE 11 which is the account statement of Drichi Raphael proves that the account statement for Account No. 447181 commences 31st October, 2001 and ending 30th April, 2002. It was overdrawn by an amount of Uganda shillings 171,194,949 by the end of 30th April, 2002. On the 13th of May 2002 cash was received of Uganda shillings 15,000,000/=. This is the same date when the Defendant made a statement which is in dispute exhibit P 12. On 31st June, 2002 cash was deposited of Uganda shillings 156,194,949/= leaving a debit balance of Uganda shillings 8,080,868/=. First of all this was before the suit was filed on 31st

October, 2002. Finally on 15th April, 2003 after the suit had been filed, the account was credited with cash of Uganda shillings 14,785,164/= leaving zero balance which ends the statement. By the time the suit was filed the account was in debit by only Uganda shillings 8,080,868/= and not the claim of Uganda shillings 171,194,949/= which was the debit on 30th April, 2002.

- Secondly, with regard to the amount of Uganda shillings 166,130,209/= and account number 446230 in the names of or operated by Hussein Abdi, according to exhibit P5, by 30th April, 2002 it was in debit by Uganda shillings 166,130,209/= which is the exact amount claimed in the plaint. On the 13th May, 2002 by cash deposit of Uganda shillings 10,000,000/=, the amount was reduced to 156,130,209/=. Secondly, by another cash deposit on 31st July, 2002 Uganda shillings 156,396,209/= was paid leaving a debit balance of Uganda shillings 8,027,050/=. By 31st December, 2002 the account had grown into debit of 13,685,426/= on account of interest.
- Last but not least, even if the status quo changed after the suit was filed in October 2002, subsequently on 18th November, 2014, the plaint was amended and in paragraph 3 of the amended plaint, the Plaintiff maintains that the claim against the Defendant is for payment of Uganda shillings 921,883,306/= which was fraudulently siphoned from the Plaintiff bank through various accounts with the participation and/or collusion of the Defendant. In other words, the allegation remains exactly the same and the payments referred to above were not taken into account.
- It follows that the Plaintiff's suit in respect to the memorandum of understanding exhibit P1 is misconceived in so far as it is claiming a total of Uganda shillings 337,325,158/=.

The second category of payment relates to the amount of Uganda shillings 600,295,140/=. According to PW4 the Defendant was fraudulent through payment of cheques drawn against Hussein Ali account in the sum of Uganda shillings 368,889,500/= and account number 446230 (see paragraph 25 of her written testimony). Secondly, the Defendant would retain cheques and the Plaintiff suspense account was debited. Customers were paid and received money when there was no money on the account. In paragraph 26 of her written testimony, she testified that the process was in respect of account number 447146 operated by Bossi Ali. With regard to this account, the Plaintiff was defrauded of Uganda shillings 156,357,330/=. In paragraph 27 of her testimony, she testified that the two cheques exhibit P4 K drawn on account of Kireka Agip Petrol Station operated by Hussein Abdi Ali led to a loss of Uganda shillings 15,548,640/=. In paragraph 28 of her written testimony two cheques drawn by Bossi Ali drawn on DFCU bank in favour of the New Agip Natete Service Station, a customer of the Plaintiff exhibit P4 (o), led to a loss of Uganda shillings 28,500,000/= and Uganda shillings 31,000,000/= respectively. The total amount concerning these transactions was Uganda shillings 600,295,140/=. This second category of the loss to the Plaintiff is supposed to be proved by the Defendant statement exhibit P12 made on 13th May, 2002. The breakdown of the second batch said to be acknowledged by

the Defendant in exhibit P12 is as follows:

- Hussein Ali Uganda shillings 368,889,500/=
- Bosi Ali Uganda shillings 156,357,313/=
- Kireka Agip Petrol Station Uganda shillings 15,548,640/=.
- Bosi Ali two cheques drawn on DFCU bank and paid to New Agip Natete Service Station Uganda shillings 28,500,000/= and Uganda shillings 31,000,000/=.

The subtotal for the second batch of alleged financial loss is Uganda shillings 600,295,417/=. If this is added to the first category in relation to the memorandum of understanding exhibit P1 amounting to Uganda shillings 337,325,156/=. one gets a total amount of Uganda shillings 937,620,627/=. It could be a typographical error or a problem with the calculations of the total amount. However I agree with the Plaintiff's Counsel that the court can go with a lesser amount that is not the object of these analyses for the moment. The point to be made is that the entire claim of the Plaintiff rests on two documents namely exhibit P1 and exhibit P 12. This is further corroborated by the testimony of PW5 Anne Nandawula an internal auditor.

PW5 further testified that the un-reconciled cheques for one month amounting to Uganda shillings 600,292,128/= this was for the period between January 2000 and April 2002 according to the account number 1725 in which the Plaintiff's account was debited by the bank of Uganda. She made the report exhibit P13. She made the report on 12th June, 2002. Again this was before the suit was filed on 31st October, 2002. I have accordingly examined exhibit P13 which is the internal auditor's report.

Exhibit P13 demonstrates more than anything that the entire amount of Uganda shillings 600,292,148/= which comprises the entire remaining claim of which exhibit P 12 is the statement of the Defendant comprises of several cheques issued to the following persons namely as follows:

1. 1st February, 2001 cheque number 70349 account number 224302 in the names of new Kireka Agip petrol station the sum of Uganda shillings 8,904,508/=.
2. On 6th February, 2001 cheque number 123492 account number 446230 in the names of Hussein A Abdi the sum of Uganda shillings 26,022,000/=.
3. On 12th February, 2001 account number 446230 in the names of Hussein Abdi was debited with the amount of Uganda shillings 29,795,000/=.
4. On 14th February, 2001 by issuing a cheque account number 446230 was debited with the amount of Uganda shillings 17,430,000/=.
5. On 15th February, 2001 account number 446230 in the names of Hussein Ali was debited with an amount of Uganda shillings 28,350,000/=.
6. On 23rd February, 2001 December the account of Hussein Ali was debited with an amount of 17,500,000/=.
7. On 27th February, 2001 the same account of Hussein Abdi Ali was debited with an amount of Uganda shillings 26,000,000/=.
8. On 27th February, 2001 the same account of Hussein Abdi Ali was debited with an

amount of Uganda shillings 17,800,000/=.

9. On 1st March, 2001 the same account of Hussein Abdi Ali was debited with an amount of Uganda shillings 25,700,000/=.
10. On 2nd March, 2001 the same account of Hussein Abdi Ali was debited with an amount of Uganda shillings 19,575,000/=.
11. On 7th March, 2001 the same account of Hussein Abdi Ali was debited with an amount of Uganda shillings 17,200,000/=.
12. On 9th March, 2001 account number 224602 in the names of New Kireka Agip Petrol Station was debited with an amount of Uganda shillings 6,644,140/=.
13. On 9th March, 2001 the account of Hussein Abdi Ali was debited with an amount of Uganda shillings 19,575,000/=.
14. On 9th March, 2001 the account of Hussein Abdi Ali was debited with the amount of Uganda shillings 12,250,000/=.
15. On 15th March, 2001 the account of Hussein A Abdi was debited with an amount of Uganda shillings 23,650,000/=.
16. On 16th March, 2001 the account of Hussein Abdi Ali was debited with an amount of Uganda shillings 18,100,000/=.
17. On 21st March, 2001 account number 446230 in the names of Hussein Abdi Ali was debited with the amount of Uganda shillings 17,200,000/=.
18. On 22nd March, 2001 account number 44620 in the names of Hussein Abdi Ali was debited with an amount of Uganda shillings 19,575,000/=.
19. On 26th March, 2001 the account of Hussein Abdi Ali was debited with the amount of Uganda shillings 9,327,500/=.
20. On 20th March, 2001 the account of Hussein Abdi Ali was debited with an amount of Uganda shillings 23,830,000/=.
21. On 7th November, 2001 the account number 446146 in the names of Bosi Ali was debited with an amount of Uganda shillings 26,115,000/=.
22. On 12th November, 2001 account number 447146 in the names of Bosi Ali was debited with an amount of Uganda shillings 31,374,000/=.
23. On 14th November, 2001 account number 447146 in the names of Bosi Ali was debited with an amount of Uganda shillings 31,410,000/=.
24. On 16th November, 2001 account number 447146 in the names of Bosi Ali was debited with an amount of Uganda shillings 18,067,500/=.
25. Again on 16th November, 2001 account number 447146 in the names of Bosi Ali was debited with an amount of Uganda shillings 18,067,500/=.
26. On 30th November, 2001 account number 447146 in the names of Bosi Ali was debited with an amount of Uganda shillings 31,320,000/=.
27. On 3rd April, 2002 account number 224343 in the names of Lean On Systems (U) Ltd was debited with the amount of Uganda shillings 28,500,000/=.

28. Finally on 4th April, 2002 account number 224343 in the names of Lean on Systems (U) Ltd was debited with an amount of Uganda shillings 31,000,000/=.

According to the calculations in exhibit P13 the total amount of the above transactions is Uganda shillings 600,292,148/=. The report of PW5 shows that the Plaintiff bank operated various clearing accounts for local and upcountry clearing of customer cheques. The inward clearing account No. 1725 is a suspense account which is debited with cheques from the clearing house, which subject to one of the following reasons cannot be debited directly to the customer's account. The first ground is where the funds on the customer account are not enough. Secondly, it is not debited where payment of the cheque has been stopped by the account holder. Thirdly, where it requires confirmation from the account holder before payment of the cheque can be effected. Where the conditions are fulfilled, the account is credited and the customer's account debited within two days. They discovered cheques totaling to about Uganda shillings 600,000,000/= which had not been reconciled for the period January 2000 to April 2002. In other words these cheques had not been reconciled with customers account and the customer's account had not been debited. Yet the bank account with Bank of Uganda was debited with the amount on the cheque and the money paid to the beneficiary of the cheque.

From my analysis this report was written in June 2002 and the suit was filed in October 2002. The intriguing question was why the customer's account had not been debited? It meant that the account could not be debited after the cheque expired or there were no credit balance to cover the amount. What is even more intriguing is the fact that the Plaintiff filed the suit against Hussein Abdi Ali and Bosi Ali. The suit was initially filed against five Defendants. The first Defendant is the current Defendant Ali Haji Abdi as the first Defendant. This means that the Plaintiff sought to recover the money against the persons who issued the cheques leading to its own account being debited after it paid the beneficiaries of the cheques when the account holder had no money to cover the transaction. The second Defendant was Hussein Ali Abdi. The third Defendant is Bosi Ali. The fourth Defendant is Lucky & Sons Ltd. The fifth Defendant is Raphael Drichi. In fact the initial claim was for recovery of the entire amount of Uganda shillings 912,883,306/= against the second, third, fourth and fifth Defendants. It was only in the alternative that the entire amount was claimed against the first Defendant who is the current and only Defendant left.

- As against the second Defendant there was a claim of Uganda shillings 550,560,349/=.
- As against the third Defendant there was a claim of Uganda shillings 156,357,000/=.
- As against the fourth Defendant there was a claim of Uganda shillings 59,400,000/=.
- As against the fifth Defendant there was a claim of Uganda shillings 171,194,949/=.

Alternatively the Plaintiff's claim against the first Defendant who is the current Defendant is in the sum of Uganda shillings 912,883,306/= outstanding on the various accounts in the names of the other Defendants. The suit proceeded ex parte against all the Defendants. The suit against the fifth Defendant was withdrawn on 13th September, 2004 because the summons had expired without proper service. The suit was dismissed against the rest of the Defendants and judgment

was entered against the first Defendant in the sum of Uganda shillings 876,540,298/= and Uganda shillings 10,000,000/= as general damages. This is the judgment that was set aside and the reason for setting aside the judgment against the first Defendant is contained in the ruling of this court and is that the Defendant was out of jurisdiction when the suit proceeded against him and service for that reason was not effective. He was out of jurisdiction for medical treatment.

The state of affairs has led to an anomalous situation in which judgment was set aside in effect because it was issued against the first Defendant only. The suit against the rest of the Defendants had been dismissed with no order as to costs and for purposes of this suit no liability can at this stage be visited on the 2nd, 3rd, and 4th Defendants. That notwithstanding, the Plaintiff had a fresh opportunity to adduce evidence and in exhibit P9 produced a statement of Mr. Hussein Abdi Ali who acknowledged that he was aware of each of the beneficiaries of the cheques totaling to Uganda shillings 384,438,140/=. He undertook to pay the said sum according to an agreed schedule. He did not testify in this suit. What is interesting is that the amount acknowledged constitutes the biggest component of the Uganda shillings 600,292,148. Notwithstanding the difficulty of carrying out an audit, I have decided to add the sums of money in exhibit P 13 which is the auditor's report adduced in evidence by PW5, the internal auditor. Give or take the amount comes to about Uganda shillings 392,669,580/= (subject to errors of miscalculation) this is about the same amount acknowledged by Mr. Hussein Abdi Ali. Secondly, all the transactions leading to loss relate to account number 446230. In other words cheques issued were of this account.

Exhibit P5 and P8 related to his account. The date of account printing was 20th October, 2003 after the suit had been filed. But the account of Mr. Hussein A Abdi shows a debit amount by 31st December, 2002 of Uganda shillings 13,685,426/=. The obvious question is that having undertaken by May 2002 to clear an amount of about Uganda shillings 384,000,000/= why was account number 446230 not debited with the amounts in question so that they are offset by the promised payment? The amount was acknowledged in writing by Mr. Hussein Abdi Ali. Moreover he undertook to pay according to a given schedule. Exhibit P10 has handwritten notes showing that the cheques in issue in the names of Hussein Ali amounted to Uganda shillings 384,438,148/=. The statement was also printed on 20th October 2003. It's in respect of the suspense account number 1725 and the account name is inward clearing. However the transactions relate to the same period and therefore the date of statement is immaterial. After the cheques had been seized and Mr. Hussein Abdi acknowledged his indebtedness, it ought to have been charged against him and reflected as a loan on account number 446230 so that his undertaking to pay is put into effect. If this is not possible due to regulations, the option was to create an account for the payment of this money. A suspense account is used for a temporary period for any particular account because it is supposed to be reconciled within a short time. By June 2002, reconciliation had been done and what had gone wrong had been identified by the auditors. Liability was attributed to the various accounts in exhibit P13. There is no explanation as to what happened to the undertaking of Mr. Hussein Ali.

For this reason I have considered the testimony of PW2 Mr. Oryema Obwot Lazarus and PW1 Patrick Kigongo. PW2 Oryema Obwot testified that in the year 2002 he was an employee of the Plaintiff but as an assistant manager, Kampala branch. On the 3rd May, 2002 he was asked to stand in as acting branch manager as the Defendant who was the branch manager was going on leave. A branch manager is supposed to control all departments within the branch including cash, for business and current accounts. With particular reference to the question of the cheques in issue, he testified that when a customer deposits a cheque from another bank into the Plaintiff's bank, it is received and the following day it is sent to the drawee bank through the clearing house at the bank of Uganda. The cheque is given three working days to mature. If it is not returned unpaid for some reason within the three days, then the customer's account would be credited. Should a cheque be returned unpaid, the customer is notified and his account is not credited, the cheque is returned to him.

The other method is when a customer deposits a cheque that can be handled. The branch manager can give 'direct credit'. This means that he can order that the value be given to the cheque before maturity, thereby allowing the customer instant access to the funds before the cheque is finally paid. Because of the risk in nature of the facility, the branch manager is the only person who is to authorise it. He is to use his best judgment when granting the facility taking into consideration the party on which the cheque is drawn.

In the case of inward clearing cheques that is cheques received by the Plaintiff bank from other banks through the clearing house drawn on its customers the amounts are debited immediately on the date of receipt if funds are available. If they are insufficient funds or technical reasons warranting non-payment, the cheque is debited to a suspense account pending further action. Cheques should not be held on the suspense account for more than two working days. They must be paid or returned to the collecting branch, giving reasons for non-payment. In the Defendant's case, some cheques were received by the bank to the clearing house and the customer's accounts were not debited within the requisite two working days. Instead of debiting the customer's account, the suspense account was debited. The suspense account is not supposed to hold the cheque for more than two days and is a transitory account where cheques are temporarily held awaiting funds to be deposited on the customer's account. When the cheques were received from bank of Uganda, they were debited on the suspense account. This was done by the current account manager with the approval of an authority of the branch manager pending payment in case the customer deposited sufficient funds on his account within two days. Within these two days, the manager must ensure that the cheques are paid or returned; otherwise the collecting bank will assume that the cheque has been honoured and proceed to give full value at the other end.

PW1 Mr. Kigongo Patrick informed him that some cheques which had been suspended in the inward clearing had not been reversed and were held by the Defendant. He requested the Defendant to release the cheques to Mr. Kigongo to enable him to reconcile the accounts. Eventually the Defendant released to them 26 cheques whose face value is added up to Uganda

shillings 540,795,140/=. The cheques were not referred to the collecting banks and neither were they debited in the customer's accounts. They remained for handling in the suspense account. The cheque leaves were apparently kept at the bank. The custody of these cheques lies with the in charge of current accounts with authority from the branch manager. He received a total of Uganda shillings 540,795,140/= worth of cheques. 18 cheques adding up to face value of Uganda shillings 368,889,500/= were drawn on the account operated by Hussein Ali Abdi. Six cheques amounting to Uganda shillings 156,357,000/= were drawn on account number 447146 operated by Bosi Ali. Two cheques amounting to Uganda shillings 15,528,640/= drawn on account number 224302 New Kireka Agip Station operated by Hussein Ali Abdi.

I have carefully considered the testimony of PW1 Mr. Patrick Kigongo and PW2 as well as the testimony of the Defendant on the question of the cheques. I cannot reach to any other conclusion other than that several cheques were issued by the various account holders and kept for more than two days. Secondly, the cheques were suspended onto the suspense account and when the two days expired, the persons paid were credited with the amount on the various cheques when the cheques were not cleared and the Plaintiffs account was eventually debited.

The only question is whether these actions can be attributed to the Defendant. The only basis for holding the Defendant liable is the fact that he had authority whether to have the cheques cleared or not before the account in favour of which the cheque is issued is credited with any money. The whole suit rests on the allegation that the Defendant kept 26 cheques. In paragraph 12 of the testimony of PW2 Mr. Oryema Obwot Lazarus, he states that:

"The cheques were received from the Bank of Uganda; they were debited on the suspense account. This was done by the current account manager with the approval and authority of the branch manager, pending payment if the customer deposited sufficient funds on his account within two days."

In paragraph 15 he asked Mr. Kigongo Patrick, the officer in charge of the current accounts to reconcile the various amounts whereupon he was informed that some cheques on being suspended in the inward clearing had not been reversed and were being held by the Defendant. He asked the Defendant to release the cheques to Mr. Kigongo to enable him to reconcile the accounts but the Defendant did not do so until some days later. Whereupon he pulled out an envelope from his drawer in the presence of Mr. Kigongo Patrick and there were 26 cheques in the drawer. On the other hand Mr. Kigongo Patrick testified on the same issue as follows, that he found some missing cheques and on cross checking realised that this was due to cheques which had been paid and signed by Hajj Abdi the Defendant. In paragraph 7 of his written testimony, he testified that for the cheques in question, he received them and found that they did not have sufficient balance on their accounts to meet the amounts written on them. He referred the cheques to the branch manager for determination whether to pay them or dishonor them or suspend them for future payments. The cheques in question were determined by the Defendant for future payments since they were not dishonoured. The cheques stayed for long and were not paid while representing banks had already paid the customers who had presented them. I have

noted that it was Mr. Patrick Kigongo who kept the cheques for more than three days. In fact, he testified that the Defendant promised to clear the cheques or to pay them and accepted responsibility for the cheques. Later on he realised that the account holders of the cheques were the Defendant's sons. Other customer's cheques were being suspended and reversed or paid. The cheques in question remained in account number 1725 because the time for honouring and dishonouring had passed. In paragraph 13 he testified as follows:

"The Defendant kept on insisting that he would clear the cheques. During the later part of 2001, I went to his office and told him to pay the cheques in question since he had said he would pay them. I left them on his desk/table and he kept them until the new manager took office."

Again he testified in paragraph 14 of his written testimony as follows:

"As for the cheques which were marked time barred, the Defendant determined later not to pay them and they were returned time barred. When I informed him about it, he simply said he was personally responsible. That was around November 2001.

The second category he testified about concerned Uganda shillings 28,400,000/= drawn on DFCU bank on the basis that credit was given to the payee of the cheque New Agip Nateete Station. The cheque was later dishonoured by DFCU bank by the time it was received by the Plaintiff; the funds had already been withdrawn from the account. Furthermore, there was another Uganda shillings 31,000,000/= drawn in favour of New Agip Nateete Station which was also given a direct credit to the account. It was dishonoured by DFCU with the same result. He took this cheque to the Defendant for presenting but he never did so. These cheques were supposed to be recorded in the unpaid cheques register whereby the owners of those accounts would come sign in the register and take the dishonoured cheques.

For his part the Defendant testified that the allegations against him were not true. During the period he was a manager, the Plaintiff had a system called direct credit for encouraging customers to get paid their money quickly and the bank gets profit by charging the customers interest of 30% per annum for 3 to 6 days on the amount of the cheque banked. A direct credit would get cleared within four working days from the date it is banked. All the cheques to be signed by two signatories namely the principal is that of the branch manager or a subsidiary who was his assistant in current accounts Mr. Patrick Kigongo.

He agreed that the Plaintiff bank operated the suspense account which was transitory where cheques were supposed to be held for not more than two days awaiting funds to be deposited on the customer's account. Within the two days the head of current accounts Mr. Patrick Kigongo was obliged to ensure that the cheques are either paid or returned by the third day. When the cheques are kept for more than three days, the Plaintiff's bank account with the central bank would be debited to the tune of the value of the cheque in issue. In situations where there was no money on the customer's bank account, such cheques were never made good. The Plaintiff bank would then lose the money on the cheque to the collecting bank. The debited amount would then go to the person who banked the cheque in issue.

He testified that in the instant case, none of the cheques mentioned by the Plaintiff was issued by him. His account was never credited with any money from bank of Uganda. The cheques were issued by the Defendant bank customers in their individual capacity and not on his behalf. Secondly, it was not his duty to authorise and he had no mandate to authorise the overdrawing of any customers account and he did not do so in respect of the persons mentioned. It was not his duty and he had no mandate to suspend any cheques in the clearing suspense account which was controlled by the manager central accounts Department and the cheques were suspended by the head of accounts Mr. Patrick Kigongo. All cheques without sufficient funds on the customer's account were referred to the general manager and it was his duty to decide whether to honour the dishonoured cheques. He testified that all the cheques in issue related to accounts where there were no sufficient funds and were returned to the general manager by the head of accounts. It is the general manager who decided to authorise the payment. Furthermore, the cheques in issue were not returned by Patrick Kigongo to the collecting bank after the expiry of the prescribed three days in the suspense account. It was the general manager who overdrew the account for the relevant period.

He further testified that he was presented with unpaid cheques of one Hussein Ali Abdi who was a customer of the bank. He was instructed by the general manager who authorised the debit to follow up with Hussein Abdi. He did so and Hussein Abdi promised to pay Uganda shillings 15,000,000/= per month starting July 2001 and this is reflected in exhibit P5. The general manager agreed to the proposed settlement because the customer had started paying and had paid Uganda shillings 75,000,000/= by the time he was suspended. He started his leave on 2nd May 2002 which is the date the Plaintiff alleged that he entered into a memorandum of understanding after handing over to the assistant manager.

I have carefully considered the above testimony and the question is who kept the cheques beyond three days?

The evidence clearly demonstrates that it is Mr. Patrick Kigongo who suspended the cheques. The issue of suspending the cheques is supposed to be a routine matter where they are insufficient funds on the account. Secondly, where were the cheques kept? The cheques were kept by Mr. Patrick Kigongo and this appears in his testimony in paragraph 8. This is what he said:

"The cheques in question were determined by the Defendant, for future payments since they were not dishonoured.

In paragraphs 9 and 10 of the testimony he testified as follows:

"These cheques stayed for long and were not paid while representing banks had already paid their customers who had presented them."

10. "I realised later that the account holders of the cheques were actually the Defendant's sons."

In paragraph 12 he testified that the cheques in question remained in account number 1725 because the time for honouring and dishonouring had passed. Finally in paragraph 13 this is what

PW1 testified:

"The Defendant kept on insisting that he would clear the cheques. During the later part of 2001, I went to his office and told him to pay the cheques in question since he said he would pay them. I left them on his desk/table ... until the new manager took office".

It is therefore apparent that it is Mr. Patrick Kigongo who had custody of the cheques by the time the Plaintiffs account was debited. His only defence is that it was with the consent or knowledge of the Defendant. The procedure was to return the cheques and indicate that they had been dishonoured because there were insufficient funds on the customer's account. Loss to the Plaintiff was caused by keeping the cheques for more than three days. All the cheques were in the custody of Mr. Patrick Kigongo. He eventually handed them over around November 2001 because the Defendant had allegedly told him that he would clear the cheques.

The Defendant denies having anything to do with the cheques. He does not deny having the cheques suspended because this was supposed to be done when there are insufficient funds. The suspension was supposed to last for a period of two working days in the suspense account and it is returned if no funds are deposited by the customer within that period. That is the testimony of PW2, PW3 and PW4. Apart from the direct credit issued to New Agip Nateete Station, amounting to Uganda shillings 28,500,000/= drawn on DFCU bank and Uganda shillings 31,000,000/= drawn on DFCU bank, the rest of the cheques were kept by Patrick Kigongo until November 2001. That is when he allegedly handed them over to the Defendant.

Finally I have checked the various dates on the cheques exhibit P4. They range from 2000 – to early November 2001. In all these transactions, no decision was taken whether to honour or dishonor the cheques. It was the act of keeping the cheques for more than two days that led to the debit of the Plaintiffs account with the bank of Uganda. Who is to be faulted for keeping the cheques for two days and more? The cheques were in the custody of Mr. Patrick Kigongo.

Figures are bound to vary from individual to individual and particulars of cheques may be at variance and this is the problem with the testimony of PW1 Mr. Patrick Kigongo. I have particularly noted that the cheques in issue is said to belong to the Defendants sons. In paragraph 10 of his written testimony he testified as follows:

"I realised later that the account holders of the cheques were actually the Defendant's sons."

In paragraph 8 he had testified that the cheques in question were determined by the Defendant for future payment since they were not dishonoured. Particularly in paragraph 18 he testified as follows:

"I noticed in the register that the unpaid cheques belonging to the Defendant's sons were collected by the Defendant who signed for them. A copy of the extract from the register is hereto attached for reference."

I have accordingly considered the extract where the Defendant is said to have signed for the cheques the subject matter of the suit. The extracts from the books were admitted in evidence as exhibit P6. The record shows that on 7th December, 2015 a list of cheques handled by the

Plaintiff bank to the clearing house between the month of January 2001 and July 2001 were agreed to be exhibited as exhibit P6. Exhibit P6 is photocopy of a book in which cheques were acknowledged as having been taken by individuals. I have gone through all the highlighted portions of the book in the testimony of Mr. Patrick Kigongo and the results are so startling because they have no relationship whatsoever to exhibit P13 which is the list of cheques identified by the auditor PW5 and amounting to Uganda shillings 600,292,148/=. They also bear no relationship to exhibit P4 which is the batch of cheques constituting the amount in exhibit P13. What does this testimony mean?

For illustrative purposes I have considered the cheque numbers and the date when they were supposed to have been signed for by the Defendant as follows:

- On 10th January, 2001, the Defendant is alleged to have signed for cheque number 3233781 for Uganda shillings 60,000,000/=. There is no Uganda shillings 60,000,000/= in exhibit P13.
- On 15th January, 2001 the Defendant is alleged to have signed for cheque number 3233785 for Uganda shillings 50,000,000/=. There is no cheque with that number or amount in exhibit P13.
- Again on the same day the Defendant is alleged to have signed for cheque number 3233785 for Uganda shillings 50,000,000/=. There is no amount corresponding to that amount in exhibit P13 or cheque number.
- On 2nd February, 2001 the Defendant is alleged to have signed for cheque number 466886 for Uganda shillings 50,000,000/=.
- Cheque number 3541336 for Uganda shillings 30,000,000/=. There is no corresponding figure or cheque number in exhibit P 13.
- On 30th March, 2001 cheque number 3541352 for Uganda shillings 50,000,000/= the Defendant is alleged to have taken a cheque which has no corresponding but in exhibit P13.
- On 30th March, 2001 the Defendant is supposed to have taken cheque number 466890 for Uganda shillings 50,000,000/= but it has no corresponding evidence in exhibit P13.
- Cheque number 3541358 for Uganda shillings 20,000,000/=
- Cheque number 3541359 for Uganda shillings 30,000,000/=
- Cheque number 3541363 for Uganda shillings 30,000,000/=
- Cheque number 466887 for Uganda shillings 50,000,000/=
- Cheque number 3541350 for Uganda shillings 50,000,000/=.
- All the above cheques have no corresponding cheque numbers or amounts in exhibit P13.
- On 26th April, 2001 the Defendant is said to have taken cheques numbers 354 1355 for Uganda shillings 50,000,000/=
- Cheque number 3541365 for Uganda shillings 50,000,000/=
- Cheque number 3541364 for Uganda shillings 50,000,000/=
- Cheque number 466889 for Uganda shillings 20,000,000/=

- Cheque number 466888 for Uganda shillings 30,000,000/=
- Another cheque without numbers for Uganda shillings 50,000,000/=.
- None of the above cheques have the corresponding number of figure in exhibit P13.
- On 30th April, 2001 the Defendant is reported to have taken according to exhibit P6 the following cheques:
 - Cheque number 969936 for Uganda shillings 50,000,000/=.
 - Cheque number 88462 for Uganda shillings 50,000,000/=.
- On the 30th May, 2001 the Defendant is alleged to have signed for cheque number 3541370 for Uganda shillings 50,000,000/=.
- Cheque number 3541371 for Uganda shillings 50,000,000/=.
- Cheque number 3541369 for Uganda shillings 50,000,000/=.
- On the 24th May, 2001 the Defendant is alleged to have taken cheque number 323 3785 for Uganda shillings 50,000,000/=.
- Cheque number 3541373 for Uganda shillings 50,000,000/=.
- Cheque number 969936 for Uganda shillings 50,000,000/=.
- Cheque number 3541376 for Uganda shillings 50,000,000/=
- cheque number 79544 for Uganda shillings 50,000,000/=.
- On 7th June, 2001 the Defendant is alleged to have signed for cheque number 3679543 for Uganda shillings 50,000,000/=.
- Cheque number 88463 for Uganda shillings 50,000,000/=.
- Cheque number 3879545 for Uganda shillings 50,000,000/=.
- On 12th June, 2001 the Defendant is alleged to have signed for cheque number 417806 for Uganda shillings 50,000,000/=.
- Cheque number 3233787 for Uganda shillings 50,000,000/=.
- Cheque number 3233788 for Uganda shillings 50,000,000/=.
- Cheque number 3233789 for Uganda shillings 50,000,000/=.
- On 20th June, 2001 the Defendant is alleged to have signed for cheque number 520256 for Uganda shillings 50,000,000/=.
- On 22nd June, 2001 the Defendant is alleged to have signed for cheque number 417807 for Uganda shillings 150,000,000/=.
- Cheque number 3079546 for Uganda shillings 50,000,000/=.
- Cheque number 217653 for Uganda shillings 350,000/=.
- Cheque number 13674 for Uganda shillings 600,000/=.
- On 25th June, 2001 the Defendant is alleged to have signed for cheque number 520256 for Uganda shillings 150,000,000/=.
- Cheque number 3079547 for Uganda shillings 50,000,000/=.

All the above cheques have no corresponding amount or cheque number in exhibit P13 which constitutes the Plaintiff's claim. The testimony of PW1 is completely suspect and contradictory to the evidence of PW 5 the internal auditor. If the above were the cheques which were kept by

the Defendant, then they have nothing to do with the alleged loss of Uganda shillings 600,292,148/=. The question then would be where those cheques were kept? All the cheques belonged to the Defendant's sons. The majority of the cheques belonged to Hussein Abdi Ali and were issued between January 2001 and June 2001. In exhibit P13 the cheques were issued between February 2001 and March 2001. Cheques issued in November 2001 belonged to Bosi Ali. The Plaintiff's Counsel at page 13 and the second and last paragraphs of his submissions actually testified that the Defendant was able to identify signature of some of the cheques and also against exhibit P6 being the list of cheques returned to the clearing system for non-availability of funds. He listed some of these cheques between pages 13 and 14 of his written submissions. At the same time he also relies on exhibit P4 which is the list of cheques admitted. I have carefully considered exhibit P4 and indeed exhibit P13 corresponds with some of the amounts and the dates as to when the cheque was received by the bank.

For his part the Defendant testified in paragraph 27 of his written testimony that the cheques in issue were not returned by Patrick Kigongo to the collecting bank after the expiry of the prescribed three days in the suspense account. He testified that he was shown a batch of cheques on the 13th of May 2002 and asked why he had kept them.

The question that remained was who was in custody of the cheques by the time the Plaintiffs account was debited in Bank of Uganda. I find that it cannot be fixed on the Defendant through the testimony of the only person who had accessed the cheques namely PW1. It was therefore not proved that it was the Defendant who kept the cheques beyond the three days. It was in fact Patrick Kigongo who did. It is the action after the debit which is being called into question. The cheques ought to have been returned immediately or within two days since they could be debited on the 3rd day. In exhibit P9 which is the judgment of the Magistrate's Court in Criminal Case Number 723 of 2002 Patrick Kigongo suspended the cheques after referring it to the branch manager. There was however proof that PW3 had an interest in the cheques and put pressure on the customers to pay by his visits to their Petrol Stations to pay which fact he admitted in cross-examination.

After careful evaluation of evidence, it cannot be explained why all the cheques in issue were the cheques attributed to the sons of the Defendant.

It is therefore my humble conclusion, despite the contradictory evidence of PW1, that PW1 and the Defendant knew something about these cheques and their being kept beyond the period of three days and in any case, the activities of the servants of the Defendant were within the knowledge of the Defendant because he discussed the same with PW1 Mr. Patrick. It was a joint responsibility between the two.

I have further considered the testimony with respect to the issue of duress. My conclusion is that there is other independent evidence that incriminates PW1 Mr. Patrick Kigongo and the Defendant. So even if the information was procured through duress, I am unable to determine for sure whether the Defendant was tortured. I have opted to rely on other independent evidence which I have set out in detail above.

Particularly the court cannot rely on the evidence of exhibit P1 which is an acknowledgement in a memorandum of understanding as well as exhibit P 12 for the simple reason that by the time the suit was filed, some of the money exhibit P1 which is the memorandum of understanding had been paid off. Why was this suit filed inclusive of the figures in exhibit P1? Exhibit P1 and exhibit P12 are suspect documents and ought not to be relied upon by the court because they do not depict the state of affairs by the time the suit was filed in October 2002. Furthermore, PW1 referred to evidence which refers to different transactions. Hussein Abdi Ali independently acknowledged his indebtedness. The production of exhibit P6 demonstrates that the evidence compiled against the Defendant is suspect and contradictory. For the reasons there is evidence that the Defendant made acknowledgement of indebtedness due to the other pressure he was subjected to.

Conclusion:

- By the time the matter cropped up, this was in May 2002 by which time the Defendant was due for his leave. He went on leave and evidence was compiled in his absence.
- The acknowledgement in exhibit P1 and P12 do not reflect the true state of affairs by the time the suit was filed in October 2002.
- After the acknowledgement in exhibit P1 and P12 efforts were made by Raphael Drici to clear a sum of Uganda shillings 171,194,949/= which was in debit on his account. This amount was fully cleared by the time the suit was filed but it was included as a claim in the suit and by amendment of the plaint in 2014, it was further included as against the first Defendant only.
- Similarly a substantial part of the Uganda shillings 166,130,209/= attributed to Hussein Abdi Ali were paid leaving a balance of over Uganda shillings 8,027,050/= by 31st of July 2002 which was the debit balance. By the time the suit was filed, the account was in debit balance by only about Uganda shillings 13,685,426/= yet the entire amount was filed against the Defendant.
- Proceedings were commenced against the sons of the Defendant and the suit against them was dismissed.
- Hussein Abdi Ali independently acknowledged a sum of Uganda shillings 384,438,140/= on account of various cheques issued when there was no money on the account.
- Subsequently Hussein Abdi Ali made payments on the 13th May, 2002 of Uganda shillings 15,000,000/=. And another Uganda shillings 156,194,949/= on 31st of June 2002. The suit was filed on 30th October, 2002. No further evidences given as to whether he continued making payments as undertaken.
- The evidence of PW 5 gives the position with regard to the cheques in question by June 2002. Subsequent payments made by Hussein Abdi and Raphael Drici one not taken into account because apparently they relate to direct credits.
- There is no evidence that no other payments were made in another way similar to the work relating to the direct credits. All the testimonies give the position by May 2002. The

testimonies did not disclose payments made after the other two. These were discovered from the documents adduced by the Plaintiff.

- Because exhibit P1 and P2 cannot be relied on for the reasons given in the judgment, the sum of Uganda shillings 384,438,140/= attributed to Hussein Abdi Ali cannot be charged on the Defendant. Being a customer of the bank who has been servicing his account, he ought to be held accountable and there is no basis for attributing this amount on the Defendant. The Defendant secured Mr. Hussein Abdi Ali who undertook to clear his indebtedness with the bank and there is evidence of his commitment in exhibit P9.
- I have considered the testimony of PW 4 who testified that the Defendant paid Uganda shillings 25,000,000/= during the month of June 2002 but did not make further deposit. This amount is not reflected in any statement produced or any deposit slip or record of the Defendant. The Defendant denied having paid this money. It however proves that from the testimony of the Plaintiff's witness, money could be paid on another account but this account has not been disclosed to the court. Her testimony attributes the entire loss claimed on Defendant when some of the money had been paid by the time PW4 testified in this court.
- In the premises, the Defendant is not liable for the entire amount of loss. Secondly it is Mr. Patrick Kigongo who kept the cheques for more than three days leading to the debit. The Defendant's fault is that he did not put pressure on his sons to clear the indebtedness by the time the issue was discovered according to the testimony of PW1. He allegedly promised to clear the indebtedness which he did not do prompting PW1 to leave the cheques at his desk. These cheques were exhibited as exhibit P4. Lastly by the time the cheques were dumped at the Defendant's desk, the loss had already occurred due to the act of suspending the cheques and keeping them for more than two days from the time they were first received.

Before concluding with the remedies I will first deal with the counterclaim of the Defendant.

COUNTERCLAIM

Issue No. 2: Whether the Defendant was lawfully suspended and/or dismissed by the Plaintiff?

The Counterclaimant's Submissions:

The Defendant's counter claim raised the issue of **whether the Defendant was lawfully suspended and dismissed**. The Counterclaimant's Counsel submitted that this issue should be answered in the negative on the following grounds:

Sub Issue (a):

Unlawful suspension: As far as this sub issue is concerned the Defendant's Counsel submitted that his suspension without pay was unlawful and in breach of the Bank's Regulations, Terms, and Conditions of Service which took effect from 7th March 1998 and is exhibit D3.

According to **Exhibit D7** (letter Ref: DF/014 dated 22nd July, 2002) and addressed to the Defendant by Berna A. Ajakol (Mrs.), the Manager Personnel & Administration, the Defendant was suspended from duty with effect from 17th May, 2002 in accordance with Regulation 30 of the Staff Regulations, Terms, and Conditions of Service. This was due to "**Following circumstances under which he was charged with causing financial loss to the Bank**" Also the Memorandum dated July 19, 2002 from the Manager Legal Services, to the Manager - Personnel & Administration (Exhibit D6) reveals that on 17th May, 2002 both the Defendant, AI Haji Abdi and Mr. Patrick Kigongo were charged with causing financial loss to the Bank. They had to be suspended with immediate effect, having regard to the nature and gravity of the criminal offence involved. It was decided that they were not to receive salary during the time they would remain on suspension. Indeed Exhibit D7 (the Defendant's letter of suspension dated 22nd July, 2002) conveyed this message to the Defendant.

While it is true that the Bank had the mandate to order the suspension of its employees who have been charged with a criminal offence, and the same is pending in a Court of Law, under Regulation 30 (a), the said employees were entitled to receive half salary during the first three (3) months of the suspension and thereafter, the management of the Bank was obliged to review the case with a view of either extending the same; or terminating service. In the Defendants case, the Bank reviewed the Defendant's case in November, 2005; after it got an ex parte judgment against the Defendant in H.C.C.S. No. 569 of 2002 and thereafter terminated the Defendant's services by dismissing him forthwith on 8th of November 2005 under Regulation 23 (i) of its Regulations, Terms, and Conditions of Service. The facts show prima facie that the Defendant was put on continued suspension from 22nd July, 2002 up to 8th November 2005 being a period of three years and four months. This in itself was a breach of the Defendants fundamental Constitutional right to a fair and speedy disposal of disciplinary proceedings against him.

In the case of **Perez Kakumu versus Attorney General 2003 KALR 344**, the facts were that the Police CID was investigating a possible crime against Mr. Perez Kakumu in the management of Government funds. The Permanent Secretary interdicted him on that basis and wrote to him a letter on 30th January, 1995 requesting him to defend himself on charges of misconduct. Kakumu gave his defence by reply one week thereafter on 9th November, 1995. Thereafter he never heard from the Permanent Secretary, till he filed his Suit in 1997 about two (2) years thereafter. It was held that the Permanent Secretary was in breach of the law which requires a speedy conclusion of disciplinary proceedings against an Officer. Therefore, the continued interdiction of 2 years was unlawful; and would be lifted. An order was also issued for the Plaintiff to be paid all his salary arrears including

benefits which had been withheld because of the long interdiction.

The Counterclaimant's Counsel submitted that in this case the Defendant was suspended on 22nd July, 2002 and was remanded in Luzira Prison, and his suspension continued and lasted for over three (3) years without any pay and this was unlawful.

Sub Issue (b)

Unlawful dismissal:

The Counterclaimant's Counsel submitted that according to **Exhibit D 10**, the Defendant after his acquittal wrote to the Bank a letter dated 22nd Jan, 2013 through his Lawyers Messrs Joseph Kiryowa & Co. Advocates, to establish his fate because he had never received further communication since his suspension on 22nd July, 2002 about 11 years earlier. The said letter **Exhibit D10** was duly received and acknowledged by the Bank's Legal Department on 23rd January 2013. The Bank did not bother to reply to the letter until the Counterclaimant filed Civil Suit No. 93 of 2013 against the Bank to declare his continued suspension, unlawful, as was done in Perez Kakumu's Case.

The Plaintiff claimed that the Defendant was no longer on suspension has been dismissed though no proof of the alleged dismissal was attached. The Court ordered the Plaintiff in 2014 to produce proof of the communication of dismissal whereupon the Plaintiff's Lawyers delivered a photocopy of a letter of termination of services/dismissal to the Defendant's Advocates on 26th May, 2014. For the first time; the Defendant saw and received a photocopy of this letter dated 8th November 2005 (**Exhibit P3**) signed by **Mohammed Wahra** General Manager Tropical Africa Bank Ltd and not **Mr. Khallas** as indicated in the written submissions of the Plaintiff's Counsel. Before the said date the Bank never wrote to the Defendant requesting him to defend himself before a Disciplinary Committee, following the Defendant's suspension on 22nd July 2002. Instead the Plaintiff relied on an ex parte Judgment in H.C.C.S. No. 569 of 2002 where the Defendant was never heard to terminate his services in 2005.

Secondly, the criminal charges against the Defendant were still pending hearing in Buganda Road Magistrates Court by 2005 by the time the decision to terminate his services was taken and he was presumed innocent.

In her written testimony PW 4 Addah T. Wegulo testified that on receipt of the ex parte judgment against the Defendant, it was not necessary to subject the Defendant to disciplinary hearing.

The Counterclaimant's Counsel submitted that the procedure adopted for termination of the Defendant's employment without giving him a hearing was unlawful. In **Kamurasi Charles vs. Accord Properties Ltd & Another S.C.C.A. No. 03 of 1996**, it was held

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that to condemn a person unheard was a violation of the cardinal rule of natural justice and which rule embraces the whole procedure of due process. In **Matovu & 2 Others vs. Sseviri & Another [1974] HCB 174** it was held that a decision arrived at in breach of a rule of natural justice is void ab initio and is of no consequence. The same conclusion was reached in **Lukwiya Joseph vs. Gulu District Local Government HCT-02-CV-CS-0022 of 2003** where it was held that termination from employment without affording an opportunity to the employee to be heard in defence of the charges laid against him was unlawful (See also **Jabi vs. Mbale Municipal Council 1975 HCB 191**).

In the premises the Counterclaimant's Counsel submitted that the right to be heard is sacrosanct and the Bank had no right whatsoever to deny the Defendant an opportunity to defend himself. This was more so, when the affected Bank customers; Hussein Ali Bossi Ali and Drichi Raphael had cleared their Accounts in 2002 and 2003 according to the exhibited Bank Statements. As it turned out later, the ex parte Judgment which the Bank relied on in November, 2005 was subsequently set aside by this Court on the 23rd August, 2013.

Furthermore, the Defendant was later found innocent by the Buganda Road Magistrates Court Criminal Case No. 723 of 2002 on 14th of October 2011 and acquitted of all the criminal charges, for which he was suspended by the Plaintiff on 22nd July, 2002. The Defendant's Counsel prayed that Court finds that the continued suspension of the Defendant without pay and his subsequent dismissal were unlawful.

Plaintiffs Reply

In reply to issue 2 on **whether the Defendant was lawfully suspended and/or dismissed by the Plaintiff**, the Plaintiff's Counsel submitted that it is the Plaintiff's/ Respondent to counterclaim case that the Counterclaimant was involved in malpractices. He ordered direct credit on customers' accounts against cheques presented when there were no corresponding amounts of money on the accounts. It was further discovered that the Counterclaimant suspended cheques on the suspense account No. 1725 beyond the requisite three (3) days and by the time the cheques were returned unpaid, the bank's suspense account had already been debited with the funds on the cheques. Following this discovery, the Counterclaimant was charged in the criminal court for causing financial loss and was further suspended from work. Further still the counter Defendant filed civil suit No. 569 of 2002 for recovery of the money whose loss was attributed to the fraudulent conduct of the Defendant. At first, the Counterclaimant did not defend the suit and judgment was pronounced against him on the 1st November, 2005. In the said judgment, the Counterclaimant was found to have caused the counter- Defendant loss of Uganda Shillings 876,540,298/= through his breach of duty and fraudulent conduct. Shortly after the judgment of the court, the Counterclaimant was summarily dismissed by letter dated 8th November, 2005, Exp3. The counter-Defendant's defence is that both the suspension and subsequent dismissal were justified. Under the Regulations, Terms and Conditions of Service

Exhibit D3, provision is made for summary dismissal of an employee for gross misconduct. **Regulation 23 (i)** provides that:

"Without prejudice to any criminal or civil liability, an employee may be deemed to have committed an offence and may be liable to disciplinary action under these regulations if found guilty in any or all the following cases namely: (k) Guilty of acting dishonestly in the course of his duties."

Under **Regulation 23 (iii)** the management may take on appropriate disciplinary action against an employee who persistently fails in his own duties and responsibilities provided he has been formally informed of the same and before a final decision is taken, the employee should be given a chance to defend himself. Counsel submitted that under that regulation where an employee is found liable by a competent court to an employer for fraud, whether in civil or criminal proceedings, there would be no need for another hearing before disciplinary action is taken against him. The Counterclaimant was therefore lawfully dismissed once the High Court found him liable in breach of duty and fraud. The Counterclaimant averred in his pleadings and testimony that he was charged in Buganda Road Court with 27 counts of causing financial loss to the Counter- Respondent, but the court found him innocent and acquitted him of all the charges. It is true that the criminal court acquitted the accused on the 14th October, 2011 of charges which were brought against him in 2002. The acquittal came long after the judgment of the High Court in this same suit where the accused was found to have been fraudulent, therefore causing financial loss to the counter-Defendant of more than Uganda shillings 800,000,000/= . It was after the finding of fraud in the Civil Suit that the dismissal letter dated 8th November 2005, Exhibit P3 was written to the Defendant. In paragraph 55 of her witness statement, PW4 Addah T. Wegulo testified that fraud is a fundamental vice in the banking business as banks deal with customers' money and the public places a lot of trust in the bank. A person found to be fraudulent at whatever level cannot continue in the employment of the bank.

Furthermore, the Counter Defendants Counsel submitted that the standard of proof in criminal cases is not the same as that in civil cases. While proof in criminal cases is that beyond reasonable doubt, in civil cases proof is on a balance of probabilities. It is true however that the standard of proof for fraud is higher than in other civil cases because of the seriousness of the vice. A finding of fraud against a bank employee should therefore be sufficient cause for dismissal without further disciplinary hearings. Counsel relied on **Black's Law** Dictionary Eighth Edition for the definition of Fraud as a: "A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. Fraud is a tort, but in some cases (especially when the conduct is willful) it may be a crime ..." He submitted that in the matter before court there was a clear and willful misconduct on the Defendant's part which would tantamount to a criminal act. The Defendant did not therefore require any other hearing after a finding of fraud. The Counterclaimant accuses the counter-Defendant of backdating the said letter which he claims to have received through his lawyers.

This accusation is not true as it was responded to in the testimony of PW4 Addah T. Wegulo when she mentioned in paragraph 54 of her statement that the letter terminating the Defendant's service could not have been backdated as alleged by the Counterclaimant considering the fact that the General Manager, Mr. Khallas who signed it, left the bank in the year 2009.

The Counterclaimant could not be reinstated on the job as prayed for after his discharge as he had already been dismissed. That the judgment upon which the Counterclaimant was dismissed was itself set aside cannot entitle the Plaintiff to a reinstatement to his job where he was dismissed eleven (11) years earlier and where he does not qualify to be employed by virtue of age. Secondly, the Counterclaimant could not possibly be reinstated even if he was eligible as he had already reached retirement age. According to the human resource manual of the Plaintiff, the retirement age for employees of the bank is 60 years. If the Counterclaimant was 71 in 2015, he ought to have retired from the bank in 2004. Two years after he was suspended. Even if the retirement age was 65 years as suggested by the Counterclaimant during cross-examination, he would then have retired in 2009. In any case, the prayer for reinstatement cannot stand. It is not true that the counter-Defendant failed to avail to the Counterclaimant the necessary pay slips as pay slips are always given to the employee (the Counterclaimant in this case) as proof that his salary is paid. Section 50 of the Employment Act provides that:

"Every employee shall receive with each payment of his or her wages an itemized pay statement from his or her employer, in writing, in a form and language which the employee may reasonably be expected to understand, which shall set out; 'the amount of every deduction from his or her wages due at the end of that particular pay period; the amount of every deduction from his or her wages during that pay period and the purpose for which each such deduction was made; and the employee's net wages payable at the end of that pay period."

The pay slips were received by the counter claimant. He had no reason therefore to demand for them. The Counterclaimant did not plead the specific net salary that he was earning as branch manager. He further did not plead or prove any fringe benefits and emoluments from 17th May, 2002 up to May 2014 as alleged. In any case, the Counterclaimant would not be entitled to these benefits as he was due to retire in the year 2006. Salary arrears and other emoluments are special damages. There are authorities on how special damages ought to be specifically pleaded and strictly proved (see **ROSEMARY NALWADDA vs. UGANDA AIDS COMMISSION HCCS NO. 67 OF 2011**, where Hon. Justice Stephen Musota held that the principles governing the award of general damages is well settled. A claim for special damages must specifically be pleaded and strictly proved. A Plaintiff had the duty to prove their damage. It is not enough to write down particulars, throw them to the court and say "this is what I have lost I ask you to me these damages." They have to be proved. This does not mean that proof of special damages have to be proved by documentary evidence in all cases.

The Plaintiff's Counsel submitted that the Counterclaimant fell short of the principle to specifically plead and strictly prove the salary arrears and other emoluments. There is no basis therefore upon which such damages can be awarded. Finally, under the Regulations, Terms and Conditions of Service exhibit D3 and **Regulation 24 on RESIGNATION AND DISCHARGE**, under clause 2 (i) (Retirement benefits), provides that:

“To qualify for the benefits, the employee should have been in continuous service.”

The Counterclaimant in his pleadings averred and testified that he was first employed by the bank from 1973 to 1995 when he resigned from his job. He was later in February 1998 re-employed until 2002 when he was suspended and later dismissed. Under the circumstances therefore, the Counterclaimant cannot claim for benefits in accordance with regulation 24.

Under the provisions of **Section 83 of the Employment Act**, 'continuous service' is defined as an employee's period of uninterrupted service with the same employer.

The Counterclaimant testified that he resigned from work and was reinstated after a period of 3 years. He was therefore not in continuous service and is not entitled to benefits. He concluded that the employment service of Defendant/Counterclaimant was lawfully terminated.

The Plaintiff's Counsel submitted that they have shown in their main submissions how the Defendant admitted to fraudulent acts of using the Suspense Account number 1725, to siphon money out of the bank in concert with other people mentioned therein. Further evidence of fraud was brought when it was revealed that the cheques that were suspended were kept by the Defendant in his drawers. This was done as a way to conceal the malpractices that the Defendant was involved in. It is not true as submitted by defence Counsel that by the time of the ex parte judgment, the money had already been paid back by the customers who included the Defendant's children. In his allegation, the Defendant attempted to rely on the statements of Hussein Ali Abdi exhibit P5 and exhibit P8 which it was submitted, showed an outstanding debit balance of Shillings 13,685,426/= as on 31st December 2002. Similar conclusion was drawn regarding Account No. 447161 of Raphael Drichi (Exp11) and Account No. 447146 (Exp7) of Bosi Ali. By relying on these bank statements, the Defendant attempts to hide the mala fides that happened on the Suspense Account No. 1725. It is clear from the Audit Report exhibit P13 and the evidence of Anne Nandawula (PW5) that the cheques in question, whose numbers are shown as against the accounts of the involved parties are part of the sources of loss. These cheques amounting to Shillings 600,292,148/= are un-reconciled entries on the Suspense Account No. 1725. They are un-reconciled because they were not brought back into the system. As such, they cannot be reflected on the statements of account of the relevant parties involved. The intention of the Defendant was to hide the loss. So he kept the cheques and did not surrender them until questions were asked. His signature was proved at different places on Exhibit P6 that the

Defendant collected these cheques himself once they were brought back from the clearing house. If these cheques were brought back into the system, the amounts would have been reflected on the different accounts. The fraud was very well orchestrated that it would not reflect on the individual accounts. It could only be discovered by an audit of the Suspense Account supported by the admission of the Defendant.

Remedies

The Plaintiff's Counsel prayed that judgment be entered in favour of the Plaintiff in the amount of Uganda shillings 912,620,298/= and Interest be awarded at the rate of 26% pa from the date of filing the suit till the date of judgment and costs of the suit.

Defendant's Submissions in reply:

In reply the Defendant's Counsel submitted that the Plaintiff's main Suit should be dismissed with costs and the counter claim be allowed with costs.

With regard to special damages, Counsel submitted that the Defendant resigned from Tropical Bank Ltd in 1995 and even requested for his benefits (Exhibit D4) which closed the 1st phase of his employment.

However, the Defendant was reinstated in the service of the Bank as Assistant Bank Manager on permanent terms according to his letter dated 23rd February, 1998 exhibit D5. He was later on 22nd November, 1999 and appointed as acting Manager Kampala Branch (Exhibit D2). Management appreciated his work as a result of favorable reports from his superiors and careful assessment of his performance of duties during 2001. They increased his gross pay from Uganda shillings 1,914,484/= to Uganda shillings 2,017,017/= with effect from 1st January 2002 (Exhibit D17). His continuous service from 23rd February 1998 was simply interrupted by his unlawful suspension due to work intrigues.

With reference to the claim for payment of salary arrears and other benefits during the loan suspension from 2002 to 2014m Counsel submitted that it is erroneous for the Plaintiff's Counsel to submit that the Counterclaimant failed to plead and prove salary arrears which he was entitled to in May, 2002 being the time of his suspension.

With regard to the long suspension without pay, Counsel relied on the case of **Justus Kalebo vs. Uganda Revenue Authority HCT – 00 – CV – CS – 0405 – 2006** where the court addressed the issue of effective

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communication of a letter of dismissal of an employee. It was held that the status of the Plaintiff as an employee of the Defendant would obtain till the Defendant communicates to him the final decision on the termination. Counsel submitted that the Defendant/ Counterclaimant in a letter written by his lawyers Messrs Joseph Kiryowa & Co, Advocates and addressed to the General Manager of the Plaintiff demanded to know his fate as an employee of the Bank after his acquittal and this letter was duly received by the Legal Department on 23rd of January 2013. The Plaintiff Bank did not respond to the same, even after expiry of the seven (7) days given. The Defendant clearly put it to the Bank that he was continuously tormented by the endless suspension. He was never told that he was dismissed in 2005 as the Plaintiff later on tried to claim. It was only on the 27th of May 2014 that the Plaintiff's Lawyers, Messrs J.M Musisi Advocates & Legal Consultants; wrote a letter dated same date (**Exhibit D8**) forwarding the "**Dismissal Letter**" for the Plaintiff dated 8th of November 2005.

According to the **Perez Kakumu's Case (Supra)**, the employee should be paid all his salary arrears including benefits which were withheld because of the long suspension.

In these circumstances the Counterclaimants Counsel submitted that the 27th May, 2014 should be the effective date of communication of the dismissal of the Defendant from the Plaintiff's Bank service. Up to this date, the Defendant is deemed to have remained in continuous service of the Plaintiff; though under suspension without pay. The Defendant is therefore entitled to his gross salary of Shillings 2,017,017/= throughout this period of long suspension being a period of 144 months amounting to Uganda shillings 290,450,448/=. The amount should carry interest from 2005 to cater for inflation and pay rise.

As far as retirement benefits are concerned, the Counterclaimants Counsel prayed that the Counterclaimant is awarded a retirement benefit of a minimum of 11 years worked as he would have normally retired at 65 years. With regard to the submission that the retirement age was 60 years the Plaintiff did not adduce in evidence any human resource manual of the Plaintiff and therefore cannot rely on it. The mere fact that the Defendant would have clocked 65 years in 2009, does not necessarily mean that he would have automatically ceased to work in the Bank in that year; or that, he had to retire automatically.

In the Case of George Ndajimana versus Uganda Printing & Publishing Corporation 2001 KARL 440; Court defined "Retirement" as voluntary termination of one's employment or career, especially upon reaching a certain age.

That on attainment of a certain age, an employee is free to voluntarily terminate his employment with the employer; and the employer has discretion to say yes or no; although the acceptance is not automatic.

He had more nine (9) years of normal service before clocking the normal retirement age of sixty five (65) years. Furthermore, the Bank could still have continued to employ him on contract if he had not had such rude interruption.

In just and fair circumstances, he is entitled to all his Retirement Package in accordance with Clause 2 Regulation 24 of the Bank Regulations, Terms, and Conditions of Service Exhibit D3.

With regard to the Defendant's continuous service from 23rd Feb 1998, and with reference to the Plaintiff's submissions that the Defendant was not in continuous service of the Bank to qualify for the retirement benefits Counsel disagreed that there is no specified period of service given for employees on permanent terms before one can qualify for retirement benefits. He submitted that the requirement is for an employee to have been in continuous service with the bank whereby even the period when one is on suspension without pay is included in the computation of the days of continuous service contrary to the argument of the Plaintiff's Counsel. He cited section 82 of the Employment Act No. 6 of 2006 which provides that continuous service shall begin from and include the first day on which the employee begins from and include the first day on which an employee begins to work for an employer and shall continue up to and include the last day on which that work shall be completed.

Counsel submitted that in the instant case the Defendant's service as an Assistant Manager Kampala branch on permanent terms began on 26th February, 1998 according to exhibit D5 and was interrupted by his suspension without pay in May 2002 until he received a photocopy of a letter of termination of service on 27th May, 2014 admitted in evidence as Exhibit P3.

Counsel made reference to Section 84 (1) (b) of the Employment Act of 2006 which provides that an employee's continuous service shall not be regarded as broken where an employee is absent from work..."due to his or her suspension without pay..." Subsection 2 provides that any period of time elapsing in a situation referred to in subsection (1) shall count for the purposes of calculating the length of continuous service.

Counsel further submitted that in the instant case the Defendant is deemed to have remained on suspension from May 2002 to 27th May, 2014 (12 years) when he received the letter of termination of his services. He submitted that retirement carries with it benefits and entitlements collectively known as Retirement benefits and entitlements which an employee normally looks forward to the day when the benefits would accrue to him.

He further submitted that in the instant case the demeanour of the Defendant in court during cross examination showed that he was still in his proper mental faculties and body fitness to have carried on meaningful work long after he clocked 65 years in 2009. The Defendant's Counsel further submitted that the past meritorious service of the Defendant which manifested itself in the several years he worked for the bank and which was recognized in Exhibit D17 was interrupted by his unlawful suspension in 2002. He further submitted that he did not freely/ voluntarily terminate his employment with the Plaintiff Bank and he was not convicted by any court to be disentitled to his retirement benefits hence the Plaintiff should bear the financial consequences of its high handedness and arbitrary dismissal of the Defendant who was innocent. He should be awarded his retirement benefits under Clause 2 Regulation 24 of the Terms, Regulations and Conditions of service Exhibit D3.

As far as general damages are concerned the Counterclaimant's Counsel relied on **Senyonga Kiwanuka Godfrey vs. Attorney General H.C.C.S. No. 146 of 2008**. In that case the Plaintiff was interdicted for 10 years without being given his salary or any other benefits up to the time he was given his letter of dismissal 10 years later and was awarded general damages.

He submitted that the Defendant's employment was governed by a written service agreement which could not be found due to failure to find his personal file according to exhibit D8 and as such the Defendant was entitled to be heard. The Plaintiff denied him the right to be heard and treated the letter of termination of service exhibit P3 as his dismissal.

The issue of dismissal whether summarily or otherwise had to be governed by the terms of the Service Agreement. Both the Plaintiff and the Defendant were under obligation to observe the terms of the said Service Agreement. At common Law; an employee whose Contract of Service is breached by the employer has an option to sue for general damages, as was held in **Gulabala vs. Kampala Pharmaceuticals Ltd S.C.C.A. No. 6 of 1998** cited in the case of **David Massa vs. National Housing Corporation 2002 KALR 492**. In the case of Massa (supra), the trial Judge, Musoke Kibuuka J found that the Plaintiff who was a turn boy and earned Uganda shillings 260,000/- per month was entitled to general damages for wrongful dismissal. He applied a multiplier of 15 to calculate the general damages and even awarded exemplary damages. In the instant case, there is no evidence of breach of fiduciary duty or of financial loss as claimed by the Plaintiff. There was no proof of criminal liability after the Defendant was acquitted.

In the premises he contended that the dismissal which was communicated to the Defendant was wrongful and he is entitled to all his benefits for the remaining years of service as was held In the case of **Southern Highlands Tobacco Ltd vs. David McQueen [1960] EA 490**. Similarly in the English Case of **Ridge vs. Baldwin & others (1964) AC 40** it was held that where the employer terminated the

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employee's Contract unjustly, the latter was entitled to compensation. Counsel prayed that the Plaintiff should pay general damages/compensation for the unlawful suspension and dismissal of the Defendant.

With reference to the allegations of embarrassment, inconvenience, financial loss and mental stress, the Defendant’s Counsel submitted that the Plaintiff falsely claimed that the Defendant was fraudulent and this soiled his name for 9 years while under trial, in the Criminal Proceedings at Buganda Road Magistrates Court. He was acquitted. Managers in the banking business exercise a higher duty of care and diligence because they manage peoples’ finances and are held in high esteem by the society. They enjoy a special fiduciary position with their actual or potential customers and the general public. He contended that the Plaintiff’s conduct seriously undermined the reputation of the Defendant who had been appreciated a few months back for his meritorious service delivery according to exhibit D2.

The Bank was paid its money by its customers between 2002 and 2003 as earlier submitted. It kept utilizing the money it in its business, while the Defendant was out of employment for 12 years up to 2014 without any communication of his fate. He could not be employed in any financial institution or other business in a fiduciary position with reputable customers, given the allegations of fraud on his head.

The Counterclaimant’s Counsel further submitted that according to Exhibit P 12, the Defendant was put under duress to pledge to immediately put his properties on sale. This property included his three Mercedes Benz lorries and trailers, two Scania trailers and a house. From the Court record in earlier proceedings in Misc. Application No. 362 of 2006 and exhibit D11, he suffered mental stress due to the ex parte judgment where he was unjustly ordered to pay Uganda shillings 876,540,298/=; interest thereon at 20% per annum, general damages and costs while he was sick and undergoing medical treatment abroad. The Defendant fought hard to set aside this ex parte Judgment.

Furthermore, he was imprisoned in Luzira and had to suffer further mental stress, incur legal expenses, and untold inconvenience and embarrassment while undergoing trial at Buganda Road Court for nine (9) years before he was finally acquitted.

The Counterclaimant’s Counsel submitted that this suffering was in addition to the same pain the Defendant was going through while defending this case of causing financial loss of Uganda shillings 921,883,306/= to the Bank which money the Bank already received from its customers between 2002 and 2003. It kept on tormenting him unfairly. In the premises, the Defendant prayed for general damages of at least Uganda shillings

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600,000,000/= with interest at 30% per annum from the date of judgment together with costs of the main suit and the counterclaim.

In rejoinder the Plaintiff's Counsel submitted that in the plaint the Plaintiff's claim in paragraph 3 of the plaint was for Uganda shillings 912,883,306/=. In its prayers, the Plaintiff prayed for Uganda shillings 912,883,306/=. After the testimonies of the Plaintiff's witnesses, an amount of Uganda shillings 912,620,298/= was proved as the loss incurred by the Plaintiff. Whereas the discrepancy in the figures mentioned in the plaint may be a typographical error between **921 and 912**, the court is enjoined to award the lesser figure of Uganda shillings 912,620,298/= as brought out in evidence. In the case of **Uganda Commercial Bank vs. Kigozi C.A.C.A. No. 21 OF 1999**, the Court of Appeal held that the court will not be barred from awarding a higher or lesser figure provided it is guided by evidence. He reiterated prayers for the award of Uganda shillings 912,620,298/= and prayed that court awards the entire amount as proved in evidence.

Resolution of the Counterclaim issue of: Whether the Defendant was lawfully suspended and/or dismissed by the Plaintiff?

I have duly considered the above submissions of the parties through the Counsel. The counterclaim is for declaration that the continued suspension of the Counterclaimant by the counter Respondent was illegal; the dismissal was unlawful and violation of the rights of the Defendant, payment of the Counterclaimant salary arrears and fringe benefits, general damages, interest at 30% per annum and costs of the counterclaim.

The Counterclaimants Counsel submitted that the Counterclaimant/Defendant was suspended from service contrary to regulations governing the employment. The Counterclaimant was suspended with effect from 17th May, 2002 under regulation 30.

The Counterclaimants Counsel submitted that the basis of the suspension of the Counterclaimant was the prosecution where the Counterclaimant was charged with causing financial loss. Subsequently, ex parte judgment was entered against the Defendant in September 2004 and the case was reviewed in November 2005 and services of the Counterclaimant were terminated forthwith. The Defendant was on suspension from 22nd July, 2002 up to 8th November, 2005. The Counterclaimant's Counsel submitted that this was in breach of the fundamental rights of the Defendant to be kept without payment for three years and four months. Secondly, the dismissal of the Counterclaimant was not communicated to the Counterclaimant until an order of the court in 2014 and by letter dated 26th May, 2013 exhibit P3 is when the Defendant got to know about his dismissal. The Defendant never appeared before a disciplinary committee following his suspension. Charges were pending before a court of law when he was dismissed. Subsequently he was acquitted on 4th October, 2011 and has never been given a hearing with regard to disciplinary proceedings in the Respondent to the counterclaim.

In reply, Counsel for the Respondent submitted inter alia that the Counterclaimant caused financial loss of Uganda shillings 876,540,298/= through his fraudulent acts. Shortly after judgment, he was summarily dismissed by a letter dated 8th November, 2005 exhibit P3. In the premises, the suspension and dismissal were justified. He further contended that summary dismissal is allowed for gross misconduct by regulation 23 (i) of the regulations. Regulation 23 (iii) permits the Respondent's management to take disciplinary action against an employee where he or she is found liable by a court of law for fraud whether in civil or criminal proceedings. The disciplinary action does not require further hearing and the staff can be dismissed forthwith. He further contended that the acquittal of the Plaintiff came long after ex parte judgment was entered consequent upon which the Counterclaimant was dismissed on 8th November, 2005.

By this court setting aside the judgment, it does not entitle the Counterclaimant to reinstatement. Moreover the Counterclaimant had reached retirement age and cannot be reinstated.

As far as the quantum is concerned, the Counterclaimant did not prove his salary and special damages are supposed to be pleaded and specifically proved according to the authorities cited in the submissions of Counsel above. The Plaintiff did not qualify for terminal benefits because he had not been in continuous service of the Respondent to the counterclaim in terms of regulation 24.

The Counterclaimant was in service from 1973 of 1995 whereupon he resigned and was later re-employed from February 1998 and 2002 when he was suspended. He was then dismissed in 2005. In the premises his benefits did not accrue in accordance with regulation 24.

I have carefully considered regulation 30 of exhibit PE 2 which gives the terms of service of the Counterclaimant. Regulation 30 provides as follows:

"(a) Where an employee has been charged with a criminal offence and the same is pending in a court of law, the management may, having regard to the nature of the offence and the public interest, order the suspension of such employee.

(b) During the first three months of the suspension, the employee may be receiving half salary and thereafter the management shall review the case with a view to either extending the same or terminating services.

(c) The Management shall as soon as circumstances allow review the position of the suspended employee if he has been acquitted or discharged by a court of law.

(d) Notwithstanding the provisions of regulation 30 (c) the management may dismiss the employee if it thinks that his continued employment will prejudice the interests of the bank."

Regulation 30 (a) permits the management of the Respondent to the counterclaim to suspend a member of staff who has been charged with a criminal offence. The fact that criminal proceedings were pending before a court of law where the Counterclaimant was charged with the offence of causing financial loss is not in dispute and therefore management was entitled to suspend the Counterclaimant. Secondly, regulation 30 (b) provides that during the first three months of the suspension, the employee may be receiving half salary and thereafter the management shall review the case with a view to either extending the same or terminating the services.

The Counterclaimant's services were not terminated when he was on suspension. In fact the suspension continued. Regulation 30 (b) gives the Management discretionary powers whether to terminate or extend the suspension which is expected to be on half pay. In the premises, the suspension cannot be unlawful and the extension of the suspension could only be in the interest of the Counterclaimant because it is expected to abide the outcome of the criminal proceeding. The management have discretionary powers for reasons stipulated in the regulations to terminate the services. This is made explicitly clear by regulation 30 (c) which provides that management shall as soon as circumstances allow, review the position of the suspended employee if he has been acquitted or discharged by a court of law.

From a clear reading of the above regulation, management can act after the employee has been acquitted or discharged by a court of law. Some points may be made from this provision. The first one is that it envisages that the staff is on suspension. Secondly it envisages action by the management as soon as circumstances allow after the staff has been acquitted or discharged by a court of law. The question is whether circumstances allowed? Prosecution of the Counterclaimant was never completed and judgment was only issued in 2011. In the meantime, the Respondent to the counterclaim had filed this suit against the Counterclaimant which resulted into an order for the Counterclaimant to pay a sum of Uganda shillings 876,540,208/= together with general damages of 10,000,000/= interest on the special damages at the rate of 20% per annum from November 2002 till payment in full. The suit was filed on 30th October, 2002 and the order reads that interest runs from the date of filing the suit till payment in full. Judgment was delivered on 1st November, 2005.

On the other hand the Counterclaimant was acquitted on 14th October, 2011. The issue for consideration is whether the Respondent to the counterclaim was within its rights to terminate the services of the Counterclaimant as it did after judgment was issued on 1st November, 2005. This situation is clearly catered for by regulation 30 (d) which provides that notwithstanding the provisions of regulation 30 (c) the management may dismiss the employee if it thinks that his continued employment will prejudice the interests of the bank. In other words the management does not have to wait for the acquittal or discharge of the employee and the sole basis upon which the management may dismiss the employee who is facing criminal prosecution is if his

continued employment will prejudice the interests of the bank. What is prejudicial to the interests of the bank can be determined by the management.

What remains for consideration is whether the proper procedure was applied when services were terminated.

The Respondent to the Counterclaimant through Counsel relied on Regulation 23 which deals with the disciplinary proceedings. It provides that without prejudice to any criminal or civil liability, a member of staff may be deemed to have committed an offence and may be liable to disciplinary action under the regulations if found guilty in any of the listed cases; in cases where he or she is convicted of a criminal offence; secondly, if he refuses or neglects to obey any lawful orders and instructions or if he misbehaves towards another member of staff or the public; thirdly, for refusal or neglect or omission to perform any of the duties; for incompetence; absenteeism from duty without prior permission or reasonable cause for five continuous days for 10 days in a calendar year; accepting presents for purposes of winning his favour; failing to pay debts when they fall due, declared bankrupt, insolvent or enters into an arrangement with his creditors; if by act or omission he conducts himself in a manner prejudicial to the proper performance of any of his duties or unfitting of an employee of the bank; if he is guilty of gross misconduct or negligence; if he is guilty of negligence loss, or damage of the property of the bank; if he fails to safeguard the business secrets of the bank/or divulges the same unauthorised persons and no employee is allowed to give any information about the bank to newspapers without the permission of the managing director/general manager.

The Counsel for the Respondent to the counterclaim specifically relied on the provision for gross misconduct or negligence.

Before concluding the issue, it is pertinent to consider the letter terminating the services for establishing the ground upon which the termination proceeded. This letter was admitted in evidence as exhibit P3 and is dated 8th November, 2005. It is addressed to the Defendant on the subject of: "Termination of Services".

The letter makes reference to the judgment of the court dated first of November 2005 which I have referred to. From the second last paragraph it writes as follows:

"The court found that you were guilty of breach of duty and fraudulent, thus causing financial loss.

You are therefore hereby dismissed forthwith from the service of the bank under regulation 23 (i) of the Bank Regulation, Terms and Conditions of Service."

The regulations relied upon by the Respondent to the counterclaim is clearly stipulated in the letter which speaks for itself. It provides that:

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"23 (i) Without prejudice to any criminal or civil liability, a member of staff may be deemed to have committed an offence and may be liable to disciplinary action under this regulation if found guilty of any or all of the following cases, namely:"

It is true that among the instances for disciplinary proceedings is where a member of staff is found guilty of gross misconduct or negligence. Whereas in the letter of termination exhibit P5, the specific ground relied on is that of breach of duty and fraud thereby causing financial loss. The ground in the termination letter purports to rely on the judgment of the High Court.

The first question for consideration is what disciplinary action is. Disciplinary action is provided for under the said regulation 23 where it is provided that the bank may take appropriate disciplinary action against a staff for persistent failure to do his duties and responsibilities provided he has been formally informed of the same and before a final decision is taken, he has been given a chance to defend himself. The specific provision provides as follows:

"The management may take an appropriate disciplinary action against an employee who persistently fails in his duties and responsibilities; provided he has formally been informed of the same and before a final decision is taken, he has been given a chance to defend himself."

The Counterclaimant Counsel submitted that the Counterclaimant was not given a hearing when the letter of termination was given. Secondly, he was not notified of the termination.

In reply, the Plaintiff/Respondent to the Counterclaimant's Counsel submitted that termination can be summary.

I do not have to consider whether termination can be summary because the regulations specifically provided for disciplinary action after a defence by the person sought to be subjected to disciplinary action. The Plaintiff was never called by way of a notice of the offences against him, so as to give his defence before any disciplinary action could be taken against him. Under regulation 23 (ii) disciplinary action include a warning; deduction on monthly salary in the amount of money as fine for the offence committed; forfeiture of one's pay if absent from duty without leave reasonable excuse; deduction of salary of any amount of money to restore property negligently lost or damaged; reprimand; deferment of the increment; demotion; suspension with half pay or without pay; termination of services and instant dismissal.

The Counterclaimant was not given notice of any disciplinary proceedings/action, was not given a hearing and was not even notified of the disciplinary action of instant dismissal. Criminal proceedings terminated in his acquittal.

The Respondent to the counterclaim is barred by the doctrine of estoppels from asserting that the Counterclaimant was summarily dismissed or dismissed after review pursuant to suspension.

In the premises, the Respondent to the counterclaim was entitled to suspend the Counterclaimant with half pay under regulation 30 (b) pursuant to the criminal proceedings commenced against the Counterclaimant for causing financial loss. However the Counterclaimant was suspended without pay contrary to regulation 30 of the terms and conditions of service of the Respondent to the counterclaim.

Secondly, the termination was without notice of disciplinary action and also without a right of defence as provided for by regulation 23 of the regulations. It follows that the termination of the Counterclaimant services was unlawful.

Remedies

Following the resolution of the issue of whether the Defendant caused financial loss to the Plaintiff, I have carefully considered the last issue dealing with the remedies available to the parties with regard to the Plaintiff's suit as well as the counterclaim of the Defendant.

As far as the plaint is concerned, the Plaintiff prayed for judgment for Uganda shillings 912,620,298/= together with interest at the rate of 26% per annum from the date of filing the suit till the date of judgment and costs of the suit. On the other hand the Defendants Counsel sought to have the suit dismissed with costs.

From the resolution of the first issue the question was whether the Defendant had caused financial loss in the amount claimed in the plaint.

Following the resolution of the issues, the Plaintiff's claim based on the evidence is for Uganda shillings 912,620,298/=. The court has already resolved the question of the outstanding amount claimed as follows:

1. Out of the total claim of the Plaintiff a sum of Uganda shillings 171,194,949/= had been paid before the suit was filed in October 2002. The sum must first be deducted from the total claim of the Plaintiff.
2. Secondly, a sum of Uganda shilling 10,000,000/= was paid on the 13th of May 2002 on account number 446230 according to exhibit P5. Secondly an amount of Uganda shillings 156,396,209/= was paid on 21st July, 2002 leaving debit balance of Uganda shillings 8,027,050/=. By the time the suit was filed given the charging of interest, the account was in debit by an amount of Uganda shillings 13,685,426/=.
3. In exhibit P9 Hussein Ali Abdi acknowledged being indebted to the bank in the sum of Uganda shillings 384,438,140/= before the suit was filed.

It follows that the following amounts will be deducted from the total claim of the Plaintiff of Uganda shillings 912,620,298/=. Namely Uganda shillings 171,194,949/= and Uganda shillings

156,396,209/=. Secondly, Uganda shillings 384,438,140/=. This leaves the balance of Uganda shillings 200,591,000/= which can be considered on its merits.

The evidence in support was exhibit P13 which is the audit report that does not prove who in actual fact was responsible for the loss. Secondly there is no evidence of exhibit P4 which are the cheques that had been kept by PW1 and subsequently handed over to the Defendant according to the testimony of PW1 and PW2. The testimony of PW1 is unreliable. None of the receipt in the book he tendered in evidence exhibit P6 relates to any alleged financial loss in terms of exhibit P13 and exhibit P4. These documents deal with the position by May 2002. The evidence clearly demonstrates that subsequently the relevant accounts were credited with deposits thereby reducing the total claim after the audit report had been filed and the suit was subsequently filed including amounts which had been paid.

In terms of rule for special damages, the cheques which were admitted in exhibit P4 could have made an excellent piece of evidence to claim special damages. However, the basis of the losses is the debits on Account No. 1725 because cheques were not returned within the prescribed period of three days. The cheques were withheld after being suspended by PW1. It is only after the loss that the cheques were according to the testimony of PW1 and PW2 handed over to the Defendant and subsequently the Defendant is alleged to have kept these cheques in his desk.

Another important point to note is that these cheques were never debited on the various accounts from which they were issued. There was no direct credit to the account holders who issued the cheques. What happened is that because of the delay in not returning the cheques, the Plaintiffs account was debited in the clearing house. Therefore the culpable action is the delay in returning the cheques to the various persons who issued them as dishonoured cheques. As I noted earlier, this was the action jointly with the knowledge of the branch manager between PW1 and the Defendant. The Defendant testified that he was not responsible for overdrawing the accounts of the various account holders. This case does not involve overdrawing of accounts but neglect in returning cheques as dishonoured because of having no cash to back it up. It follows that it is a case of negligence of duties or a deliberate scheme.

In the lower court, it was held that Mr Kigongo had an interest in the cheques according to the judgment of the Magistrate's Court exhibit D9. The Defendant had been charged for omission to take proper actions on cheques drawn on account number 44230, 447 7146 and 224 3602 which had insufficient funds to pay the amounts specified knowing or having reason to believe that such omission would cause financial loss to the bank. In the magistrates court the Defendant testified that the decision to keep the cheques beyond the three days grace period was not made by him and he denied having been consulted on the issue. PW1 testified that he had consulted him and that the suspension of the cheques into the suspense account was with the consent of the branch manager. Finally PW2 testified that the cheques were found with the Defendant. The entire case of the Plaintiff hangs on the testimony of the two witnesses. As I have noted earlier,

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the evidence of PW1 is suspect having produced exhibit P6 which has nothing to do with any financial loss and which has colossal amounts of money. If this is true, it simply means that the beneficiaries were paying back colossal sums of money to the Plaintiff bank. Nonetheless, the issue remained between PW1 and the Defendant and the evidence of the cheques cannot be brushed aside.

While there is no evidence that Hussein Ali Abdi and Bosi Ali paid back the sums owing to the Plaintiff, they were sued in this suit and the suit against them was dismissed. Subsequently, judgment was only set aside against the Defendant because he was out of the country for treatment when the suit proceeded against him. However, because Hussein Ali Abdi undertook to pay what he had issued by way of cheques to various beneficiaries that led to the financial loss, I have deducted his amount from the total claim. This is coupled with the Defendant's evidence that he persuaded him to start paying back and there is evidence that he had started paying back by the time the suit was filed up to over Uganda shillings 156,000,000/=. No further evidence was given thereafter by the Plaintiff.

The burden is on the Plaintiff to prove that the Defendant caused financial loss. On the balance of probabilities, there was omission to deal with the issue because the cheques were found in possession of the Defendant according to the testimony of PW2, the acting manager. I therefore find for the Plaintiff to the limited extent that the Defendant acted in breach of his duties because all the cheques in issue were the cheques of his sons. It could not be coincidentally found in his possession and the Plaintiff proved that he had knowledge about these cheques together with the PW1. He shares joint responsibility for these cheques even though it is PW1's action of delaying the cheque beyond the three days that led to any loss by May 2002. PW1 subsequently gave the cheques to the Defendant.

In light of what has transpired before, I award the Plaintiff general damages representing half of the remaining amount because the Plaintiff opted to proceed only against the Defendant. The rest of the suit claim against the Defendants was dismissed and the Plaintiff used PW1 as a witness against the Defendant when the evidence clearly indicates that PW1 was involved in the transaction. This was also the finding of the lower court which held that he had an interest in the cheques and the beneficiaries of the cheques had started paying back because he was following it up. Some of the amounts claimed had already been paid back.

As against the Defendant I award the sum of Uganda shillings Uganda shillings 100,000,000/= as general damages for breach of duty.

The above amount shall carry interest at the rate of 17% per annum from the date of the judgment till payment in full.

The Plaintiff's suit succeeds with costs commensurate with the amount awarded as general damages.

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As far as the counterclaim is concerned, the Defendant was unlawfully dismissed. I have duly considered the submission that the Counterclaimant did not prove his salary. I do not agree with the submissions because the specific issue is not the quantum of salary in a case of this nature. The quantum of salary is within the knowledge of the Plaintiff and cannot be an issue. It is the Plaintiff who pays all salaries of staff and the court can only deal with the period for which salary should be paid. The letter of suspension is exhibit D7 and it shows that the Defendant was suspended with effect from the 17th May, 2002 under Regulation 30 of The Staff Regulations, Terms and Conditions of Service.

The Counterclaimant is awarded his full pay from the date of suspension until the date of his termination of employment. For the reason that the termination cannot be set aside in the circumstances the Counterclaimant is not entitled to full retirement benefits.

I further award the Counterclaimant 3 month's salary in lieu of notice. The termination however stands because it is evident that there was omission of duties he owed to the Plaintiff as a manager.

I further award the Counterclaimant general damages for the pain, suffering and trauma he has been subjected inclusive of being prosecuted and failure to give him a hearing before his dismissal in the amount of Uganda shillings 50,000,000/=.

The amounts in the counterclaim in relation to salary and the award of salary in lieu of notice carry interest at 17% from the time of termination of employment till date of judgment.

The decreed amount at the date of judgment will carry interest at 17% from the date of judgment till payment in full.

The counterclaim also succeeds with costs.

Judgment delivered in open court on the 13th of April 2017

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

John Mike Musisi for the Plaintiff

Kivumbi Ibrahim holding brief for Kiryowa Joseph for the Defendant

Defendant is in court

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Charles Okuni: Court Clerk

Julian T. Nabaasa: Research Officer Legal

Christopher Madrama Izama

Judge

13th April, 2017