

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA

CIVIL SUIT NO. 52 OF 2017

MATEETE MICROFINANCE CO-OPERATIVE TRUST LTD ::::::::::::::: PLAINTIFF

VERSUS

1. KIBUYE GEORGE WILSON
2. LUKOWE SYLVIA
3. FLORENCE KAZIBWE
4. SSALONGO KALIKA FRANCIS ::::::::::::::: DEFENDANTS

Before; Hon Justice Victoria Nakintu Nkwanga Katamba

JUDGMENT

The Plaintiff, Microfinance Co-operative Trust Limited, instituted this suit against the Defendants jointly and severally seeking recovery of Ugx. 50,916,700=, general damages, punitive damages, interest thereon and costs of the suit.

The Plaintiff's claim is that, the Plaintiff carries on the business of micro-finance that involves among others accepting deposits from its members and lending to them and that the 1st and 2nd Defendants while being employees of the Plaintiff defrauded the Plaintiff of Ug shs 25,000,000= between 1st August 2015 to 31st December 2015. The Plaintiff avers that the 1st Defendant who was the manager of the Plaintiff's branch in Kinoni trading center conspired with the 2nd Defendant and made counterfeit deposits to the 2nd Defendant yet the deposits were not supported by any deposit slips. The Plaintiff adduced evidence of an audit report dated 9th March, 2016 detailing the fraud attributed to the 1st and 2nd Defendants. The Plaintiff further claims that the 1st Defendant withdrew Uganda Shs. 6,200,000= from the accounts of the Plaintiff's clients (Nakajjigo Goreth, Nakirijja Viola and Nakalule Sauda). That the 1st Defendant further stole money amounting to Ug Shs.

2,986,700= from the Plaintiff's Clients Mulindwa Pasco, Kasuja Deo which sum was a loan facility and a loan advance payment respectively.

The Plaintiff further claims that the 3rd and 4th Defendants signed undertakings (guarantees) dated 15th December 2009 and June 13th 2012 undertaking to pay the Plaintiff's money in case of any misappropriation or theft by the 1st and 2nd Defendants respectively. The 3rd and 4th Defendants are being sued in their capacity as guarantors.

The 2nd and 4th Defendants reached a settlement with the Plaintiff and a consent judgment to that effect was endorsed by this court and dated the 14th day of January 2020. This suit therefore proceeds/stands as against the 1st and 3rd Defendant.

The 1st Defendant did not file a defence and the court allowed the suit to proceed *ex parte* as against him.

In her Written Statement of Defence, the 3rd Defendant, Florence Kazibwe, objected to the suit and contended that it does not disclose a cause of action against her and is misconceived and unmaintainable against her. She denied the claim and stated that the guarantee agreement signed was in respect of the 1st Defendant's appointment to the trust as a cashier and was therefore not binding on the subsequent contract dated the 28th of August 2014. She further averred that she was privy to the contract of service and prayed for the suit to be dismissed with costs.

In their joint scheduling memorandum, the Plaintiff and 3rd Defendant proposed the following issues for determination which were adopted by the court;

1. Whether the 1st and 2nd defendants defrauded the plaintiff of Ug. Shs. 25,000,000= (twenty five million shillings only).
2. Whether the 1st defendant made counterfeit deposits to his account and caused to the plaintiff a loss of 16,150,000= (Sixteen million one hundred fifty thousand shillings only).

3. Whether the 1st defendant unlawfully caused the disappearance of a sum of money totaling to Ug. Shs. 6,200,000= (Six million two hundred thousand shillings) that was deposited by the plaintiff's customer's as fixed deposits.
4. Whether the 1st defendant caused the disappearance of Ug. Shs. 2,986,700= that had a connection to loans advanced to the plaintiff's customers.
5. Whether the 3rd defendant's guarantee/ undertaking was only limited to the 1st defendant's appointment as a cashier.
6. Remedies available to the parties.

The Plaintiff's case opened on the 20th of January 2021 with the evidence of Busulwa Lawrence, PW1, the Plaintiff's General manager. In his witness statement which was admitted as his evidence in chief, PW1 stated that around December 2015, he suspected some misappropriation of the Plaintiff's funds and fraudulent transactions at Kinoni Branch in Lwengo District. That he reported to the Plaintiff's Board who permitted him to engage an audit. The audit was conducted by Shore Partners and they submitted a report of findings dated 9th March 2016. He stated further that between the months of August 2015 to December 2015, the 1st Defendant conspired with the 2nd Defendant to defraud the Plaintiff whereby the 1st Defendant would report to another branch of the Plaintiff that a deposit had been made on the 2nd Defendant's account and the account would be credited yet no such deposit was made. Upon discovery of the fraudulent transactions, the 2nd Defendant could not provide deposit slips supporting the same and only said that she used to send mobile money to the 1st Defendant to make for her the deposits which excuse was also just a cover up. The 2nd Defendant admitted her involvement in the fraud and agreed to pay the money.

He further stated that the 1st Defendant used the same scheme to defraud the Plaintiff of Ug Shs 16,150,000/= yet all the deposits he reported lacked deposit slips and he used his position as the manager to enter the deposits in the inter-branch transfer statements. PW1 further stated that the 1st Defendant fraudulently withdrew money from the Plaintiff's customers' accounts totaling to Ugx 6,200,000 plus interest of Ugx 580,000=, as well as Ugx 2,960,700= from two customers some of which was a for a loan facility of Ugx

566,700= to Mulindwa Pascoe) and the other was loan advancement payment (2420 to Kasujja Deo). He also stated that the 3rd Defendant undertook to be a guarantor for the 1st Defendant throughout the time he was working for the plaintiff and the Plaintiff prays that court compels her to fulfill the undertaking.

In cross examination, PW1 stated that the 3rd Defendant was sued because of a contract of guarantee that she undertook. That the 1st Defendant was employed by the Plaintiff on 15th December 2009 and his contract was renewed every two years. The renewals were never communicated to the guarantors and the guarantee was open to operate throughout the period of service which was explained to the guarantors at the beginning. When asked if there was an attachment of a guarantee to the subsequent contracts of service, he stated that there was no attachment of guarantee because the first guarantee was still running and applies to subsequent contracts although this was not indicated in the contracts.

PW1 further stated that the Plaintiff relied on the parent and child relationship and trusted that the parent would provide the necessary assurance because she knew her child well.

PW2 Lutwama Cate a board member of the Plaintiff Micro Finance stated that the 3rd Defendant by the undertaking dated 15th December 2009, undertook to make good any loss caused to the Plaintiff in case the Defendant misappropriated or defrauded the Plaintiff's money.

In cross examination, she stated that she witnesses the guarantee agreements and her responsibility as a witness is to explain to the parties, the employees' roles and responsibilities, what is not expected and what would occur in the event of breach. She further stated that the contracts of service were renewed every two years and it was not necessary to renew the guarantorship.

That was the Plaintiff's case.

The 3rd Defendant, Florence Kazibwe, also gave her evidence in chief by witness statement. She stated that she is the mother and guarantor of the 1st Defendant who was employed by

the Plaintiff on condition that his contract was guaranteed by a parent. She was informed by the 1st Defendant and the Plaintiff's representatives that the 1st Defendant would not be employed without her guarantorship. She also stated that she entered into a contract of guarantorsip on the 15th day of December 2009 where she pledged to help the 1st Defendant to pay back any monies defrauded from the plaintiff company. That the 1st Defendant was then employed by the Plaintiff as an entry level cashier and later promoted to branch manager to which she did not sign another contract of guarantee nor what she informed of the same.

The Defendant further contended that she is not party to any subsequent contracts of service hat were entered into after the initial contract between the plaintiff and the 1st Defendant.

In cross examination, she confirmed that she signed a contract of gurantorship where she pledged to help the 1st Defendant pay back any monies defrauded from the Plaintiff company. She stated that the initial contract did not state that the 1st Defendant was a cashier nor did it mention the duration of the guarantor-ship. Her son, the 1st Defendant told her that he was going to be employed as a cashier.

That was the 3rd Defendant`s case.

Both parties filed written submissions as directed by court.

Counsel for the Plaintiff submitted on the first issue that PW1 who is the Plaintiff's General Manager elaborated on how the 1st and 2nd Defendants made a scheme to defraud the Plaintiff. He relied on evidence of PW1 and the audit report which contains the relevant evidence of the fraud on pages 23 and 24 under the title counterfeit deposits at Kinoni Branch, and submitted that the Plaintiff has proved that the 1st Defendant participated in defrauding the Plaintiff's Ugx 25,000,000= . It was also counsel's submission that the 2nd and 4th Defendants agreed to refund Shs 13,668,500= and prayed that court directs the 1st and 3rd Defendants to pay the balance of Shs 13,668,500=.

On the second issue of whether the 1st Defendant made counterfeit deposits to his account and caused to the plaintiff a loss of 16,150,000= (Sixteen million one hundred fifty thousand shillings only), Counsel relied on the evidence of PW1 and the audit report at pages 23 and 24 under the heading counterfeit deposits at Kinoni Branch and also pages 35-41 which contain inter-branch transfers. He submitted that this evidence was not contested and prayed for the second issue to be resolved in the affirmative.

The third issue relates to the Shs 6,200,000= that was deposited by the Plaintiff's customers as fixed deposits. On this issue, counsel directed this court to the audit report on pages 104-119 showing details of how the money was fleeced by the 1st Defendant and prayed for the court to find that the 1st Defendant swindled the said sum.

Counsel further submitted on issue four and directed the court to the audit report from pages 126-124 under the heading fictitious loans to support the claim that the 1st Defendant withdrew money that was meant as a loan advance and an amount that was meant to be a loan facility.

For the fifth issue of whether the 3rd Defendant's guarantee/undertaking was only limited to the 1st Defendant's appointment as cashier, counsel submitted that the guarantee agreement dated 15th December 2009 established the relationship between the Plaintiff and the 3rd Defendant and that the agreement was not tied to the 1st Defendant position as cashier but rather his entire employment. Counsel cited sections 91 and 92 of the Evidence Act which prohibit adducing oral evidence to vary the terms of a written agreement. Counsel prayed for the 5th issue to be decided in the Plaintiff's favor.

Regarding the issue of remedies, counsel submitted that the Plaintiff has proved its case to the required standard and prayed for all the prayers to be granted and the Plaintiff's case be allowed with costs.

In arguing issue one, Counsel for the 3rd Defendant cited several decisions on the definition of fraud including the case of *Fredrick J.K. Zaabwe vs Orient Bank & 5 others SCCA No. 4 of 2006* where it was stated that allegations of fraud need to be fully and

carefully inquired into. Counsel submitted that the author of the audit report was never called to court to testify and the 2nd Defendant never stated in her consent that the 1st Defendant was involved in the fraud. Counsel relied on the cases of *Sheikh Mawanda & anor V Kobil Uganda HCCS 350 of 2008* and the case of *AG V barangay [1976] HCB 48* which address the need to have contents of a document proved. Counsel argued that merely admitting the audit report does not amount to an admission of its contents and no one from Shore Partners testified as to its contents or was cross examined on the same. Counsel invited the court to disregard the audit report and submitted that the Plaintiff has failed to prove fraud against the 1st Defendant.

On the second and fourth issues, counsel argued that the evidence of PW1 was merely hearsay as he did not author the audit report and much as the evidence was not contradicted by the 3rd Defendant, the onus was on the Plaintiff to prove the fraud beyond the balance of probability.

Regarding the third issue, counsel submitted that the clients were never brought to court to testify or verify the said allegations and therefore the plaintiff has failed to prove its case.

On issue five which seeks to determine whether the 3rd Defendant's guarantee was only limited to the 1st Defendant's appointment as cashier, Counsel for the 3rd Defendant argued that PW1 approbated and reprobated in his evidence when he stated that the clause requiring every contract to be backed by a guarantorship agreement was standard and later stated that the same clause was redundant. Counsel relied on Section 114 of the Evidence Act and contended that the Plaintiff is estopped from declaring the said clause a redundant clause since they rely on the same contract as evidence.

It was further counsel's submission that the guarantor-ship agreement was nullified since the contract of employment for the 1st Defendant's new position as branch manager was entered a year after the contract of guarantor-ship. Counsel cited and relied on Section 74 of the Contracts Act which is to the effect that a guarantor is discharged from his obligations by variance in terms of the contract, and the case of *Bank of Uganda vs Bank Arabe*

Espanol SCCA No. 08 of 1998 where the Supreme Court held that, ‘where there is material variation to the guaranteed contract without the guarantor’s consent may lead to a discharge of the guarantor’

In rejoinder, Counsel for the Plaintiff argued that the Plaintiff discharged its burden of proof because all the evidence adduced by PW1 was never challenged during cross-examination. Counsel relied on the case of *URA Vs Stephen Mabosi SCCA No. 26 of 1995* where court stated that ‘an omission or neglect to challenge the evidence in chief on a material or essential point by cross-examination would lead to the inference that the evidence is accepted’, and submitted that since counsel for the 3rd Defendant never asked any question in cross examination regarding fraud, it led to an irresistible inference that the 3rd defendant accepted all the Plaintiff’s evidence on that aspect.

Regarding the failure to call the authors of the audit report to testify, Counsel relied on the Supreme Court decision on *Administrator General Vs Bwanika James & 9 others SCCA No. 7 of 2003* that agreed facts and documents become part of the evidence on record, and invited court to rely on the evidence of the audit report.

As to whether the guarantee was limited to the 1st Defendant’s appointment, Counsel argued that the contract of guarantee is not void since it was not illegal. It is also counsel’s arguments that *Section 74 of the Contracts Act* does not apply to the present case since the guarantee was not tied to a given contract so that its variation can give rise to discharging the guarantor. Counsel further submitted that the guarantee was made to guarantee the 1st defendant’s employment irrespective of the post he held and as long as liability arose during the course of the 1st Defendant’s employment, then the 3rd defendant would be liable as his guarantor. Counsel further relied on *Section 91 of the Evidence Act* and submitted that the intention of the 3rd Defendant and the Plaintiff can only be deduced from that very contract and nowhere else.

Determination of the issues;

I will resolve issues one, two, three and four concurrently as they all relate to the fraudulent transactions attributed to the 1st Defendant and the Plaintiff relied on the same evidence to prove these issues.

Issue one; Whether the 1st and 2nd defendants defrauded the plaintiff of Ug. Shs. 25,000,000= (twenty five million shillings only)

The term “**fraud**” was given judicial interpretation by the Supreme Court in *Fredrick J.K Zaabwe vs. Orient Bank& Others, SCCA No.4 of 2006*, per Katureebe JSC (as he then was), as;

“...Anything calculated to deceive, whether by single act or combination, or by suppression of truth, or suggestion of what is false, whether it is by direct falsehood ... a generic term embracing all multifarious means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth....and an unfair way by which another is cheated, As distinguished from negligence, it is always positive, intentional. It involves all acts.... involving breach of a legal duty or equitable duty resulting in damage to another.”

In the earlier decision, the court in *David Sejjaaka vs. Rebecca Musoke, Civil Appeal No. 12 of 1985* adopted more or less similar definition of “**fraud**” in *Black Law Dictionary 6th Edition, at page 660*, as;

“A generic term embracing all multifarious means which humans ingenuity can devise and which are resorted to by one individual to get advantage of another by false suggestions or by suppression of the truth and includes all surprise, trick cunning, dissembling and any other way by which another is cheated.”

In the instant case, the fraud attributed to the 1st Defendant is that during his employment as branch manager at the Plaintiff’s Branch - Kinoni Branch, he conspired with the 3rd Defendant to defraud the Plaintiff of Uganda Shillings 25,000,000/= . The 2nd Defendant

admitted to the fraud and agreed to pay half of the amount but the 1st Defendant absconded and cannot be found.

The Plaintiff adduced evidence of PW1 Busulwa Lawrence, the Plaintiff's General Manager who testified that around December 2015, he suspected misappropriation and the board allowed him to acquire audit services which audit was conducted by Shore Partners. PW1 stated in his evidence that audit indeed revealed the fraudulent transactions by the 1st Defendant. He referred this court to the audit report dated 9th March 2016.

Relying on evidence of PW1 and the evidence in the audit report which was admitted in evidence at scheduling, counsel for the Plaintiff submitted that the Plaintiff has proved that the 1st Defendant participated in defrauding the Plaintiff of Ugx. 25,000,000/=.

To rebut the foregoing, Counsel for the 3rd Defendant argued that merely admitting the audit report on the court record does not amount to an admission of its contents, and therefore court should not rely on the report since it was not verified by its author.

Counsel for the Plaintiff contended that the evidence of fraud was never challenged during cross examination which led to the inference that the 3rd Defendant accepted all the Plaintiff's evidence on that aspect. Counsel then relied on the Supreme Court decision of *Administrator General Vs Bwanika James & 9 others SCCA No. 7 of 2003* where court stated that agreed facts and documents become part of the evidence on the record, and invited court to include the audit report in the evidence.

I have carefully considered both the Plaintiff's and 3rd Defendant's evidence regarding this issue as well as the submissions of both their Counsel.

I have to note that this particular issue raises a question to be determined as against the 1st Defendant who neither defended the suit nor entered appearance to prove his case. This case is proceeding against him ex parte. The learned justices in *Prof. Oloka Onyango & Ors Vs Attorney General (Constitutional Petition No.6/2014) while considering Order 8 Rule 3 Civil Procedure Rules* found that every allegation in a Plaintiff, if not specifically or

by necessary implication denied in a pleading by an opposite party, shall be taken to be admitted. Since the 1st Defendant did not file a defence or any reply to deny the allegations in the plaint, this court takes it that he admits every allegation against him.

I am also in agreement with Counsel for the Plaintiff that the Counsel for the 3rd Defendant did not cross examine the Plaintiff's witnesses of the aspect of fraud but rather the status or enforceability of the guarantee.

I make reference to the case of *Uganda Revenue Authority versus Stephen Mabosi Supreme Court Civil Appeal Number 26/1995* where Karokora JSC cited with approval the case of *Criminal Appeal No. 5/1990, James Sawoabiri & Fred Musisi v Uganda (unreported)* where it was ruled that an omission or neglect to challenge the evidence in chief on a material or essential point by cross-examination would lead to the inference that the evidence is accepted subject to its being assailed as inherently credible or probably true.

To this end, I agree with Counsel for the Plaintiff that since the evidence of fraud was never rebutted, it is taken to have been accepted by the Defendant. In addition, by seeking to challenge the evidence in the submissions, counsel for the 3rd Defendant is simply giving evidence from the bar which is definitely unacceptable.

As to whether the audit report was admitted into evidence or not, the Parties filed a joint scheduling memorandum and the audit report was included among the Plaintiff's agreed documents.

The principal objective of the scheduling conference is to enable court to assist parties to dispose of cases expeditiously by sorting out points of agreement and disagreement or assessing the possibility of mediation, arbitration and other forms of settling the suit. (See *Tororo Cement Vs Frokina International Limited SCCA No. 2 of 2001*)

I have read both decisions cited by Counsel for both parties on this particular issue. In the case of *Sheikh Mawanda & anor V Kobil Uganda Ltd HCCS 350 of 2008* Justice Madrama agreed with the Plaintiff's Counsel that the report cannot be accepted as proof

even on the balance of probability because the relevant forensic examiner was not called to testify and was not cross examined.

It is apparent that the author of the audit report was not called to testify and verify the contents of the report. However, I have to emphasize that the issue and claim of fraud is brought against the 1st Defendant and the 3rd Defendant was simply sued as a guarantor. The 3rd Defendant's Counsel even focused on the validity of the contract of guarantee in their line of cross examination. The 1st Defendant did not file a defence or enter appearance and that was an early admission.

In the Supreme Court case of *Administrator General Vs Bwanika James &) others SCCA No. 7 of 2003* cited by Counsel for the Plaintiff, Justice Oder relied on the provisions of *rule 15 of order 1 of the C.P.R.* and held that since the Bank did not enter appearance despite being duly served, nor file a defence, the Bank was deemed to admit the validity of the decree obtained against Administrator General as the defendant and the Bank's own liability to contribute or indemnify, as the case may be, to the extent claimed in the third party notice.

I associate my considered opinion with the decision of the Supreme Court which binds this court.

As I have already stated, by failing to file a defence the 1st Defendant admitted the claim/allegations against him including the claim of fraud. *Section 101 of the Evidence Act* is to the effect that he who alleges must prove. The Plaintiff's General Manager PW1 gave sufficient evidence that was supported by an audit report which was admitted and never contested by the Defendants, I therefore find that the Plaintiff has sufficiently proved beyond a balance of probabilities that the 1st Defendant defrauded the Plaintiff of Ug. Shs. 25,000,000/=.

Issue two & three; Whether the 1st defendant made counterfeit deposits to his account and caused to the plaintiff a loss of 16,150,000= (Sixteen million one hundred fifty thousand shillings only).

Issue three; Whether the 1st defendant unlawfully caused the disappearance of a sum of money totaling to Ug. Shs. 6,200,000= (Six million two hundred thousand shillings) that was deposited by the plaintiff's customer's as fixed deposits.

The Plaintiff's evidence is that the 1st Defendant defrauded the Plaintiff of Ug. Shs 16,150,000= using a scheme through which he would call the Plaintiff's Mateete Branch and inform them that he had deposited different sums of money on different dates at Kinoni and then his account at Mateete would be credited on such basis and he would later withdraw the money yet all such transactions were never true and lacked deposit slips.

I will re-iterate my findings in issue one and resolve that since this evidence was not contested as it was admitted by the 1st Defendant's failure to file a defence, issues two and three are also resolved in the affirmative.

Issue four; Whether the 1st defendant caused the disappearance of Ug. Shs. 2,986,700= that had a connection to loans advanced to the plaintiff's customers.

Issue five; Whether the 3rd defendant's guarantee/ undertaking was only limited to the 1st defendant's appointment as a cashier.

The Contracts Act 2010 defines a contract of guarantee to mean ***a contract to perform a promise or to discharge the liability of a third party in case of default of that third party, which may be oral or written.***

According to "***The Law of Guarantees***" by Geraldine Andrews & Richard Millet 2nd Edition, at page 156---

"A contract of guarantee is an accessory contract, by which the surety undertakes to ensure that the principal performs the principal obligations. It has been described as a contract to indemnify the Creditor upon the happening of a contingency namely the default of the principal to perform the principal obligation. The surety is therefore under a secondary obligation which is dependant upon the default of the principal and which does not arise until that point."

In the instant case, the 3rd Defendant Florence Kazibwe mother to the 1st Defendant, entered into a contract of guarantee on the 15th day of December, 2009 which I have reproduced below as follows;

“I, Florence Kazibwe a parent to Kibuye G accept without being forced, my son to work for the above organization faithfully and following the rules and regulations of the organization, without defrauding any organization`s property.

And I also pledge that if he is caught in any kind of fraud, he must pay and also me as his parent must help him pay what he has defrauded including the money that will have been given to him by the organization and be expelled.”

The evidence of the Plaintiff is that the contract of guarantee was meant to remain enforceable and applicable for as long as the 1st Defendant was the Plaintiff`s employee.

The 3rd Defendant contends that she only guaranteed the 1st Defendant`s employment for his first position as cashier and signed only one contract. The 3rd Defendant further contends that she was never party to the subsequent contracts between the Plaintiff and the 1st Defendant.

Counsel for the 1st Defendant submitted that the contract of guarantee clearly shows that the 3rd Defendant`s undertaking was to cover the 1st Defendant`s employment with the Plaintiff and was not tied to his position as cashier only. Counsel relied on **Sections 91 and 92** of the Evidence Act Cap 6 which prohibit adducing oral evidence to vary terms of a written document.

Counsel for the 3rd Defendant argued that the contract of guarantee was not for the life of employment. Counsel relied on evidence of PW2 who stated in his evidence that he never informed the 3rd Defendant that she was signing the agreement for the life of the employment and the evidence of PW1 that the clause requiring the guarantee was mandatory in all subsequent agreements.

In her evidence in cross examination, the 3rd Defendant confirmed that the 1st Defendant's position was not stated on the contract of guarantee and indeed it is not stated therein. To say that the guarantee was limited to the 1st Defendant position as cashier would therefore be against the parole evidence rule in *Section 91 and 92 of the Evidence Act* which prohibits giving oral evidence when the contents have been reduced to a document.

This court has to take the whole instrument read together in order to determine its effect and the intention of the Parties. Parties are bound by the terms of their contracts unless there are vitiating factors deeming the contract unenforceable or illegal which factors must be pleaded and proved. A court cannot re-write the contract by giving it a different effect than what it purports.

From the reading of the contract of guarantee dated 15th December 2009, it can be interpreted that the same was not tied to a certain position but rather intended to assure the Plaintiff of the 1st Defendant's performance of his responsibilities as the Plaintiff's employee. It is therefore my finding that the 3rd Defendant's contract of guarantee or assurance was not tied to the 1st Defendant's position as cashier. It was open to the 1st Defendant employment by the Plaintiff. It remained valid and was enforceable against the guarantorship for the duration of the 1st Defendant's employment with the Plaintiff.

It was during his employment with the Plaintiff that the 1st Defendant committed the fraudulent acts. It does not matter what position he held with the Plaintiff. Trying to vary the terms of the contract of guarantee by oral evidence offends the parole evidence rule.

The contract of guarantee was clear in as far as the guarantor's obligation was concerned "*I also pledge that if he is caught in any kind of fraud, he must pay and also me as his parent must help him pay what he has defrauded including the money that will have been given to him by the organization and be expelled.*"

Consequently, the 3rd Respondent cannot be absolved from the responsibility of making good her obligation under the contract of guarantee. She knew what she was getting into

and at the time of guaranteeing her son's good conduct assumed liability for any fraud occasioned to his employer. The 3rd Defendant cannot now retract her earlier intention.

In the circumstances, the 3rd Defendant is liable as a the Defendant's guarantor.

The 3rd Defendant was not limited as guarantor to the 1st Defendant's position as cashier. The third issue is resolved in the negative.

Remedies available;

The Plaintiff prayed for exemplary and general damages.

It is now trite that general damages are at the discretion of the court and are intended to place the injured party in the same position in monetary terms as he would have been had the act complained of not taken place. (*See Phillip vs. Ward [1956] I AU ER 874*)

The position of the law is that the award of general damages is in the discretion of court, and is always as the law will presume to be the natural consequence of the defendant's act or omission. *See: James Fredrick Nsubuga v. Attorney General, H.C.C.S No. 13 of 1993.*

It was also held in *Robert Cuossens v. Attorney General, S.C.C.A. No. 08 of 1999* that;

"The object of the award of damages is to give the plaintiff compensation for the damage, loss or injury he or she has suffered...."

A plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been in had she or he not suffered the wrong. *See: Charles Acire v. Myaana Engola, H.C.C.S No. 143 of 1993; Kibimba Rice Ltd. v. Umar Salim, S.C.C.A. No.17 of 1992.*

The Plaintiff has clearly incurred expenses in conducting the audit to inquire into the 1st Defendant's fraudulent actions as well as defending its duty to its clients. I will accordingly award general damages of **Ug. Shs. 5,000,000/= (Five Million Uganda Shillings)** to be paid by the 1st Defendant.

The rationale behind the award of exemplary damages: exemplary damages should not be used to enrich the plaintiff, but to punish the defendant and deter him from repeating his conduct. (*see George Kiggundu v Attorney General (Civil Suit-2014/386) [2019] UGHCCD 189 (19 August 2019)*) Punitive or exemplary damages are awardable to punish, deter, express outrage of court at the defendant's malicious conduct

An award of exemplary damages should not be excessive. The punishment imposed must not exceed what would be likely to have been imposed in criminal proceedings, if the conduct were criminal. *Per Spry V.P. in Obongo vs Municipal Council of Kisumu [1971] EA 91*. All circumstances of the case must be taken into account, including the behavior of the plaintiff and whether the defendant had been provoked. *See O'Connor Vs Hewiston [1979] Crim. LR 46, CA; Archer Brown [1985] QB 401*

In the instant case, the Plaintiff trusted the 1st Defendant with employment in its institution. The 1st Defendant had a duty not only to the Plaintiff as his employer but also the Plaintiff's clients whom he defrauded. The 1st Defendant did not enter appearance to defend the case or have the matter resolved amicably. I therefore find it fitting that the 1st Defendant is punished for his fraudulent actions and in that regard award exemplary damages of Ugx. 5,000,000/= (Uganda Shillings Five Million) to the Plaintiff to be paid by the 1st Defendant.

This suit hereby succeeds and judgment is entered for the Plaintiff with the following orders:

1. The 1st and 3rd Defendants jointly and severally pay the Plaintiff Ug. Shs. 11,331,500/= that was defrauded by the 1st Defendant;
2. The 1st and 3rd Defendants jointly and severally pay to the Plaintiff Ug. Shs. 16,150,000/= that was wrongly deposited by the 1st Defendant on his account and thereafter withdrawn;
3. The 1st and 3rd Defendants jointly and severally pay to the Plaintiff Ug. Shs.6,780,000/= that was misappropriated by the 1st Defendant from the Plaintiffs` customers` the fixed deposits;

4. The 1st and 3rd Defendants pay to the Plaintiff Ug. Shs. 2,986,700/= being money defrauded by the 1st Defendant having been loans intended for two of the Plaintiff's clients;
5. General damages of Ugx. 5,000,000/= to be paid by the 1st Defendant;
6. Exemplary damages of Ugx. 5,000,000/= to be paid by the 1st Defendant;
7. Costs of the suit are awarded to the Plaintiff to be paid jointly and severally by the 1st and 3rd Defendants.

I so order.

Dated at Masaka this 27th day of September, 2021.

Signed;



VICTORIA NAKINTU NKWANGA KATAMBA
JUDGE