

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
CIVIL SUIT NO. 262 OF 2011**

**FREDRICK BUWEMBO :::::::::::::::::::::::::::::::::::PLAINTIFF**

**VERSUS**

**DFCU BANK**

**LIMITED:::::::::::::::::::::::::::::::::DEFENDANT**

**COUNTERCLAIM**

**DFCUBANK LIMITED :::::::::::::::::::::::::::COUNTER CLAIMANT**

**VERSUS**

**1. FREDRICK BUWEMBO**

**2. ALEX AHIMBISIBWE**

**DEFENDANTS**

**3. NASSAZA ANNET**

**4. LINDA MATOVU t/a 4U2**

**::::::::::::::::::COUNTER**

**BEFORE: HON. LADY JUSTICE ELIZABETH MUSOKE**

**JUDGMENT**

The plaintiff/1<sup>st</sup> Counter defendant served the defendant/Counter claimant (originally known as Gold Trust Bank Ltd) from 15/07/1996 up to 15/6/2007 when he was summarily dismissed by the defendant. During his service at the defendant Bank, the plaintiff rose through the ranks from Cashier to Banking Officer.

On 11/6/2007 he was handed over to the Criminal Investigation Department (CID) after being suspended from the Bank. He was later charged at the Anti-Corruption court with offences of Embezzlement, Causing Financial Loss, and Abuse of office, but was later acquitted of all the charges.

The plaintiff then brought this suit against the defendant seeking for special and general damages for wrongful dismissal.

The defendant, in the Amended Written Statement of Defence, denied any wrongdoing, and contended that the dismissal of the plaintiff was lawful, based on investigations that were conducted in the International Division, and statements of several people who implicated the plaintiff in fraudulent transactions. It was further contended that the dismissal of the plaintiff was done in accordance with the Bank's Human Resource Handbook. As such he was not entitled to terminal benefits.

The defendant further filed a counter-claim (Amended) against the plaintiff as the first counter defendant, Alex Ahimbisibwe, Nassazza Annet, and Linda Matovu t/a 4U2 as counter-defendants No. 2, 3 and 4 respectively. The defendant counterclaimed against the counter-defendants jointly and severally for conspiracy to defraud the sum of Shs. 92,151,512= (Ninety Two Million One Hundred Fifty One Thousand Five Hundred Twelve only) and USD 22,514.98 (US Dollars Twenty Thousand Five

Hundred Fourteen point Ninety Eight only) from the counter claimant.

It is stated that the Counter-defendants together with one Frank Senabulya, Semeon Jezreel Kakembo, and James Byaruhanga contrived a scheme to combine and defraud the counter-claimant of the said amounts.

The Counter-defendants denied all the allegations in their respective replies to the Counterclaim

The parties were represented by the following Counsel;

- Plaintiff by Mr. Kabega MacDusman.
- Defendant/Counter-Claimant by Mr. William Kasozi and Mr. Brian Kalule.
- 2<sup>nd</sup> and 3<sup>rd</sup> Counter-defendants by Mr. Matovu David and Ms. Nakamate Esther.
- 4<sup>th</sup> Counter-defendant by Mr. Kaggwa David.

At the scheduling conference, the following issues were agreed:

- 1) Whether or not the plaintiff/1<sup>st</sup> Counter Defendant was lawfully dismissed.
- 2) Whether the Counter-Defendants defrauded the Defendant/Counter-Claimant.
- 3) Whether the Counter Defendants were involved in a conspiracy to defraud the Defendant/Counter claimant.

- 4) Whether the 1<sup>st</sup> and 2<sup>nd</sup> Counter Defendants acted in breach of trust and of their fiduciary duties to the Defendant/Counter claimant.
- 5) Whether the 3<sup>rd</sup>, 4<sup>th</sup> Counter Defendants are liable for knowing receipt or/dishonest assistance in breach of trust, money had and received.
- 6) Remedies available to the parties.

**Issue No. 1: Whether or not the Plaintiff/Counter-Defendant was lawfully dismissed**

In his submissions, Counsel for the plaintiff contended that the suspension of the plaintiff which was effected by the Head Operations and the Executive Director, Finance, was unlawful in as far as it was not carried out by the General Manager as provided in the 2004 Staff Handbook (Exhibit 6 page 11), Terms and Conditions of Service Policy which states:

Employment;

***“..... staff may only be dismissed after following normal disciplinary procedures and the General Manager has authority to suspend staff pending full investigations.”***

Furthermore, that the suspension letter did not spell out the specific allegations of fraudulent transactions which the plaintiff was stated to have been involved in.

Counsel relied on ***Jabi Vs Mbale Municipality Council [1975] HCB 191***, and ***Ridge Vs Baldwin [1965] AC 40***, to state that although an employer had the right to terminate the employment of his employee at anytime for any reason, he must do so in a manner warranted by the contract of service and the rules and regulations governing the employment.

On the dismissal, the plaintiff maintained that he was called to an impromptu meeting at the bank on the 15<sup>th</sup> June 2007, attended by the Head of Operations, Head of Legal, Chief Internal Auditor and Human Resource Officer; and told that he had transferred money from International Division/Trade Finance Department to customer accounts and that he had committed a breach, to which he was asked to respond, there and then. He testified that he requested to be shown the vouchers and documents related to the allegations but the Head of Operations said it was not relevant. The plaintiff had gone ahead to tell the members that since he had not been shown the vouchers and documents containing the transactions, he was not in a position to answer them. After this he was told to go. After three weeks, the plaintiff was called to the bank and handed his dismissal letter.

DW1, Walusimbi who testified that he attended the Disciplinary Committee meeting of the plaintiff, testified that the plaintiff was told about the fraudulent transactions that had happened on the accounts of Linda Matovu T/A 4U2, Kakembo Simeon, James

Byaruhanga, Nassaza Annet, and Senabulya; that the plaintiff had denied any involvement but was apologetic about what had transpired; that since the plaintiff brought no evidence to dispute what he was accused of, the Committee concluded that there was overwhelming evidence against him and recommended to the Managing Director for his dismissal. Counsel further refuted allegations by DW1 that by the time of suspension of the plaintiff, investigations as reflected in Exhibit 25 (Report on fraudulent transactions) had already been carried out and the resultant report was available. The plaintiff however contended that the report was dated 4/3/2008 long after his dismissal. (See page 7 of 7 of Exhibit 25). Counsel for the plaintiff therefore submitted that it would, therefore, be safe to conclude that there were no investigations at the time of suspension and dismissal.

It was the plaintiff's Counsel further submission that DW4, Ms. Tibeyita, the Legal Officer of the defendant, had on the other hand stated that the Disciplinary Committee hearing had been based on the statements of Alex Ahimbisibwe, James Byaruhanga, Frank Ssenabulya, Simeon Kakembo, Linda Matovu T/A 4U2, and Annet Nassaza; and that the plaintiff had denied everything that in her evidence there was no mention whatsoever that vouchers, statements or documents were shown to the plaintiff. DW4 stated that since he denied everything, they recommended for his dismissal.

Counsel submitted that it was a fundamental requirement of natural justice that a person properly employed was entitled to a fair hearing before being dismissed on charges involving breach of disciplinary regulations on misconduct. He was entitled to know charges against him and to be given opportunity to exculpate himself. He should also be given sufficient time to prepare and present his defence. For the above propositions, Counsel relied on ***Jabi Vs Mbale Municipality Council (Supra) and Mary Nalwadda Vs Uganda Aids Commission HC MC No. 0045/2010.*** He further relied on Article 28(1) and (2) of the Constitution of the Republic of Uganda to add that the plaintiff had the right to be afforded a chance to hear the witnesses of the other side testify openly and to challenge them through cross-examination.

Counsel contended that in the present case the plaintiff was not availed the alleged evidence before he came to the Disciplinary Committee hearing to enable him know the charges in advance so as to prepare his defence accordingly. The authors of the statements were not availed to the plaintiff to be cross-examined on their statements by the plaintiff. There is also no evidence that the vouchers and statements were shown to the plaintiff.

On the alleged incriminating vouchers, Counsel submitted that at the time Exhibit 15 (a) was checked by the plaintiff on 13<sup>th</sup> May 2006, he had no job description; and the job description relied on

by the counter claimant, that is to say, Exhibit 2 (a), was dated 22/10/2006, which is much later.

Further, that no statement from Citibank New York was shown to court to confirm that this money subject of Exhibit 15 (a), was on their account statement. In any case DW2 in further cross-examination stated that the voucher was authorized by Bosco Olweny, Manager International Division/Trade Finance, and verified and passed by Rose Kajoina, the Data Verification Manager; and that Bosco Olweny would not authorize if he found that the one who had prepared or checked the voucher was not authorized to do so. With regard to Exhibit 15 (b), the plaintiff stated that he had prepared this voucher, which was checked by Alex Ahimbisibwe and authorized by Bosco Olweny, but that this was not a payment to a customer, but a reversal of funds into the bank's account, as confirmed by DW2, in cross-examination.

He therefore submitted that had the Disciplinary Committee considered all this evidence they would not have come to a decision to dismiss the plaintiff. Their decision was rash, irrational, without justifiable cause, and, therefore, unlawful.

It was the plaintiff's further contention that the Staff Hand Book Exhibit 6 page 47 provides in mandatory terms that the Disciplinary Committee shall be composed of;

**"1.**

**2.**



**3. Head of Human Resource or any other representative from the Human Resource Department who shall serve as Secretary, .....**

In cross-examination, however, DW1 stated there were no minutes in court about what transpired in the Disciplinary Committee meeting and that the minutes would show what the charges were and the evidence brought against the plaintiff. The minutes were signed by the members present.

DW4 on this issue said in cross-examination that it was a requirement in the Manual (Exhibit 6) to take minutes and they are recorded by the Human Resource Manager. The minutes would show what transpired in the meeting. The minutes were not in court even, though they were taken. Counsel further pointed out that the Human Resource Manager was never called by the defendant. He invited court to draw an adverse inference that if produced, the minutes would have contradicted the defendant's case and confirmed the evidence as given by the plaintiff.

It was the plaintiff's further complaint that after the disciplinary hearing, he was not informed of the outcome of the disciplinary process. When asked about the issue, DW1 and DW4 simply stated that the outcome was embedded in the dismissal letter (Exhibit 5). This was a requirement under the Staff Hand Book (Exhibit 6).

Counsel concluded that a combination of all the above led to the irresistible conclusion that the dismissal of the plaintiff was not in conformity with the Staff Governing Manual (Exhibit 6), and was therefore, unlawful.

Counsel for the defendant was of a different view. It was the defendant's submission that the employment of the plaintiff was terminated in accordance with proper procedure. The suspension itself was in accordance with Section 63 of the Employment Act, 2006 which empowered the employer to suspend an employee with half pay wherever an inquiry was being conducted which it is believed could reveal a cause for the dismissal of the employee. The plaintiff and another were suspects in a fraud whereby they had prepared and checked a forged voucher, Exhibit 15 (e). According to DFCU (the defendant's) Bank Staff Hand Book Exhibit 6 (page 49), fraud and embezzlement are breaches of discipline which could lead to summary dismissal. Exhibit 4, the suspension letter, had spelt out clearly the reasons for the suspension. The letter was not signed by the General Manager as stated in the Hand Book, Exhibit 6, but according to DW4's evidence by June 7<sup>th</sup>, immediately prior to the suspension, the post of General Manager had been scrapped; and this evidence was never controverted.

On the disciplinary hearing, it was Counsel's contention that as per DW1's evidence, investigations were conducted whereby Chris Byaruhanga, Head of Operations, interviewed the plaintiff and 2<sup>nd</sup> counter defendant, and also recorded statements from James Byaruhanga, (Exhibit 45), Senabulya Frank, (Exhibit 46), and Simeon Kakembo, (Exhibit 47). The 2<sup>nd</sup> counter defendant admitted that the fraudulent schemes were contrived together with Fred Buwembo, the plaintiff (Exhibit 44). The same 2<sup>nd</sup> counter defendant had the opportunity to come to court and clarify; challenge, or oppose this statement but he did not. Counsel, therefore, asked court to take the statement as true in its entirety.

The committee further considered Exhibits 46, 47, (supra) and 48 (Linda Matovu's statement), and Exhibit 49 (statement of Annet Nassazza). The said statements corroborated what the 2<sup>nd</sup> counter defendant had stated in his statement (Exhibit 44). Even Linda Matovu (4<sup>th</sup> counter defendant) in her statement (Exhibit 48) had confirmed receipt of Shs. 18,000,000= on her account and payments to the plaintiff and 2<sup>nd</sup> counter defendant. Linda Matovu was in court but did not deny the statement. James Byaruhanga in Exhibit 45 acknowledged that the plaintiff and 2<sup>nd</sup> counter defendant had used his account for the fraudulent transactions. So did Simeon Kakembo in Exhibit 47.

It is the defendant's case that at the disciplinary hearing, the plaintiff was asked to explain his role in the fraudulent transactions, after the committee explained to the plaintiff the purpose of the convening (as confirmed by DW1 and DW4). The plaintiff was told about his involvement in the fraud and also shown Exhibits 15 (a) and (e) and the statements recorded. The plaintiff had accepted checking and preparing Exhibits 15 (a) and (e) respectively. The rest were not available, having been destroyed by the plaintiff and 2<sup>nd</sup> counter defendant as admitted by the 2<sup>nd</sup> counter defendant in his statement (Exhibit 40 and 44). The plaintiff in cross-examination did accept that his job description in Exhibit 2 (a) did not include raising vouchers. DW2, Kate Kabahindi, the plaintiff's immediate supervisor had also confirmed in her testimony that the plaintiff's did not have the right to raise vouchers.

Counsel further referred court to DW1's testimony to the effect that at the hearing the plaintiff was given an opportunity to explain himself and at no time was he refused to say anything, intimidated or tortured. Further, that during the meeting the plaintiff never said he was being treated unfairly, and he brought no evidence to dispute what he was accused of. In his testimony, DW1 had laid out the following acts for which he found that the plaintiff was culpable as:

- a) As the officer in charge of reconciliation with responsibility to highlight inconsistencies and irregularities on the accounts under his oversight, the plaintiff never brought the irregularities on these accounts to the attention of his superiors.
- b) His involvement in particular transactions picked up in which he participated in raising and checking vouchers contrary to his role which vouchers turned out as fraudulent transactions.
- c) Statements from beneficiaries proving that the plaintiff was a beneficiary to the funds credited on their accounts.

Counsel pointed out that DW1 had concluded that the plaintiff had failed in the key result areas of his job description; which was to prevent financial loss and fraud and that the committee was justified in recommending his dismissal. He had also come to the conclusion that the plaintiff was involved in a conspiracy to defraud the defendant.

DW4, who had also attended the disciplinary committee hearing, agreed that the decision to dismiss the plaintiff was justified given the evidence presented to the plaintiff and his failure to rebut the evidence in the statements; and that the Human Resources Manual, Exhibit 6, allowed the defendant to summarily dismiss

the plaintiff for dishonesty, fraud, and causing Financial loss (pages 45, 49 and 50).

Counsel submitted that based on the facts available to the committee, there was sufficient evidence before the committee to recommend a summary dismissal of the plaintiff in accordance with the procedure for summary dismissal set out in the Staff Policy Manual, Exhibit 6 at page 49.

On the plaintiff's Counsel's submission that there was not enough evidence to warrant a termination, Counsel relied on Section 68 (2) of the Employment Act; and ***British Home Stores Vs Burchell [1978] LRLR 379*** as approved in ***Kiwanuka George Vs Attorney General (HCT-00-CV-CS-563 of 2005)*** for the proposition that in such cases, the employer had only to show that he entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at the time. The committee had believed the statements of the 2<sup>nd</sup> counter-defendant, and the beneficiaries of the various accounts had implicated the plaintiff in the fraud, and the law demanded no more of them. The report of investigations, Exhibit 25, had also confirmed the contents of the statements.

On the complaint by the plaintiff that he was suspended on suspicion and that the suspension letter did not spell out the specific allegations of fraudulent transactions, nor did it state that

the plaintiff was being suspended because he was being investigated, Counsel submitted that the letter (Exhibit 4) had clearly stated that following the fraudulent investigations in the International Division (where the plaintiff was working), he was being suspended from work to pave way for the investigations. Further, there was no requirement that a suspension should spell out “the specific allegations of fraudulent transactions”. Counsel relied on **Section 63 (1) of the Employment Act 2006** and **Rose Mary Vs Uganda Aids Commission, Misc. Cause No. 45 of 2010 (Civil Division)** to state that a suspension (an interdiction) was an interim measure and not a final decision, hence an employee could not complain that she was not heard before the interdiction.

As for the contention that the suspension letter was unlawful because it was signed out by the authorized person, the General Manager, Counsel referred to DW4’s testimony that there was no position of General Manager in the Bank at the time. As such, the reference to the word “General Manager” at page 11 of Exhibit 6 should only be interpreted as not having any effect after the position was abolished.

On the allegation that the plaintiff was denied a fair hearing because he was not availed the evidence before he came for the disciplinary hearing to enable him prepare his defence accordingly, Counsel agreed with the principles of fair hearing laid down in **Jabi Vs Mbale Municipal Council** and **Mary Nalwadda Vs**

***Uganda Aids Commission (supra)*** but submitted that the conclusion made in those cases had to be read in the context in which they were made. At the hearing, the plaintiff did not say that he was un-prepared. Nor did he ask to cross-examine any witness. DW1 and DW4 testified that the statements were shown to the plaintiff at the hearing but he chose not to exercise the right to cross-examine. He could not now claim to have been denied the said right. In the instant case, the fraud was discovered on 7<sup>th</sup> June 2007. On 11<sup>th</sup> June 2007 the plaintiff was suspended, and the hearing took place on 15<sup>th</sup> June 2007 (not 11/6/2007 as he stated). Most of the statement were recorded on the 12<sup>th</sup> of June 2007, and availed to him on 15<sup>th</sup> June 2007 during the meeting. The plaintiff did not ask to adjourn the meeting to prepare himself. He only asked for the vouchers of other transactions which he knew he had stolen and destroyed. Neither did he exercise his right of appeal under the Grievance Handling Policy, Exhibit 6.

It was therefore the defendants' submission that the plaintiff was afforded a fair hearing and that was why he did not appeal the decision. He should not be allowed to benefit from his fraudulent conduct. By his omission to ask to cross-examine the witness or even ask for more time to prepare his defence, he is estopped from claiming otherwise. See ***Section 114 of the Evidence Act.***



On the plaintiff's invitation to court to draw an adverse inference that if produced, the minutes would have contradicted the defendant's case, Counsel submitted that that assertion was without foundation or evidence and ought to be ignored. DW1 and DW2 both of whom had attended the disciplinary committee meeting had given evidence of what had transpired; their evidence was unchallenged and an inference cannot contradict or diminish the value of oral testimony. Also, DW4 had stated in cross-examination that the person who acted as Secretary, Agnes Nannozi had left the Bank in 2008 and they could not trace where she had placed the minutes.

On the complaint that the defendant did not inform the plaintiff about the outcome of the process, Counsel submitted that this was done through the letter Exhibit 5 which was addressed to the plaintiff and which the plaintiff acknowledged receipt of. Exhibit 6 (Staff Manual) does not put a timeline in which the outcome should be made known to the employee and how it should be made.

Counsel concluded that the plaintiff was given a fair hearing before the disciplinary committee. He voluntarily appeared and spent 30-45 minutes with the committee. He knew the charges and was shown the evidence. He voluntarily opted not to cross-examine witnesses, or to have a work colleague to assist him. Based on the facts available to the committee there was sufficient

evidence before the committee to recommend a summary dismissal of the plaintiff in accordance with the Staff Policy Manual Exhibit 6 at page 49. He therefore prayed that the Plaintiff's suit against the defendant should be dismissed with costs.

In his submissions in rejoinder, the plaintiff reiterated his earlier submissions and added:

- 1) Suspension; Counsel rejoined that it was the duty of the defendant, counter-claimant to show court by documentary evidence the non-existence of the office of the General Manager at the material time, which they had failed to do.
  
- (2) (a) The statement of Alex Ahimbisibwe (Exhibit 44), Counsel rejoined that no evidence was led by the defendant/counter claimant to show that the plaintiff credited any money to any account. He could not do so since he had no user rights. The person who credited the funds into customers' accounts as per Exhibit 34 BNK, was never called. There was also no evidence of his drawing money or any cheque or that he shared any money with anyone. Neither could the plaintiff post/credit any money to either the accounts of 4U2 or

that of Annet Nassaza, or any other account contrary to the defendant's Counsel's submission. He had no posting rights.

- (b) The vouchers Exhibits 15 (a), 15 (b) and 15 (c) that lay foundation for the fraud were authorized/approved by Mr. Olweny who chaired the disciplinary committee. DW2 testified to the fact that Olweny authorized the vouchers which were prepared or checked by the plaintiff, and Rose Kajoina verified. If it was wrong for plaintiff to prepare/check no authority of the manager would have been made.
- (c) The counter claimant had a duty to call James Byaruhanga, (Exhibit 45), Frank Senabulya (Exhibit 46) and Simeon Kakembo (Exhibit 48) but did not do so. This would have assisted in the assessment of truthfulness or otherwise of their statements.
- (d) On the loss of minutes of the disciplinary hearing, Counsel rejoined that these were not for the individual who recorded them but bank minutes. Minutes of a Disciplinary committee meeting are a requirement of the manual. Even the chairman was not called, leading to the inference that everything that transpired was flawed.

I have considered the pleadings and submissions of Counsel on either side on the first issue.

Under Section 69 of the Employment Act, 2006, (hereinafter called the Act) the law on summary dismissal is as follows:

- 1) Summary dismissal means a dismissal without notice or with less notice than the employee is entitled to under the contract or under the Act.
- 2) Summary dismissal is justified when the employee by conduct shows that he has fundamentally broken the contract of service.

In the instant case the plaintiff was summarily dismissed. There is no indication that he was given any notice at all. The termination letter is headed "Summary Dismissal."

Section 66 of the Employment Act, 2006 now makes it mandatory for an employer to afford a hearing to his employee in every form of dismissal, which right was not available earlier in summary dismissals.

The questions to answer would be:

- 1) Whether the plaintiff was accorded the right to be heard as required; and
- 2) Whether his conduct fundamentally broke or disregarded the essential conditions of the contract of service so as to justify summary dismissal.

### **Right to be heard**

Generally, courts have considered a right to a fair hearing as having been afforded by the employer where Notice of allegations against the plaintiff has been served on the plaintiff, and a reasonable time left between the date of such notification and the date of the disciplinary hearing. This is meant to afford the employee sufficient time to prepare his defence. The notice ought to set out clearly the allegations against the employee and what his rights at the oral hearing would be. Such rights would include the right to respond to allegations against him orally and/or in writing; the right to be accompanied at the hearing; and the right to cross-examine the employer's witnesses or call witnesses of his own.

The employee is then expected to present his case before an impartial committee of the employer in charge of disciplinary matters.

A look at the disciplinary process carried out by the defendant/counter claimant in respect of the plaintiff reveals none

of the above basic requirements for a fair hearing, in fulfillment of the right to be heard. Indeed I did not find on record any letter inviting the plaintiff to the disciplinary hearing. Such letter would have contained the above stated basic requirements. The defendant referred to the suspension letter and stated that it had the allegations against the plaintiff. The suspension letter is Exhibit 4 and it states as follows:

***“Our Ref: STAFF/SUS/FB/07***

***PRIVATE AND CONFIDENTIAL***

***Frederick Kabega Buwembo  
Management Information Officer  
DFCU Bank***

***Dear Frederick***

***SUSPENSION FROM WORK***

***Reference is made to the ongoing investigations into the International Division fraudulent transactions.***

***A decision has been reached to suspend you from work with immediate effect to allow further investigations into the matter. You will be contacted by the HR Department as soon as this investigation is complete.***

***Please arrange to hand over any Bank property in your possession including keys, nametag, and identification card to the Head of Operations.***

***Please sign the attached copy as acknowledgement of receipt of this letter.***

***Yours faithfully,***

***.....sign.....  
Chris Byaruhanga  
Head of Operations  
Finance***

***.....sign.....  
Grace Jethro Kavuma  
Executive Director -***

***Received by: .....sign.....***

***Signature: .....sign.....***

***Date: .....sign.....***

I find nothing in the suspension letter setting out the allegations against the plaintiff. The reference to ongoing investigations in the International Division did not satisfy the requirements for

clearly spelt out allegations, with documentary evidence where necessary. It, therefore, meant that the ground was not levelled for a fair hearing. I, therefore, find that there was no fair hearing.

Indeed the right to a fair hearing in administrative decisions has now been made constitutional under Article 42 of the Constitution of the Republic of Uganda which states:

***“Right to just and fair treatment in administrative decisions;  
Any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her.”***

Article 44 (c) also emphasizes that the right to a fair hearing cannot be derogated from. The investigations seem to have been completed only after the plaintiff had been dismissed. The Report of Investigations is dated 4<sup>th</sup> March 2008 (See page 7 of 7 – Exhibit 25) while the dismissal letter is dated 6<sup>th</sup> July 2007. It, therefore, appears that there was no report of investigations for consideration at the disciplinary hearing.

Most probably with such allegations as are contained in the statements of the 2<sup>nd</sup> counter-defendant and the others (Exhibits 40, 44, 45, 46, 48 and 49) the defendant took it as an open and shut case of unanswerable charges. However, the rules of natural justice require that a fair hearing must be afforded in very clear



and unambiguous terms. It should not just be gleaned from correspondence.

The reasons for the need to comply with the rules of natural justice were succinctly stated by Megarry J, in ***John Vs Rees [1970] Ch 345 at 402***, which was cited with approval in the Kenyan case of ***Oloo Vs Kenya Posts and Telecom Corporation Court of Appeal Civil Appeal No. 56 of 1981***. The Honourable Judge had the following to say;

***“It may be that there are some who may decry the importance which the courts attach to the observance of the rules of natural justice. ‘When something is obvious,’ they may say, why force everyone to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start. Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which somehow, were, of unanswerable charges, which, in the event, were completely answered; or inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings or resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.”***

I find that whatever the Employment Contract or Human Resource Manual provide on termination, the provisions of the Constitution and the Employment Act 2006 are paramount. Since the applicant was not given a fair hearing, I can state that the termination was not in conformity with the law and hence was unlawful.

I take the other issues pointed out by the plaintiff, like the suspension letter not being signed by the General Manager, not so important in this matter. It remained a suspension as long as it was communicated by a person in a leadership position. In any case, I am satisfied with the defendant's explanation that the position of General Manager had been scrapped at the time. So is the complaint that the decision of the disciplinary committee was not communicated in accordance with the Human Resource Manual. I agree with the defendant that the termination letter did exactly that, in no uncertain terms.

The court's finding above on the question of fair hearing is enough to dispose of the above issue even without going into a determination of whether there was conduct by the plaintiff which justified summary dismissal.

The first issue is therefore, answered in the affirmative.

## **Issue No. 2; Whether the Counter-Defendants defrauded the Defendant/Counter-Claimant;**

With regard to the above issue, the plaintiff/1<sup>st</sup> Counter Defendant's Counsel submitted that where fraud was pleaded it had to be fully and carefully inquired into because fraud was a serious matter. He relied on ***Fredrick JK Zaabwe Vs Orient Bank & 5 Others (SC. Civil Appeal No. 4/2006)*** where court made reference to ***Kampala Bottlers Ltd Vs Damanico (U) Ltd, (SC Civil Appeal No. 22/1992)*** and accepted that fraud must be proved strictly; that the burden is heavier than on a balance of probabilities generally applied in civil matters, almost near to criminal proceedings.

The Defendant/Counter Claimant had to prove the fraudulent act by each Counter Defendant and also show that they acted jointly and severally to defraud the Defendant/Counter claimant. The statements relied on by the Defendant/Counter claimants were made in the bank and at police, yet there was no proof under what circumstances the statements in the bank were made.

On the allegation in Alex Ahimbisibwe's statement that money was transferred from Citibank A/C of Rural Microfinance Support to Citibank A/C of DFCU Bank in New York and that the plaintiff informed Alex Ahimbisibwe to credit the funds of Ug. Shs. 18,000,000= into Linda Matovu Account T/A 4U2 which is the equivalent of USD9,970.33, Counsel submitted that the plaintiff

could not have done what Alex says he did, when he was not in the department then. He referred to Exhibit 31 which was the letter of his transfer.

Further DW1 and DW2 had in cross-examination stated that in respect to the amount credited to Linda Matovu's A/C T/A 4U2, there was no instruction document in court from Rural Microfinance Support Project, which would show the name of the beneficiary. The SWIFT message to Citibank was not in court. DW2 confirmed that the plaintiff properly matched this transaction of USD9,970.33 in his reconciliation and that if a transaction did not appear in the Reconciliation Report, it meant that the entry was okay; further that the plaintiff was not reconciling customer accounts, and yet the account mentioned by Alex was a customer account, Rural Microfinance Support Centre. This evidence by Alex was therefore not true.

Further still, in his police statement, Alex made no mention of the USD9,970.33 (Shs. 18m), while in his bank statement he states that the plaintiff passed an entry of U\$2,050 from System Suspense A/C to the Suspense Creditor's A/C. The transaction in Exhibit 15 (b) was not putting money in a customer's account but a mere reversal which DW2 confirmed that this money went to the defendant's A/C and that this was the right thing to do by the plaintiff/1<sup>st</sup> Counter Defendant. Exhibit 15 (b), DW1 stated the U\$2,050 was Withholding Tax from the bank due to URA and that this money was actually put into an account of the bank and not

of a customer. There was no evidence led to prove that the plaintiff transferred money to the Account of Linda Matovu T/A 4U2.

In the police statement at page 2 Alex stated that the plaintiff channeled US\$2,050 into the Systems Suspense A/C.

But Exhibit 34 on page 34 does not show that plaintiff ever channeled this money to the A/C stated. This exhibit shows the user ID who carried out the transaction. DW1 also confirmed that the US\$ was a system generated transaction. And DW2 stated that the plaintiff had no user rights to post transactions in the bank system. He could not therefore have posted any transaction on the system.

In reference to the Accounts used to withdraw the money, that is to say, Kakembo Simeon, James Byaruhanga, Frank Senabulya, Linda Matovu T/A 4U2 and Nasazza Annet, no evidence of any single cheque allegedly cashed by the plaintiff was ever produced in court. DW2 testified the money was drawn by customers.

The allegation by Alex that the vouchers were destroyed by him and the plaintiff were also false since no such Requisition Forms or register were brought to court to show that the plaintiff or indeed the 2<sup>nd</sup> Counter Defendant at any one time got vouchers from the Archives. According to DW2 the keys to the strong room where the vouchers were kept was kept by the Branch Manager and Branch Operations Manager who had dual control.

On the statement in Alex's police statement that the plaintiff credited Linda Matovu T/A 4U2 with Shs. 1,600,000=, Exhibit 15(d) shows that the plaintiff neither prepared nor checked it.

Counsel concluded that had the Defendant/Counter claimant considered all the above issues they would have come to the conclusion that the plaintiff/1<sup>st</sup> Counter Defendant was not involved in any fraud with the rest of the Counter-defendants, and the issue is not proven.

Counsel for the defendant/counterclaimant was of a different view. He submitted that contrary to the defendant's Fraud Policy in Exhibit 6 (page 45), the counter defendants committed fraud on the Counter-Plaintiff by diverting to their benefit, jointly and severally, money that did not belong to them, forging signatures arrogating to themselves duties and powers beyond those prescribed by their job descriptions, manipulating workmates, bypassing banking procedures and outright deception.

Counsel referred court to DW1, Mr. Kaweesa Walusimbi, who investigated the accounts mentioned in more details discovered a number of irregularities, where for instance, Sweep Interest from the correspondent Bank of Citi Bank New York in a proper transaction went onto the Sweep Account 02001020002A2 which proved to be an irregular transaction because income for the Bank amounting to USD 1927 had been diverted onto a personal

account of Simeon Kakembo as a beneficiary which beneficiary happened to be one of the people named by the 2<sup>nd</sup> Counter-Defendant as parties to the fraudulent scheme. See also entries 1 to 7 as seen in ***Exhibit 25, a Report Fraudulent Transactions.*** The 1<sup>st</sup> Counter-Defendant was supposed to reconcile the accounts on which the fraud was committed including the Citi Bank New York Nostrol Account. See Exhibit 2 (a) Fred Buwembo's job description. One transaction Z13 related to A/C 02L1040178 belonging to Par Yong Han on which Withholding Tax (WHT) was due from the Bank to Uganda Revenue Authority (URA). In this particular transaction, the WHT was credited onto the Suspense Creditors Account on 4/6/2007 and thereafter debited off and broken into two and credited to Nassaza Annet ITO Mathew Agaba (USD1,025) and 4U2. This was fraudulent because there was no corresponding credits to the Suspense Account relating to the two above named accounts for them to receive the money. The only credit was WHT in respect of Par Yong Han and should have gone to URA. The relevant voucher (Exhibit 15(b)) was prepared by Fred Buwembo and checked by Alex Ahimbisibwe. 1<sup>st</sup> Counter-Defendant's job description did not permit him to prepare vouchers nor was he permitted by DW1, his immediate supervisor. In another transaction, the 2<sup>nd</sup> Counter-Defendant prepared a voucher (Exhibit 15(a)) that was checked by the 1<sup>st</sup> Counter-Defendant on 13/5/2006 debiting Citi Bank New York Account with USD 313 and crediting Kakembo Simeon Account (one of the accounts named in the fraudulent

transactions) with the equivalent of Shs. 568,122=. It was DW1's testimony that the 1<sup>st</sup> Counter-Defendant's job description did not include checking vouchers, but to among others, check the relative balance record; the balance on statement of accounts to make sure it tallied with outstanding items. Exhibit 34 at page 8 (BNK 050 Report) is another transaction where 4U2 is credited with UG. Shs. 18,096,148= the same figure that is shown on Citibank New York Account but which account did not show a beneficiary, and hence, ought to have been held pending and posted onto the suspense creditors account, until sufficient information was received, according to DW1's testimony. The erroneous signature of the vouchers by the Manager Trade Finance, Bosco Olweny did not mean the vouchers were not fraudulent.

Counsel further submitted that in order to execute the fraud, the Counter-Defendants manipulated fellow employees like DW3, Ismail Nsereko who testified that the 1<sup>st</sup> Counter-Defendant approached him to verify the existence of funds on Linda Matovu's account. The cheque was approved and DW3 advised a teller to hand the money to Fred Buwembo. As per DW2, Kate Kabahindi testified in another transaction, the conspiracy involved moving money from two Bank Nostrol Accounts; the Operations Account and the Sweep Interest Account to personal accounts of the beneficiaries with no instructions to credit those beneficiary accounts and no deposits had been made by the customers in favour of those beneficiary accounts. She gave an example on



page 8 of Exhibit 34 BNK Report, where USD 9,970 was moved from Citibank main operation Account and converted to Shs. 18,096,148= and credited to the account of 4U2. The investigations revealed that this was money for a project called Rural Microfinance Support Project (RMFSP). The Bank had opened a dollar corresponding account in Citibank New York in which US Dollar balances were kept. If RMFSP needed to draw money, they would instruct the Bank which would in turn instruct Citibank to transfer the money to the DFCU Operations Account. From here, the money would be transferred to RMFSP. However, there were no instructions to draw the money let alone transfer them to 4U2. It was Counsel's contention that the transfer to 4U2 could only happen in a fraudulent scheme as it did as corroborated on Exhibit 40 dated 12/6/2007, the statement of the 2<sup>nd</sup> Counter-Defendant (Alex Ahimbisibwe). He also stated that several transactions had been conducted onto the account of the 3<sup>rd</sup> Counter-Defendant Nassaza Annet, his wife; this was confirmed by PW1 in cross-examination wherein he stated that he prepared a voucher for USD 2050 and on 6/6/2005, two (2) vouchers were made for USD 1025 with one for 4U2 and another for Nassaza Annet. (See Exhibit 15(d) and (e) and also page 54 of record). The 2<sup>nd</sup> Counter-Defendant also stated that for the accounts of Frank Ssenabulya, Simeon Kakembo and James Byaruhanga, the credits onto them were purely between him and the 1<sup>st</sup> Counter-Defendant. That the amounts were rebates from Citibank meant to be for DFCU Bank and after they were credited

onto the respective accounts, the 1<sup>st</sup> Counter-Defendant would call the account holders, get cheques, withdraw the money and share with them in half. Counsel contended further that these statements ought to be taken by the court as admissions by Alex Ahimbisibwe in accordance with the provisions of **Section 16 and 17(1) of the Evidence Act**. Under **Section 114 of the Evidence Act** the truth of these statements could not be denied by Alex Ahimbisibwe as they were confirmed as true by him and believed and relied on by the Counter-Claimant.

Counsel further referred court to the statement recorded by Linda Matovu, the 4<sup>th</sup> Counter-Defendant (Exhibit 41) where she stated that Alex Ahimbisibwe (the 2<sup>nd</sup> Counter-Defendant) had told her that Shs. 18,000,000= had been credited to her account and it was inward remittance from Ahimbisibwe's relatives abroad. Ultimately, she handed over the money to both the 1<sup>st</sup> and 2<sup>nd</sup> Counter-Defendants in the following sums; UG. Shs. 6,500,000= on the 20<sup>th</sup> May 2006, UG. Shs. 6,000,000= on the 22<sup>nd</sup> May 2006, UG Shs. 3,000,000= on the 23<sup>rd</sup> May 2006, UG. Shs. 2,200,000= on the 24<sup>th</sup> May 2006 and UG. Shs. 600,000= on the 25<sup>th</sup> May 2006. Though denied by PW1, Linda Matovu's testimony is further corroborated by the statements of Alex Ahimbisibwe (Exhibit 40). Further, that the 1<sup>st</sup> Counter-Defendant in his statement at Police (Exhibit 35) had admitted to cashing the cheque of UG. Shs. 1,600,000= on the 7/6/2007 which had been given to him by the 4<sup>th</sup> Counter-Defendant. Though he denied the contents of the Police statement citing duress, DW5, Joseph

Elyano at paragraph 7 of his witness statement stated that the statement by PW1 was self-recorded and made without any duress, threat or promise. These factual statements were never challenged in cross-examination. Hence it was self-evident that the duress allegations by PW1 were a mere afterthought, and a futile attempt to distance himself from the statement.

Counsel further submitted that the beneficiaries to the said fraud also admitted to their wrong doing and agreed to refund the money. In his statement (Exhibit 47) Simeon Kakembo admitted that his account had been used to draw money and agreed to refund it. Frank Senabulya (Exhibit 46) stated that the 2<sup>nd</sup> Counter-Defendant persuaded him to allow him use his account to deposit his (2<sup>nd</sup> Counter-Defendant) money from a relative abroad on several occasions. Upon withdrawing the money, the 2<sup>nd</sup> Counter-Defendant would give Frank Senabulya some money. James Byaruhanga (Exhibit 45) stated that the 1<sup>st</sup> and 2<sup>nd</sup> Counter-Defendants used his account for several transactions and he would receive the money and hand over it to them. Counsel wondered if no money was stolen, why then did James Byaruhanga, Simeon Kakembo and Frank Senabulya readily agree to pay back money to the Bank?

It was Counsel's case that although Counsel for the plaintiff/1<sup>st</sup> Counter-Defendant in his submissions criticized Exhibit 40, the statement of 2<sup>nd</sup> Counter-Defendant, Alex Ahimbisibwe, because

there was no proof of the circumstances under it was made, it was an informal admission.

Counsel relied on ***Adrian Keane; The Modern Law of Evidence at page 194*** to state that an informal admission (a statement made by a party to a legal proceeding made other than while testifying in those proceedings and adverse to his case) is admissible by way of exception to the hearsay rule as evidence of the truth of its contents, the rationale being the unlikelihood of the person speaking against this own interest. The weight attached to the statement would only be reduced by among others, the circumstances under which it was made for example where it was made as a result of some threat or inducement, and any other contradictory evidence adduced at trial by its maker.

Counsel submitted that the money stolen was between 2006-2007 debited from the Counter Claimant's accounts and credited to customer accounts as shown by the respective account statements Exhibits 16, 17, 18, and 23 and cheques and vouchers attached as Exhibits 19, 20, 21, 22 and 24. It was withdrawn using instruments with valid authorized signatures for each of the respective account holders, although customers had not deposited the respective amounts on their accounts. (See Exhibit 25 which was an agreed document). Under Section 57 of the Evidence Act, the contents of Exhibit 25 need not be proved further as they are deemed to have been admitted.

On the definition of “fraud”, Counsel relied on ***Kakira Sugar Works Vs Patrick Masombo and Anor (HCCS 120 of 2004)***, where court cited the Black’s Law Dictionary, 8<sup>th</sup> Edition page 660 where it was defined thus;

***“..... it may also be anything calculated to deceive, whether by a single act or combination or by suppression of truth or suggestion of what is false, whether it is by direct falsehood or innuendo by speech or silence work of mouth or look or gesture. A generic term embracing of multifarious means which human ingenuity can devise and which are reported to by one individual to get advantage over another by false suggestions or by suppression of truth and includes all surprise, trick, cunning, dissembling and and unfair way by which another is cheated.”***

In addition he relied on the ***Bank’s Fraud Policy set out in Exhibit 6 on page 45*** which defined fraud to include any dishonest or fraudulent act, forgery or alteration of any document or account, misappropriation of funds, impropriety in handling or reporting of money or financial transactions, destruction, removal, or inappropriate use of records, aiding someone to perpetuate fraud or similar or related inappropriate conduct. He concluded that the counter defendants committed fraud through the acts mentioned above by diverting to them benefit monies not belonging to them.

## **2<sup>nd</sup> and 3<sup>rd</sup> Counter Claimants**

On whether the Counter Defendants defrauded the Defendant/Counter Claimant, it was the case for the 2<sup>nd</sup> and 3<sup>rd</sup> Counter defendants that the Counter Claimant was never defrauded at all and that what happened was an internal confusion within the Bank involving Senior Managers like Olweny who authorized payments to various accounts of known Bank customers. Indeed the Bank did not lodge any criminal cases against the Bank customers, and the Anti Corruption court in CR.S.C 189 of 2010 correctly acquitted the 1<sup>st</sup> and 2<sup>nd</sup> Counter Defendants.

Counsel therefore concluded that the 2<sup>nd</sup> and 3<sup>rd</sup> Counter Defendants could not be said to be fraudulent for transactions which were approved by Senior officials of the Counter Claimant as genuine transactions.

#### **4<sup>th</sup> Counter-Claimant**

It was the case for the 4<sup>th</sup> Counter-Claimant (Linda Matovu) that she did not defraud the bank in any way and the money which was remitted to her account was hers.

On whether the Counter-Defendants defrauded the Defendant/Counter-Claimant, Counsel for the 4<sup>th</sup> Counter Defendant (herein Linda) submitted that Linda did not defraud the Defendant/Counter-Claimant (the Bank). He relied on ***Fredrick J. K. Zaabwe Vs Orient Bank & 5 Ors (S.C.C.A No. 4 of 2006)*** to state that cases of fraud if brought to the attention of court through

parties filing suits must be fully and carefully inquired into because of the gravity of fraud, and fraud must be proved strictly and the burden is heavier than on a balance of probabilities generally applied in civil matters; almost near to criminal proceedings.

Counsel contended that the testimonies of DW1, Dr. Kaweesa Walusimbi and DW2, Kate Kabahindi were inapplicable in as far as Linda was concerned, as she never worked in the bank at the time the alleged actions testified to by the DW1 and DW2 occurred.

Counsel submitted further that regarding the money that appeared on Linda's account, in her recorded statement (Exhibit 41) she stated that she was called and informed that there was an error on her account which error was rectified.

Counsel further placed reliance on ***Kampala Bottlers Ltd Vs Damanico (U) Ltd (S.C. Civil Appeal No. 22/1992)***, for the proposition that fraud meant actual fraud or some act of dishonesty; and ***Hainiha Saw Milling Co. Ltd Vs Waione Timber Co. Ltd (1926) AC 101 at page 106***, to state that fraud implied some act of dishonesty.

He contended that in the present case no evidence had been led to show any act of dishonesty on the part of Linda. He therefore concluded that Linda did not defraud the Counter-Claimant.

In the alternative and without prejudice to the above, Counsel submitted that as per the evidence of DW2 and Exhibit 32, the

amount of money in respect of the account of 4U2 owned by the 4<sup>th</sup> Counter-Defendant was written off by the bank, therefore Linda should not have been dragged to court.

In his submissions in rejoinder/reply, Counsel for the plaintiff/1<sup>st</sup> Counter-Defendant in respect to the statements made by Alex tending to implicate the plaintiff, reiterated that no evidence was led by the Defendant/Counter-Claimant to show that the plaintiff credited any money to any account; he could not do so as he had no user rights/posting rights. Exhibit 34, BNK Report clearly showed who transferred/credited money into customers' accounts. That person was not called. Further, DW2 in cross-examination did confirm to court that the plaintiff/1<sup>st</sup> Counter-Defendant had no user rights and could not therefore transfer/credit accounts. Secondly, there was no evidence of his having drawn money on any cheque or that he shared any money with anybody.

Further, an examination of Exhibit 29 would have revealed that the debit party was Rural Micro-Finance Support Centre which is a customer account in Citibank New York and the order party was DFCU Bank Kampala. No evidence of authority to credit DFCU Bank Account in New York on the 19/5/2006 was availed. DW2 was categorical that they had no instructions to transfer. There is no way therefore that Alex or the plaintiff/1<sup>st</sup> Counter Defendant could transfer funds from that account to the account of DFCU and later to that of 4U2.



On the allegation that voucher (Exhibits 15(a), 15(b) and 15(e) laid the foundation for the fraud as they were either prepared by the plaintiff or checked by him, Counsel rejoined that these very exhibits were authorized/approved by the very man who chaired the alleged Disciplinary Committee that purported to try the plaintiff and had they had any query, he would obviously not approve them. DW2 said that they were approved by Olweny and also verified by the verification officer Rose Kajoina as he found nothing wrong with them.

### **Resolution of the issue;**

I have carefully considered the submissions of Counsel on either side. There are allegations by the plaintiff/Counter claimant of fraud by the counter-defendants. It is a question of law for this court to determine on the basis of facts before it as to whether the counter-defendants did act fraudulently. I have considered the evidence before me from all the parties; witnesses, and documents tendered in evidence.

It is a well established rule of evidence that he who asserts a fact is under an obligation to prove it in order to succeed. I am also alive to the standard of proof required in fraud cases. Allegations of fraud must be strictly proved, although that standard of proof may not be so heavy as to require proof beyond any reasonable doubt. Something more than a balance of probabilities is required. (See ***Ratilal Patel Vs Laeje Makanyi [1957] EAR 314-317***). See also ***Frederick J.K. Zaabwe's case (Supra)***.

The various definitions of fraud have been well stated by Counsel on either side. In this respect reliance has inter alia, been placed on ***Kakira Sugar Works Vs Patrick Masombo and Another (supra)*** for the definition from ***Black's Law Dictionary (8<sup>th</sup> Edition)***; the definition in the ***Banks Policy (Supra)***; ***Kampala Bottlers Lt Vs Damanico (U) Ltd (Supra)***.

I have noted that before the plaintiff's suspension and eventual dismissal, he was an employee of DFCU Bank having crossed over from Gold Trust Bank Ltd in 2000. During the Banking career of the plaintiff, he worked as an Accounts Clerk, proceeded to cashiering, ending up as a Chief Cashier whose duties included lodging cash in Bank of Uganda and Stanbic. He was moved to International Division, then Trade Finance Division and finally promoted to Management Information Officer in June 2004, deployed in Retail Banking Department and assigned to reconcile Nostro and Suspense Accounts. These deployments were meant to expose him to the various aspects of Banking and probably prepare him for bigger responsibilities. He was given a job description as exhibited in Exhibit 2(a) with a mission to prevent fraud. Let us see how he prevented fraud.

I have gathered some banking knowledge through listening to the evidence in this lengthy and intricate matter. Nostro Accounts are accounts opened by a Bank in other Foreign Banks to handle its foreign exchange transactions. The Nostro Accounts have a mirror account in the Books of the local Bank. Payments from Nostro Account should always be after sighting a credit into the

Nostro by the remitting Bank or correspondent Bank on the statement or else such a debit will remain outstanding in the reconciliation of that Nostro A/C. The plaintiff/1<sup>st</sup> Counter-Defendant was to look out for entries that lacked corresponding credits or credits that lack corresponding debits and list them and forward them to management for appropriate action. He was therefore, the reconciler.

A reconciler is always relied on to ensure that reconcilable accounts are not abused. He raises the red flag whenever he senses any anomaly. The author of Exhibit 2(a) had this in mind when the plaintiff was assigned these duties.

Suspense Accounts are, on the other hand, temporally accounts where funds are rested before their final destination is ascertained. It is common knowledge to anyone who has ever operated an account in a bank, as I have myself, that should it arise that in the course of passing various entries one's account is credited or debited wrongly, an internal correction entry is passed the same way the wrong one was passed. When a reversal of the wrong entry is done the customer is ordinarily advised. It would, therefore, be very strange that a Bank would request their customer for cheques for purposes of correcting a wrong entry.

I will now have determined whether there are any actions of the plaintiff/1<sup>st</sup> Counter-Defendant which could be said to have been proved as amount to fraud.

Below are some of the commissions and omissions of the plaintiff/1<sup>st</sup> counter defendant that appear to have a direct bearing on the losses to the defendant/counter claimant and therefore a basis for the counterclaim.

- i) On page 44 of the proceedings, the plaintiff/1<sup>st</sup> counter-defendant is made to read from Exhibit 35 where he admitted having presented a cheque to the Operations Manager from Linda Matovu and allegedly later passed the money to Ahimbisibwe. He repeats the same on page 53 paragraph 3 during cross-examination. The presentation of the cheque to the Operations Manager is corroborated by DW3, Ismail Nsereko from page 139 to 146 of the proceedings. The strangest part is that the plaintiff wanted court to believe that the proceeds of the cheque from Linda Matovu were to correct an error in the books. A banker should know that cash does not change hands in the name of correcting errors. It is therefore, my considered opinion that fraud was abound.
- ii) Conflicting statements to different people also point to the guilt of the plaintiff/1<sup>st</sup> Counter-defendant. DW3 testified on page 140 of the proceedings, that:

***“I recognize this cheque. It is paying Linda Matovu. It bears my signature. I recall on the morning of 7/6/2007 I was seated on my desk, Fred Buwembo, a colleague at the time came and explained to me that Linda Matovu had called him and asked him to cash the cheque for her. Further that Linda was employed by Standard Chartered Bank at the time. She was busy and had sent her signed cheque through her driver. As that time it was Fred Buwembo holding the cheque, I never had any reason to doubt the plaintiff, he was a colleague and I knew Linda was his boss at one time. I received the cheque. I asked him why he had not presented it to the counter; he said the tellers could not pay him because the cheque was not in his names. I received the cheque and started verifying the cheque to see if the details on the cheque are proper, date acceptance, amounts on the cheque tally (words and figures) and that signature is the one we had in the system.***

***I called the teller and asked him to cash the cheque and asked Buwembo to move to the tellers cube. I told the teller to cash the cheque to Buwembo. He is Colin Tumusiime. Based on the fact that plaintiff came to me with the cheque and it was authorized by me, I returned it to plaintiff and asked him to move to the teller, I believe he cashed it to Buwembo.”***

From the demeanor of DW3, I took him as a very truthful witness. He never conflicted himself at anytime. The plaintiff could not indeed tell DW3 that the cheque was for correcting an error. As a banker, DW3 would know better than to believe that lie.

However in Exhibit 35, in his statement to Police the plaintiff stated that ***“later Alex told me there was an error on the account (4U2) and that I give him the money, which I did. I told Linda accordingly.”*** This was clearly an afterthought to cover the plaintiff/1<sup>st</sup> counter defendant’s footsteps in the matter.

- iii) Refer to Exhibit 8. There are 2 documents in the exhibit. One is an opening form for a personal Savings A/C OIL5006003000 dated 08/04/2004. The second one is Form 122 for Opening A/C OIL6506003000 in the names of Simeon Jezreel Kakembo and it is dated 12/01/2004. On this form Fredrick Buwembo’s name and signature appears in the field of ‘introduced by’. This account was later to be a destination of fraud money as per exhibit 25. The plaintiff denies ever introducing any Account but does not deny the signature on the form and there is no other way of explaining its existence other than for purposes of introduction of the account. This is just like under Exhibit 10 where Alex Ahimbisibwe introduced A/C OIL54070057 in the names of Nassaza Annet ITO

Mathew Alvin Agaba on 24/08/2005. The A/C was operated by his wife in trust for their infant son. This A/C too was later to be a destination for fraud money as per Exhibit 25. I do believe that these accounts were opened for purposes of defrauding the defendant given the consistency in the pattern. In most Banks staff do not introduce customers, and I doubt if it was admissible in DFCU.

- iv) Exhibit 29 which is a Bank Statement from Citibank presents a transfer to the defendant of USD9970.33. From the exhibit we can discern the funds had come from A/C 36087654 of Rural Microfinance Support because it is presented as the Debit Party. This money was later credited into the A/C for 4U2 owned by the 4<sup>th</sup> counter defendant, Linda Matovu. In Exhibit 29 no mention of 4U2 is made and Linda Matovu does not appear to present proof of owning the funds. However on page 57 of the proceedings the plaintiff during cross-examination asserts that these funds belonged to 4U2. This transaction is listed among the fraudulent transactions. According to Exhibit 34 page 8 which is daily transaction listing in the Bank, USD9970.33 was converted at a rate of 1815= and credited on 4U2 A/C. These being confirmed fraudulent transaction according to evidence on page 87 of the proceedings, why would the plaintiff appear to read from a different script on

this issue. It can only be an attempt to justify something already done by himself, and I do link him to this fraud.

- v) The plaintiff employed confusing tactics of bundling entries instead of removing them item by item as they were passed into the reconcilable Accounts. See evidence on page 116 last paragraph and page 117 first paragraph and last paragraph of page 79 in the proceedings. DW2, Kate Kabahindi stated in these paragraphs:

***“In the 1<sup>st</sup> column he marched them correctly. When it came to the second set he ought to have reported them as outstanding. We don’t pass as totals but as each came in.”***

They were summed up and matched up a total, not individually. They had no corresponding figures. They ought to have been in a report to me. I did not receive any report of any outstanding. They were not correctly matched.

The bundling was employed to confuse others and avoid detection by management.

- vi) On another occasion according to Exhibit 15(a) a transaction of USD313.8 was debited on Citibank A/C on 13/05/2006 and proceeds of Ug. Shs. 568,122= credited on Simeon Kakembo’s A/C. The transaction



was found to be fraudulent by the investigations. The voucher for this transaction was checked by the plaintiff. According to Exhibit 2(a) the duties of the plaintiff did not include raising and checking vouchers. In doing so he was unconsciously showing his interest in the transaction and I link him to this fraud too. One does not meddle in other people's duties on account of having not received a job description. DW2 stated on page 119 of the proceedings as follows:

***“Question:***

***Refer to Exhibit 15(a).***

***Who prepared that voucher?***

***Answer:***

***Alex Ahimbisibwe, checked the plaintiff. It was USD313.88. This was one of the fraudulent transactions. Plaintiff was a Reconciliation officer and did not have the right to raise or pass vouchers. This was outside the scope of his duties.***

***Question:***

***(Refer to Exhibit 15(b) dated 4/6/2007 for US\$ 2015)***

***DW2: Copy page 120 of proceedings.”***

Exhibit 15(b) for USD2050 was also prepared by the plaintiff and checked by Alex Ahimbisibwe. According to DW2 (page 120 of the proceedings) the plaintiff did

not have the authority to prepare this voucher. The amount on the voucher is part of the money stolen. Withholding tax moved to suspense creditors' account instead. It is important to note that the plaintiff (and Alex Ahimbisibwe) participated in making money move. It is worse still for the plaintiff because according to his superior DW2; he did not have the authority to prepare the voucher.

- vii) The plaintiff being a person in-charge of reconciliation is not on record for having highlighted any anomaly in his field of duty. I concur with DW1 on page 97 of the proceedings paragraph 3 when she states “**these transactions being irregular, they should have been picked by the person, in charge of reconciliation because .....**” As to why he did not, can only be explained in terms of his involvement in the scam.

With a career freckled with warning letters that question the integrity of the plaintiff (See Exhibit 37, 38, and 39) and strong circumstantial evidence that can only be construed to mean guilt of the plaintiff, the plaintiff cannot be the angel that he claims to be but a conspirator in the financial scam hence the loss to the defendant and counterclaimant.

## **The 2<sup>nd</sup> Counter Defendant, Alex Ahimbisibwe (Alex)**

As to whether Alex Ahimbisibwe defrauded the Counter-Claimant (Bank) the court will consider the weight of the statements made by Alex to the Police and to the Bank. (See Exhibit 40 dated 12/6/2007 (Bank) and Exhibit 44 dated 28/6/2007 (Police). I agree with Counsel for the Bank, that the above statements should be taken as admissions by Alex Ahimbisibwe in accordance with the provisions of Section 16 and 17(1) of the Evidence Act which state as follows:

***Section 16. Admission defined;***

***“An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and in the circumstances, hereinafter mentioned.”***

***Section 17(1); Admission by party to proceeding or his or her agent; by party in representative character; by party interested in subject matter;***

***“Statements made by a party to the proceeding or by an agent of any such party, whom the court regards, in the circumstances of the case, as expressly or impliedly authorized by him or her to make them, are admissions.”***

And according to Section 144 of the Evidence Act the truth of these statements could not be denied by Alex as they were confirmed to be true by him, and relied on by the counter claimant.

**Section 144. Cross-examination as to previous statements in writing;**

***“A witness may be cross-examined as to previous statements made by him or her in writing or reduced into writing, and relevant to matters in question, without the writing being shown to him or her, or being proved; but if it is intended to contradict the witness by the writing, his or her attention must before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him or her.”***

In his said statements, Alex explained in detail how he and the 1<sup>st</sup> counter-defendant used to pass the fraudulent transactions siphoning money out of targeted accounts in the Bank, crediting them to different accounts from which accounts they would withdraw the money and share with the account holders.

The accounts named by Alex on which the money was credited belonged to;

- 1) 4U2.
- 2) Nassaza Annet T/O Mathew Agaba.
- 3) Senabulya Frank.
- 4) Kakembo Simeon.
- 5) Byaruhanga James.

The funds fraudulently transferred to these accounts included Withholding Tax meant for Uganda Revenue Authority, rebates from Citibank, among others. Alex stated this fraud had been going on since beginning of 2006 until the fraud was discovered in June 2007, and that it was engineered by him and the 1<sup>st</sup> counter-defendant.

Further, in a statement recorded by Linda Matovu, the 4<sup>th</sup> Counter-defendant (Exhibit 41), she stated that Alex had told her that Shs. 18,000,000= had been credited to her account though it was meant for Alex, as remittance from relatives abroad. This money was withdrawn in bits and according to Linda's statement, given to Alex in 5 instalments in the presence of Fred Buwembo. Linda's statements are corroborated by Alex's statement, Exhibit 40. Although Counsel for the 1<sup>st</sup> Counter-defendant questioned the circumstances under which Alex's statement was made, that is, when challenging the allegations in the statements against his client, Fred Buwembo, as regard Alex himself, the court will attach great weight to them, since he indicated therein that he made the statements voluntarily. Further still, Alex was the 2<sup>nd</sup> Counter-defendant against whom allegations of fraud were made. Apart from general denials in the written statement of defence, Alex did not come up to offer evidence in denial to the allegations against him, or to allege that he made the statements under duress. He never appeared in court though his Counsel was there throughout and at one point his Counsel stated that his client would appear to give evidence. (See page 72 of the

proceedings). I, therefore, believe the incriminating statements he made against himself, and the court is satisfied beyond the balance of probabilities that Alex Ahimbisibwe committed fraud against the counter-claimant causing loss to the Bank.

#### **4<sup>th</sup> Counter Defendant - Linda Matovu**

Linda Matovu was the 4<sup>th</sup> Counter-defendant. In her statements (Exhibit 41 and 48 to the Police and the Bank respectively), she appears to distance herself from any adverse involvement in the transactions of which she was the end receiver of funds from her account, which funds she had never deposited there. Being a banker, and having worked with DFCU as a senior manager, and then Standard Chartered Bank, it is difficult for court to believe that Linda did not know that the money passing through her account was a result of some fraudulent transactions.

I note the wider definition of fraud in ***Kakira Sugar Works (Supra)*** quoting ***Black Law Dictionary*** which is as follows:

***“..... it may also be anything calculated to deceive, whether by a single act or combination or by suppression of truth or suggestion of what is false, whether it is by direct falsehood or innuendo by speech or silence work of mouth or look or gesture. A generic term embracing of multifarious means which human ingenuity can devise and which are reported to by one individual to get advantage over another by false suggestions or by suppression of truth and includes all surprise, trick, cunning, dissembling and unfair way by which another is cheated.”***

Linda, in my view, falls squarely in the above definition. Counsel for Linda submitted, quoting *Kampala Bottlers Ltd case (Supra)*, that “**fraud**” meant actual fraud or some act of dishonesty, and that his client had not committed any act of dishonesty. Court’s view is that by allowing her account to be used by persons perpetuating fraud, she fits in both the above definitions. I say so because of what I see from the statement she made on 12/06/2007 which was and admitted in evidence as Exhibit 48. I attach great weight to it as a true statement since Linda, being sued as Counter defendant No. 4, attended court throughout the proceedings but did not retract anything from her statement. She chose to remain silent. The court under such circumstances is entitled to make inferences from statements made by her. She stated in Exhibit 48 that Alex Ahimbisibwe had told him that Shs. 18,000,000= credited to her account was his, being an inward remittance from his relatives abroad. She then handed over the amount, in 5 instalments on five different days to Alex in the presence of Fred Buwembo. She ought to have been put to inquiry by the fact that money was just deposited on her account before she was even informed. The fact that every time she made payments to Alex, Fred Buwembo was always around, was another major factor to raise suspicion in her, if as she claims, she did not know it was fraudulent transaction.

On the transaction involving Shs. 1,600,000=, Linda claims in Exhibit 48 that she got a call from Fred Buwembo informing her of

an error on her account for which she needed to send a cheque to reverse the error. She even knows and states that Fred Buwembo cashed the cheque. This is very strange. Linda is a Senior Banker; she was Buwembo's boss while at DFCU. She still is a banker. I have never been a banker but have operated accounts in leading banks for over 30 years. Anyone who has operated a bank account and has had any error on his/her account will know that reversing an error on someone's account is done internally by the bank, without recourse to the account holder, who may be informed afterwards. This is, surely common knowledge. I shall therefore take judicial notice of the fact that reversal of errors on customers' accounts is an internal banking operation. There is no need to exchange cash in the name of reversing errors on accounts. That is why it would appear strange that a senior banker should try to explain away her involvement in the fraud, as she did. The court is not impressed by this explanation. I believe that Linda knowingly let fraudulent transactions pass through her account, 4U2.

Alex Ahimbisibwe's statement (Exhibit 44) also implicated Linda. It was admitted in evidence, and as I stated earlier, I give it a lot of weight since it was made by Ahimbisibwe himself, a counter defendant who did not come up to challenge it or the circumstances under which it was recorded. Neither did Linda come up to challenge the references to her in the statement, knowing that the statement was admitted in evidence and was implicating her. Alex clearly explained how Shs. 18million and



Shs. 1,600,000= were all credited to Linda's account, 4U2. He stated that he had been advised by Fred Buwembo to credit 4U2 with the Shs. 18million and US\$1025.

I am therefore convinced beyond a balance of probability that Linda knowingly allowed her account to be used as a conduit for fraudulent transactions. She therefore committed fraud leading to loss to the bank, the counter claimant.

### **Counter Defendant No. 3 - Annet Nassaza**

The last counter defendant to be considered is Annet Nassaza, 3<sup>rd</sup> counter defendant. She states in her statement (Exhibit 49) that she is a housewife who is out of employment. The account in issue, in the names of Annet Nassaza I.T.O Mathew Alvin Agaba, A/C No. OIL540700572, was opened allegedly to save money for Annet and Alex's son, but along the way, the account was being credited with funds which the husband would withdraw using withdrawal slips signed by the Annet.

I have found no evidence implicating her as having participated knowingly in defrauding the bank. And without much ado I will find that she did not commit any fraud, and answer the second issue in the negative on her part.

For the rest of the counter defendants, I will answer the second issue in the affirmative.

**The next issue is whether the Counter Defendants conspired to defraud the Defendant/Counter claimant;**

In his submissions regarding the above issue, Counsel for the plaintiff/1<sup>st</sup> counter defendant (Buwembo) submitted that the evidence by the Counter Claimants were mere allegations not proven by evidence. He quoted Halsbury's Laws of England, 4<sup>th</sup> Edition Volume (ii) (10 page 57 paragraph 61 for a definition of 'conspiracy to defraud' as;

***“A person who agrees with one or more other persons by dishonesty - to deprive a person of something which he would be entitled; or to injure some propriety right of a person, is guilty of conspiracy to defraud at common law.”***

Further, that the ***actus reus*** in a conspiracy is, therefore, the agreement to execute the unlawful conduct. It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place. It is necessary to show a meeting of the minds and a consensus to effect the unlawful purpose.

Counsel urged that there was no evidence of any such agreement between the 1<sup>st</sup> Counter Defendant and the rest of the Counter Defendants from the testimony of DW1, DW2, DW3 and DW4 to prosecute an unlawful purpose. The counter claimant was relying on statements made by the 2<sup>nd</sup> to 4<sup>th</sup> Counter Defendants of which the 1<sup>st</sup> Counter Defendant had no chance to cross-examine the

makers. Simeon Kakembo, James Byaruhanga, Senabulya Franks' statements attached to the statement of the DW4 were never availed for cross-examination by the plaintiff/1<sup>st</sup> Counter Defendant. In any case none of them did prove that the 1<sup>st</sup> Counter-Defendant was in any agreement with the rest of the Counter-Defendants.

In his statement to the bank, Kakembo Simeon (Exhibit 47) did accept that he withdrew the money but he does not in his statement provide evidence of handing the money to the plaintiff/1<sup>st</sup> Counter Defendant; and he was not called to be cross-examined on his statement.

No evidence was availed to show that the plaintiff/1<sup>st</sup> Counter Defendant had posted any moneys to the account of Linda Matovu t/a 4U2.

Counsel further submitted that Exhibit 15 (a) was authorized by Bosco Olweny, and DW1 and DW2 had confirmed that what Olweny confirmed was okay. Further, James Byaruhanga whom in his statement alleged that he helped the plaintiff/1<sup>st</sup> Counter Defendant to receive money through his account, had produced no document to either show that he gave the plaintiff/1<sup>st</sup> Counter Defendant money nor any document to prove that the plaintiff/1<sup>st</sup> Counter Defendant credited/posted money on to his account. He was also never called to court.

Frank Ssenabulya makes no mention of the plaintiff/1<sup>st</sup> Counter Defendant and there was no evidence that either the plaintiff/1<sup>st</sup>

Counter Defendant or the 2<sup>nd</sup> Counter Defendant credited the account of Frank Ssenabulya. All the cheques in Exhibit 24 were drawn by himself not any other person.

Lastly, as for Linda Matovu the 4<sup>th</sup> Counter Defendant, DW1 had lied when she stated that the cheque for Shs. 1,600,000= was cashed by the plaintiff/1<sup>st</sup> Counter Defendant, as there was no evidence/document in court to show that this cheque amount was paid to the plaintiff/1<sup>st</sup> Counter Defendant. And neither was there no evidence that the plaintiff credited/posted any money into the Account of Linda Matovu t/a 4U2 against which this money was drawn, Collin Tumusiime, the Cashier who paid out the money, was not called to tell court to whom he paid the money.

Counsel relied on ***Kimotho Vs Kenya Commercial Bank [2003] 1 EA 108***, and also ***Bukenya and Others Vs Uganda [1972] EA 549***, to state that when a party expected to call a witness does not, the court may infer that, that witness's evidence would have been adverse to their case.

Counsel concluded that the allegation of conspiracy to defraud had not been proved.

The defendant/Counter Claimant did not agree. Counsel relied on the ingredients of tort of conspiracy in ***Winfield & Jolowicz on Tort: 15<sup>th</sup> Edition pages 641 to 649***, which were stated to be an intention to injure, combination (a concerted action between two or more persons and which includes husband and wife), and the use of unlawful means.

Counsel further relied on ***Kuwait Oil Tanker Co. SAK Vs Al Barder and Others [2000] 2 ALLER (COM) 271 (CA)*** for the meaning of the tort of conspiracy which, in brief, was stated as: where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination of agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so.

It was Counsel's submission that the 1<sup>st</sup> and 2<sup>nd</sup> Counter Defendants conspired to identify the target accounts to debit, which accounts belonged to the Counterclaimant. The 1<sup>st</sup> and 2<sup>nd</sup> Counter Defendants would initiate the debits by preparing and checking vouchers. The funds would either be deposited on suspense accounts which were "transit" accounts and then subsequently removed and credited to the accounts of the 3<sup>rd</sup>, 4<sup>th</sup> Counter Defendants or the accounts of Frank Sinabulya, Simeon Jazree Kakembo, James Byaruhanga, the co-conspirators "the destination accounts". On other occasions, funds would be moved directly from the accounts of the counterclaimant directly to the accounts of the 3<sup>rd</sup> and 4<sup>th</sup> Counter Defendants or the accounts of Frank Ssenabulya, Simeon Jazree Kakembo, James Byaruhanga, the co-conspirators "the destination accounts". The 1<sup>st</sup> and 2<sup>nd</sup> Counter Defendants identified the destination accounts on which to deposit the funds which accounts belonged to persons who were very well known to them either as immediate family, friends or former workmates. The some vouchers were

prepared or checked by the 1<sup>st</sup> Counter Defendant who had no authority to do so. Others were prepared or checked by the 2<sup>nd</sup> Counter Defendant. Upon being deposited on the destination accounts, the funds were withdrawn and shared among the conspirators.

Further, the 3<sup>rd</sup> and 4<sup>th</sup> Counter Defendants together with Frank Ssenabulya, Simeon Jazree Kakembo, James Byaruhanga participated in the conspiracy and knowingly assisted the 1<sup>st</sup> and 2<sup>nd</sup> Counter Defendant by providing their accounts to be used in the fraud and by withdrawing the money fraudulently credited onto their accounts and sharing it with the 1<sup>st</sup> and 2<sup>nd</sup> Counter Defendants. The 1<sup>st</sup> Counter Defendant and the 2<sup>nd</sup> Counter Defendant also participated in withdrawing the funds. In total funds amount to Shs. 92,728,273= and USD 22,514 was stolen from Counter Claimant between 2006 and 2007. See Exhibits 35, 40, 41, 42, 43, 44, 45, 46, 47, 48 and 49.

### **Fred Buwembo and Alex Ahimbisibwe;**

Counsel submitted that with regard to the involvement of the 1<sup>st</sup> and 2<sup>nd</sup> Counter Defendants, the Counterclaimant had presented the statements of Alex Ahimbisibwe, the 2<sup>nd</sup> Counter Defendant Exhibit 40 in which was an admission of participating in the fraud and a detailed elaboration of how the fraud was carried out. He specifically mentioned that the plan was hatched and executed together with the 1<sup>st</sup> Counter Defendant and funds shared

together. (See pages 2, 4 and 5 of Exhibit 44). In respect of USD 2050, for example 50% of the money amounting to Ug. Shs. 1,600,000= was credited to the account of Linda Matovu 4U2 as the share of the 1<sup>st</sup> Counter Defendant and the other half was credited to the account of Nassaza Annet, the wife of the 2<sup>nd</sup> Counter Defendant as his share. Alex's statement was an admission and is very strong evidence.

Counsel relied on ***Adrian Keane, the Modern Law of Evidence 2<sup>nd</sup> Edition at page 195 - 196*** where it is stated:

***“An informal admission, that is a statement by a party to legal proceedings (or someone in privity with him) made by him other than while testifying in those proceedings and adverse to his case, is admissible by way of exception to the hearsay rule as evidence of the truth of its contents; the rationale of the exception is the unlikelihood of a person speaking falsely against his own interest ..... an informal admission is admissible in any proceedings to which the maker is a party and the weight to be attached to it depends on its precise contents, the circumstances in which it was made, for example whether it was made as a result of some threat or inducement, and any contradictory or other evidence adduced by its maker at the trial with a view to explaining it away.”***

Counsel contended that Alex's statements, Exhibits 40 and 44, having been recorded freely, ought to be taken as true. Exhibit 40, DW5, Joseph Elyanu testified the statement was not induced by any torture or threats but was freely recorded, a fact which was confirmed in the statement itself.

Further, that there is further corroboration from the witnesses DW1, Walusimbi Kawesa who testified about the forged vouchers Exhibit 15(e) and Exhibit 15(b). He further confirmed that Fred Buwembo had prepared Exhibit 15(b) with no authority. Further that Fred Buwembo had prepared a voucher to credit the sum of USD 2015 to suspense creditors' account well knowing that it should not have been credited to that account but to Withholding Tax Account. This voucher had been checked by Alex Ahimbisibwe his co-conspirator. The evidence of DW1 was also confirmed by the evidence of DW2, Kate Kabahindi. Counsel submitted that this was a deliberate act by Fred Buwembo to divert the money unto the suspense creditors' account as a "Transit" account enroute to the accounts of 4U2 and Annet Nassaza as the "destination accounts"; which funds were later divided into two amounts as USD 1025 and the Uganda Shillings equivalent of Shs. 1,682,125= was credited to 4U2 for the benefit of Fred Buwembo and the other half of Shs. 1,682,125= was credited to the account of Nassaza Annet for the benefit of Alex Ahimbisibwe. All this is consistent with the statement made by Alex Ahimbisibwe. Fred Buwembo withdrew his share of Shs. 1,600,000= as testified by DW3, Ismail Nsereko and confirmed by Linda Matovu and her driver, Musisi Michael in their statements.

A further example given by DW2 was of Exhibit 34 on page 8 where USD 9970 was moved from Citibank main account and converted to Shs. 18,096,148= and credited to the account of 4U2. The money was for a project called Rural Microfinance



Support Project (RMFSP). There were no instructions from RMFSP to pay 4U2. This was also a fraudulent transaction. Counsel contended that both Alex Ahimbisibwe and Fred Buwembo were placed at the centre of this transaction when Linda Matovu in her statement confirmed that the money was deposited on her account and she withdrew it and gave it to both of them on the listed occasions. Neither Alex Ahimbisibwe nor Fred Buwembo challenged the truth of her statement in court although she was presented for the full trial. Counsel submitted further that what Linda stated was true in accordance with the rule concerning informal admissions as stated above; and that the 3<sup>rd</sup> and 4<sup>th</sup> Counter Defendants participated in the conspiracy at different times through different acts.

On the part played by the 4<sup>th</sup> Counter Defendant, Counsel submitted that she admitted in her statement that she availed her account to the 1<sup>st</sup> Counter Defendant to use for purposes of siphoning money from the Counter Claimant. She participated in withdrawing the stolen money from her account, when she wrote out instruments (Exhibit 21) naming herself as payee and yet she took the money and paid it over to the 1<sup>st</sup> and 2<sup>nd</sup> Counter Defendants.

It is irrelevant that she came in only at the cashing and payment end of the transactions because in order for a person to be liable in conspiracy they do not have to join at the beginning or to know or participate in the whole scheme. She was in agreement with the 1<sup>st</sup> and 2<sup>nd</sup> Counter Defendants tacitly or overtly to execute

this fraudulent scheme and she should be held liable as a co-conspirator.

On the role of the 3<sup>rd</sup> Counter Defendant, Counsel stated that she held in Trust an account for her son, Mathew Agaba, a savings account, and that she had also admitted participating in the conspiracy, by permitting the deposit of stolen money on the account and facilitating its withdrawal by signing withdrawal slips and letting her husband withdraw the funds, making it reasonable to assume that she had shared in the proceeds.

On the submissions by Counsel for the 1<sup>st</sup> Counter Defendant that the persons who made statements were never called as witnesses and that the court should infer that their evidence would have been adverse to the Counter-Plaintiff's case, Counsel responded that three of the persons who made statements (Linda Matovu, Alex Ahimbisibwe and Annet Nassaza) were parties to the suit as Counter-Defendants, but they chose not to testify at trial to explain away their statements. They could not, therefore, complain if the court draws from the presented facts all reasonable conclusions. Secondly, the Bank (Counter-Plaintiff) had no control over the other people who made the statements. These people had volunteered to refund money that had been wrongfully banked onto their accounts so as to clear their names of any wrong-doing. If anything, it was up to the Counter-Defendants to call them to dispute what they stated in their statements.

Counsel went further to distinguish ***Kimotho Vs Kenya Commercial Bank*** cited by the Counter-Plaintiff because from the facts of that case, the court drew an adverse inference pointing out that in the circumstances, the defendant's witness was more likely to lie on the incident, which is not the same in the present case.

### **2<sup>nd</sup> and 3<sup>rd</sup> Counter Defendants**

On whether the 2<sup>nd</sup> and 3<sup>rd</sup> Counter defendants were involved in a conspiracy to defraud the Defendant/Counter claimant, Counsel for the two parties submitted that the term "conspiracy" connoted a well-planned scheme to commit an offence. The 2<sup>nd</sup> Counter Defendant was subjected to a criminal trial in the Anti-Corruption court and was found innocent. If the counter claimant thought that there was a conspiracy to commit fraud, then they should have included all the people who initiated the vouchers, examined them, authorized the same and all beneficiaries to these transactions. These should have been party to both the criminal proceedings and this Civil Suit to test if there was any conspiracy as alleged.

Counsel concluded that with the evidence on record now, the conspiracy theory could not stand especially when the people who took the money were not party to the suit.

### **4<sup>th</sup> Counter-defendant;**

Counsel for the 4<sup>th</sup> Counter defendant submitted that the 4<sup>th</sup> Counter-defendant did not provide her account to be used by anybody for financial transactions. As seen in issue two, the 4<sup>th</sup> Counter defendant was not an employee of the Counter-Claimant at the time of the event and no evidence was adduced to show that prior to her account being credited with various sums, she gave authority to anyone to do so.

Counsel relied on ***Kuwait Oil Tanker Co. SAK Vs Al Barder & Others [2000] 2 ALLER (COM) 271 C.A.*** to state that knowledge of the so called conspiracy was of paramount importance, and that from the evidence on record, no evidence has been adduced to show that the 4<sup>th</sup> Counter-defendant was aware of conspiracy.

In his submissions in rejoinder, Counsel for the plaintiff/1<sup>st</sup> Counter defendant sought to distinguish the decision in ***Stanbic Bank Vs Joseph Aine & 3 Others*** vis-à-vis the statement Exhibits 40 to 44, in that in the stated case, the Bank employee admitted having transferred cash to the account of the 1<sup>st</sup> and 4<sup>th</sup> defendants, and there was evidence of the transfer by them. The 1<sup>st</sup> defendant, who was the account holder, drew the money that had been transferred to the account by the 2<sup>nd</sup> defendant, the Bank employee. There was evidence that the 1<sup>st</sup> defendant drew the money and gave a commission to the Bank employees, which both admitted and there was evidence to that effect.

In the case before court, there is no single document tendered in court to show that the plaintiff posted/credited money on the account of anybody. Neither did the defendant adduce evidence to show that the plaintiff/1<sup>st</sup> counter defendant drew any money and gave it to anybody.

Further, that Linda never stated she gave money to both Alex Ahimbisibwe and Fred Buwembo, but she said she gave to Alex, but always in the presence of Buwembo (Exhibit 41 and 48).

Counsel concluded that the “conspiracy theory” and Alleged Breach of Trust would not arise.

I have considered the rival submissions of all Counsel on this issue.

I have already indicated above that I give much weight to the statements of Alex Ahimbisibwe, Exhibit 40 and Exhibit 44, of Linda. Exhibit 48, and Exhibit 35, the statement of the plaintiff because they were made without duress. According to DW5, DIP Joseph Elyanu, they were taken before him or recorded without any duress; were read over to the makers and they confirmed they were true. Counter defendants 2 and 4 are party to the suit, but they did not come up to raise any issues with the circumstances under which the statements were taken. The court will therefore rely on them and make inferences from them.

I agree with Counsel for the counter claimant that the evidence in Exhibit 40 and 44 was duly corroborated by the evidence of Linda in Exhibit 41 and Exhibit 48.

The 1<sup>st</sup> counter defendant was implicated in withdrawing Shs. 1,600,000=, a cheque of Linda Matovu. According to Ahimbisibwe, they had conspired with Fred Buwembo to steal US\$2050 and divide it and direct it to the two accounts of Linda and Annet Nassaza. Buwembo denies ever cashing the cheque of Shs. 1,600,000= but the above two counter defendants' statements point to him. That is on top of the evidence of DW3, Nsereko Mabirizi Ismail who knew both the plaintiff and the 4<sup>th</sup> counter defendant (Linda), and who narrated how when on 7/6/2007, as he was seated on his desk, the plaintiff came and explained to him that Linda had called him and asked him to cash her cheque for her as she was busy. The plaintiff explained that the tellers could not pay him as the cheque was not in his names. DW3, knowing both people, verified the cheque and asked the teller to pay the plaintiff.

The plaintiff could not go directly to the teller because the cheque was in Linda Matovu's names.

Further, according to DW1, the plaintiff had prepared Exhibit 15(b) with no authority. He had further prepared a voucher to credit USD 2050 to suspense creditors account well knowing it should not have been credited to the account but to Withholding Tax Account. The same voucher had been checked by Alex

Ahimbisibwe. This money later found its way to Linda's and Annet Nassaza's 1<sup>st</sup> and 2<sup>nd</sup> counter defendants. The proceeds, as seen above were withdrawn by Buwembo, and according to Alex, his share was intercepted by the Bank.

And on top of other transactions involving the 1<sup>st</sup> and 2<sup>nd</sup> counter defendants was also USD 9970 moved from the Bank's main account and converted to Ug. Shs. 18,096,148= and credited to the account of 4U2, and later withdrawn by Linda in instalments and, as she stated, always handed to Alex in the presence of Fred Buwembo. The voucher was prepared by Buwembo and checked by Alex.

The 1<sup>st</sup> and 2<sup>nd</sup> counter defendants are clearly part of the conspiracy to defraud the Bank as shown above. Linda also conspired with the two when she allowed her account to be used as a destination account for the fraud. She is therefore party to the conspiracy.

As for Nassaza, the 3<sup>rd</sup> counter defendant, I see nothing connecting her to the fraud as a co-conspirator. She appears to be an innocent house wife who was used by her husband to open an account to be used as a destination for fraudulent transactions. She is, therefore, not part of the conspiracy of course as a wife of Alex, he must have per took of the proceeds of the fraud but I cannot find evidence that she participated as a co-conspirator.

The third issue is answered in the affirmative in respect of counter defendants 1, 2, and 4; and in the negative in respect of counter defendant 3.

**Whether the 1<sup>st</sup> and 2<sup>nd</sup> Counter-Defendants acted in breach of trust and of their fiduciary duties to the Defendant/Counter Claimant;**

The counter claimant's Counsel submitted that an employee owed fiduciary duties to an employer and it was considered to be an implied term of the employment contract. He relied on ***Lord Greene MR in Hivac Ltd Vs Park Royal Scientific Investments Ltd [1946] Ch 169,174***. He also relied on ***British American Tobacco (U) Ltd Vs Francis Mulindwa and Others HCCS 767 of 2004***, for the proposition that the employees of a financial institution owed fiduciary duties to the employer and were accountable for money misappropriated.

Counsel contended that since the 1<sup>st</sup> and 2<sup>nd</sup> Counter-defendants were employees of the Bank, they owed fiduciary duties to the Bank and were in a position of trustee for the money that crossed their paths. Further, by diverting money that crossed their paths in the course of employment, which was a fraudulent act, the law imposed a constructive trust on them. They had deliberately caused loss to the Bank of money which they diverted into the hands of third parties but which they would eventually share with the said third parties. This occurred after flouting the rules of the



Bank as regarding effecting financial transactions, forging signatures, arrogating to themselves powers they did not have and deceit. This was a self-evident breach of trust.

On the above issue, Counsel for the plaintiff/1<sup>st</sup> counter defendant submitted that there was no evidence led to show the alleged fiduciary agreement between the plaintiff/1<sup>st</sup> counter defendant and the counter-claimant. Exhibit 28, which is alleged to be a Declaration of Fidelity and Secrecy was signed between the plaintiff/1<sup>st</sup> Counter defendant and the Development Finance Co. of Uganda Group which is a different entity from the defendant/counter-claimant. The agreement in any case did not deal with the situation in court, but only related to dealings between the employees of the Development Finance Co. of Uganda and barring them from giving information about its unauthorized businesses. Since there is no evidence/document adduced to show that the plaintiff/1<sup>st</sup> counter defendant received/drew any of the monies alleged to have been stolen, one could not talk of breach of trust, therefore.

The 2<sup>nd</sup> and 3<sup>rd</sup> counter defendants' Counsel was of the view that all the transactions in issue before this court were authorized by Senior Management of the counter claimant. The conduct of the counter claimant in shielding the managers who approved/authorized these transactions from these proceedings

and the earlier criminal trial, clears the 1<sup>st</sup> and 2<sup>nd</sup> counter defendants of any alleged breach of trust or fiduciary duties.

On the issue of breach of trust, having considered the submissions on record, it is clear that the 1<sup>st</sup> and 2<sup>nd</sup> counter defendants owed fiduciary duties to the counter claimant in the way they executed their duties, but instead they decided to divert the monies belonging to the Bank instead of guarding it. I do not wish to rehash what the defendant/counter claimant's Counsel stated in respect to the breach by the 1<sup>st</sup> and 2<sup>nd</sup> counter defendant's fiduciary duties to the Bank. Suffice it to say that I agree with his submission in this respect.

It was indeed a breach of trust by the 1<sup>st</sup> and 2<sup>nd</sup> defendant towards the Bank. The issue is answered in the affirmative.

**Whether the 3<sup>rd</sup> and 4<sup>th</sup> Counter-Defendants are liable for knowing receipt or dishonest assistance in breach of trust; or money had and received;**

Counsel for the counter claimant sought to rely on *Equity and Trusts by Alastair Hudson, 2<sup>nd</sup> ED at page 290* to define dishonest assistance as: where a person dishonestly assists another in a breach of trust, that dishonest assistant will be personally liable to account to the trust for the value lost to the trust. Dishonesty in this context does require that there be some element of fraud, lack of probity or reckless risk-taking. It is not necessary that the

trustee of the trust is dishonest, simply that the dishonest assistant is dishonest.

Counsel relied on, among other authorities, ***Royal Brunei Vs Tan [1995] 2 AC 378*** the Privy Council set the test for dishonest assistance as follows:

***“In the context of accessory liability dishonesty means “acting dishonestly or with lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstance.”***

The essential requirements of knowing receipt were stated by Hoffmann L.J. in ***El Ajou Vs Dollar Land Holdings pic [1994] 2 ALLER 685 at 700***:

***“For this purpose the plaintiff must show, first, a disposal of his assets in breach of fiduciary duty; secondly, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and thirdly, knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty.”***

Counsel submitted further that it was not in dispute that the funds amounting to Ug. Shs. 92,151,512= and USD 22,514 were stolen from the counterclaimant as proved by the investigations report. What remains is to prove the knowledge on the part of the counter defendants that the funds they received are traceable to a breach of fiduciary duty.

He also relied on, among others, ***Winfield & Jolowicz on Tort: 15<sup>th</sup> Edition at page 386***, and ***Peter Gibson Jin Baden Vs Societe Generate [1993] 1 WLR 509***, for what amounts to knowledgeable as follows:

***“Actual knowledge, Willfully shutting one’s eyes to the obvious, Willfully and recklessly failing to make inquiries which an honest person would have made, knowledge of circumstances which would indicate the facts to an honest and reasonable man, knowledge of circumstances which would put an honest and reasonable man to inquiry.”***

It was submitted for the 3<sup>rd</sup> Counter Defendant that the counter claimant had an ill motive in filing a suit claiming for monies that had been paid to them. They claimed for a total of Shs. 92,151,512= and USD 22,514 even when all of it had been recovered.

There is no document on court record to indicate the various payments made to the Bank and this fact alone makes it rather unsafe for this court to condemn the 3<sup>rd</sup> and 4<sup>th</sup> counter defendants to pay sums indicated against them without proper records from the Bank.

Further the fact that counter defendant did not sue Simeon Jezree Kakembo, James Byaruhanga and Frank Senabulya yet under paragraph 3(k) they are described as the 4<sup>th</sup>, 5<sup>th</sup> and 3<sup>rd</sup> defendants, is also worth noting. Further still if some of the monies were paid back why was this fact not expressly pleaded in the amended written statement of defence and counter claim.

For choosing to select the 3<sup>rd</sup> and 4<sup>th</sup> counter defendants the counter claimant acted in bad faith.

On this issue it was submitted for the 4<sup>th</sup> counter defendant that the mere fact that money was put on the 4<sup>th</sup> counter defendant's account did not make her liable for knowing receipt because it was her money. The 4<sup>th</sup> counter defendant did not in any way act dishonestly. The 4<sup>th</sup> counter defendant is not liable for knowing receipt or dishonest assistance in breach of trust; or money had and received.

The court finds that the 3<sup>rd</sup> and 4<sup>th</sup> counter defendants received money from the fraudulent transactions. They would authorize its withdrawal through signing the relevant documents; See Exhibit 48 and 49. I have already found that it is very highly probable that the 4<sup>th</sup> counter defendant willfully shut her eyes to the obvious; and willfully and recklessly failed to make inquiries which an honest person would have made. She had knowledge of circumstances which would put an honest and reasonable man to inquiry.

I agree with the counter claimant that although the 4<sup>th</sup> counter defendant tried to portray her participation as innocent, she was sufficiently experienced as a Banker to know that something unusual to ordinary banking practice was taking place. As an employee of the Bank, Alex Ahimbisibwe had an account in the Bank, why was the money not routed to his own account? How had Alex Ahimbisibwe known Linda's account number? The

questions posed by the counter claimant are relevant here. Why did he choose her account out of the thousands of accounts in the Bank? Why did she not notify the Bank about this transaction? The money was transferred to her account in a lump sum, why was it withdrawn in instalments? Why was Alex Ahimbisibwe always with Fred Buwembo when this money was being withdrawn? The funds were all withdrawn with her cheques which are Exhibit 21. Why did she not ask the persons receiving the money to write an acknowledgement for it? I agree that the only logical explanation is that she was well aware of what was going on; or at worst, she is culpable for willfully shutting her eyes to the obvious fact that frauds were being committed against the Bank. It should be noted that when she appeared in court as a counter defendant, she did not give any evidence nor did she seek to cross examine Fred Buwembo when he took the witness stand.

On the other hand, the 3<sup>rd</sup> Counter-defendant states in Exhibit 49 (Statement of Nassaza Annet) that she was always informed by the 2<sup>nd</sup> counter defendant that there were credits on her account. Counsel for the counter claimant faults her for never inquiring more, as any reasonable and honest person would have asked about the source of the money or at least bothered to find out why the money was deposited onto her account. Instead, on several occasions she would just go ahead to sign withdrawal slips with question. Despite the above points pointed out by Counsel, the court is still not convinced to the balance of

probabilities that there is any evidence pinning the 3<sup>rd</sup> counter defendant down in knowing receipt or dishonest as mistake in breach of trust. The issue is resolved in the affirmative for Linda and in the negative for Nassaza.

**The last issue to resolve relates to the remedies available to the parties.**

The court found on the first issue that the dismissal of the plaintiff was unlawful. The plaintiff has sought for the following remedies:

a) A declaration that the dismissal of the plaintiff was unlawful.

For the reasons I have given in my judgment above, I hereby declare that the dismissal of the plaintiff was unlawful for failure to abide by the principals of natural justice.

b) The plaintiff also claimed for Shs. 11,168,336= being the would be contribution to the Provident fund.

In his evidence the plaintiff stated the amount claimed was Provident Fund contributions of 12.5% and 7.5% of gross salary by the employer and employee respectively from the time of dismissal up to the time of acquittal which would be Ug. Shs. 11,168,336=.

On this claim I will agree with Counsel for the defendant/counter claimant that after the plaintiff's dismissal, the plaintiff and the Bank were both not obligated to make any contributions to the Fund and hence the plaintiff cannot succeed on this type of claim.

There was no documentary evidence to prove that any contributions were made during that period.

On the claim for one month's pay in lieu of notice, the defendant's Counsel contended that it would only apply where dismissal was summary in contravention of notice; it did not apply to where an employee was subjected to a disciplinary hearing and found guilty.

This is a very peculiar case for such a claim for payment in lieu of notice to be considered. Be the above as it may, and in such case where I have based my reasons for declaring the termination unlawful on the ground of violation of principles of natural justice, the remedy would lie in a claim of damages.

The claim of Ug. Shs. 49,355,838= which would have been the plaintiff's salary from July 2007 up to April 2011 when he was acquitted is speculative and untenable in law as per ***Bank of Uganda Vs Betty Tinkamanyire Supreme Court Civil Appeal No. 12 of 2007*** where Kanyeihamba J, settled this question when he held as follows:

***“The contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law. Similarly claims of holidays, leave period, lunch allowances and the like which the unlawfully dismissed employee would have enjoyed had the dismissal not occurred are merely speculative and cannot be justified in law.”***



There is a claim for general damages of Ug. Shs. 130,000,000=.

The reason given by the plaintiff was that he suffered a lot of stress, embarrassment and has not been able to get another job because of the dismissal. I am also supposed to consider damages for unlawful dismissal.

Having gone through the entire evidence in relation of the other four issues raised in this case, I have found that the evidence relating to the conduct of the plaintiff in the transactions that led to his dismissal clearly points to him as a person who participated in a series of fraudulent transactions that led to loss to the Bank. He conspired with others to fleece the Bank of the very funds which he was supposed to jealously guard. He who comes to equity must come with clean hands. I am therefore unable to grant any damages to the plaintiff since his hands appear to be soiled.

In conclusion, I shall declare that the dismissal was unlawful but decline to award damages for reasons given above.

### **Remedies for the Counter Defendant**

1. From the court's findings earlier in the judgment, judgment on the counter claim is hereby entered for:
  - a) A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> counter defendants participated in the fraud and by so doing acted in breach of trust.

b) A declaration that 4<sup>th</sup> counter defendant is liable as constructive trustees for dishonestly assisting the 1<sup>st</sup> and 2<sup>nd</sup> counter defendants to defraud the defendant/counter claimant in breach of trust.

2. The defendant/counter claimant asked court under paragraph 2 (d) of the prayers in the Amended Written Statement of Defence to order that the counter defendants are jointly and severally liable to pay to the defendant/counter claimant the unpaid balance on the sums fraudulently withdrawn. The counter claimant also prayed under paragraph (e) that compound interest on the sum in (d) above be paid from the date of loss till payment in full.

Counsel for the plaintiff disputed the claims for any unpaid balances on the ground that these are special claims which must be proved specifically; that there was no evidence of either an Internal Audit Report or External Audit Report.

I will agree that the counter claimant failed through evidence to establish any specific amounts claimed. Failure to produce evidence of either an internal or external audit report showing the extent of losses made the case worse for the counter-claimant. The submissions do not also canvas any such evidence. This claim and that of compound interest is not tenable, therefore, it is dismissed. The counter-claimant also claimed for punitive damages against the counter defendants under paragraph (f) of the prayers in the Written Statement of Defence.

**Uganda Revenue Authority Vs Wanume David Kitamirike CA No. 43 of 2010** is relied on where circumstances under which punitive damages are awarded were considered extensively. At page 20, Kasule JA stated:

***“The damages are awardable to punish, deter, express outrage of court at the defendant’s egregious, highhanded, malicious, vindictive, oppressive and/or malicious conduct ..... Unlike general and aggravated damages, punitive damages focus on the defendant’s misconduct and not the injury or loss suffered by the plaintiff. They are in the nature of a fine to appease the victim and discourage revenge and to warn society that similar conduct will always be an affront to society’s and also the court’s sense of decency. They may also be awarded to prevent unjust enrichment.”***

He asked that Shs. 80million to be paid by the counter defendants in punitive damages to send out a terse message to the would be culprits.

I find in the Kitamirike case above, that reference was also made to English decisions in ***Rookes Vs Barnard [1964] A.C. ALLER 367*** later confirmed in ***Cassell Co. Ltd Vs Broome [1972] 1 ALLER 801.*** In both of these decisions the award of punitive/exemplary damages is limited to three cases of first, oppressive, arbitrary or unconstitutional action by public servants, excepting oppressive action by private corporations or individuals. Second, where the motive of making a profit is a factor, such as where the defendant in disregard of the plaintiff’s rights, calculates that the money to

be got out of the wrong to be inflicted upon the plaintiff will exceed the damages at risk. It is then necessary for the law and courts to show that rights of an individual cannot be trampled upon and the law infringed with impunity. Third, where a statute imposes punitive/exemplary damages to be paid.

I have evaluated the evidence adduced in this case and also the law but I am not persuaded that punitive damages are awardable in this case.

This head of claim also fails.

### **General damages**

The counter claimant claimed for general damages citing ***Dr. Asaba George Vs Western Uganda Cotton Company (HCCS 353 of 2009)*** where Obura J referred to ***Black's Law Dictionary 7<sup>th</sup> Edition at page 182*** where it was stated that; ***“Every breach gives rise to a claim for damages, and may give rise to other remedies. Even if the injured party sustains no pecuniary loss or is unable to show such loss with sufficient certainty, he has at least a claim for nominal damages.”***

Counsel prayed that the counter defendants should pay general damages of Ug. Shs. 50,000,000=.

The court notes from the evidence that although the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> counter-defendants have been found culpable, there are other

officials of the Bank like Mr. Olweny and others, who either unlawfully, or through negligence, made it possible for the fraudulent activities to go through. If such officials had not been lax in the handling of their duties, the frauds mentioned would not have happened. I will, therefore, order that the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> counter-defendants pay to the counter claimant Shs. 30million out of the 50 million prayed for the respective breaches of trust, fiduciary duties, knowing receipt/dishonest assistance as found by court in the judgment above. The amount is payable jointly and or severally.

### **Costs of the suit**

The plaintiff was successful in his suit, although court did not find it appropriate to award damages. The counter-claimant has also been successful in some of its claims. Three of the counter defendants have been found liable in various aspects. The 3<sup>rd</sup> counter defendant, though not found culpable, pertook of the proceeds of the shameful transactions through her husband, the 2<sup>nd</sup> counter defendant.

Under the above circumstances, I find that the justice of this case demands that I make no order as to costs.

Orders accordingly.

**Elizabeth Musoke**

**JUDGE**

**23/12/2014**