IN THE HIGH COURT OF UNITED REPUBLIC OF THE TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM
COMMERCIAL CASE NO.53 OF 2021

PROFESSIONAL PAINT CENTRE LIMITED .....PLAINTIFF

VERSUS

AZANIA BANK LIMITED.....DEFENDANT

Last Order: 01/04/2022
Judgment: 13/05/2022

JUDGEMENT

NANGELA, J:.

One of the issues that have exercised the mental faculties of lawyers and courts over a long period of time is the issue touching on the relationship between a bank and its client, especially when such a relationship goes on rocks.

In this case, although the Plaintiff and the Defendant have maintained a cordial relationship since 2011, as I shall shortly make a disclosure hereunder, serenity of that relationship was robbed off and ravished mercilessly by an unscrupulous visitor in the name of "forgery", leaving out scars which this Court is now asked to heal using its judicial balm.

With a search for the healing of its financial scars, the Plaintiff sued the Defendant herein praying for judgement and decree as follows:

1. Payment of TZS 911,382,335.50 being the amount lost due to fraud occasioned by negligence of the Defendant.
2. Payment of TZS 300,010,364 being cost of sustaining principal loan and overdraft between 2011 and 2019.
3. Payment of TZS 1,184,126,277.88 being opportunity cost of find lost due to fraud;
4. Interest on item No.1 above at a commercial rate of 22% per annum from the date of filing this suit to the date of judgement;
5. Interest on item No.1 above at a Court rate of 7% per annum from the date of filing this suit to the date of judgement.
6. Costs of this suit and
7. Any other relief this Court may deem fit and just to grant.

The facts constituting this suit may be stated briefly as here follows: the parties herein have maintained a bank-customer relationship since 2011, in which case, the Plaintiff maintains and operates a Bank Current Account, **No.001000143673**, with the Defendant Bank at Masdo Branch in Dar-es-Salaam. In the course of operationalizing the said account, the Plaintiff availed to the Defendant a signatories' mandate in which case, two

approved signatories, in the names of Ahmed Zakaria Hamil and Vida Ahmed Zakaria, both being directors of the Plaintiff, were the only authorized persons who could sign the Plaintiffs' issued cheques.

In the course of their dealings, it happened that in 2016, the Plaintiff uncovered a massive fraudulent scam which spanned between the years 2011 to 2016, and which involved the Plaintiff's Current Account No. 001000143673. In particular, the forgery incident involved clearances and payments, by the Defendant, of a total of 111 forged cheques, amounting to **TZS 911,382,335.50**. This amount was debited from the Plaintiff's account by two Defendant's officials, namely: Ms Grace Wang'anyi and Doris Swai Mallya.

The debited amount was credited in the accounts of one, Stanley Murithi Mwaura held at KCB Bank Mlimani City Branch and his company Stano Enterprises, held at Equity Bank (T) Ltd at Kariakoo Branch. The cheques involved in the transactions had purported to have been duly signed by the two approved signatories of the Plaintiff, a fact which turned out later to be flawed.

Upon discovering the said fraudulent scheme in May 2016, the Plaintiff reported the matter to the Police for criminal investigations. The aftermath of the investigations led to the arrest of the two Bank officials and one, Mr. Stanley Murithi Mwaura for questioning and, at the end of the day, Mr. Stanley

Murithi Mwaura was charged and convicted of multiple fraudulent offences.

It is from that context the Plaintiff's is now, through a Plaint filed in this Court on the 5th day of May 2021, claiming from the Defendant a total of **TZS 2,395,518,977.00** as special damages or losses suffered alleging negligence of the part of Defendant's officials amounting to breach of contract and **TZS 200,000,000.00** as general damages. In response to the Plaintiff's Plaint, the Defendant filed a Written Statement of Defence (WSD), on the 27th May 2021. In its WSD, the Defendant denied the alleged breach of contract and the entire claim putting the Plaintiff into a strict proof of the allegations.

When the parties appeared in Court for a final pre-trial conference, the following were agreed issues for determination:

1. Whether the 111 cheques paid in favour of Stanley Murithi Mwaura and Stano Enterprises were forged.
2. Whether the bank acted negligently in paying the cheques in favour of Stanley Murithi Mwaura and Stano Enterprises.
3. Whether there was negligence on the part of the Plaintiff in handling the cheque book.
4. To what relief are the Parties entitled.

At the commencement date of the hearing of this Case, the Plaintiff enjoyed the services of Mr Timon Vitalis and Roman Selasini Lamwai while Ms. Upendo Mbaga and Mr. Mbagati Nyarigo, learned advocates appeared for the Defendant. In Court, the Plaintiff called four (4) witnesses, namely: Mr Ahmed Zakaria Hamili (Pw-1), F.8215 D/CP Aristides (Pw2), Ms Vida Ahmed Zakaria (Pw-3) and Mr Zakaria Cassim Zakaria (Pw-4) and tendered seven exhibits to prove its case.

Testifying in favour of the Plaintiff, Pw-1's witness statement was tendered and admitted as his testimony in chief. He told this Court that, being the Managing Director of the Plaintiff, he is privy to the fact that, the Plaintiff maintains a **Bank Current Account No. 001000143673** with the Defendant Bank and, that, the Plaintiff has two signatories to that account, who are himself and Pw-3 (Vida Zakaria).

Pw-1 told this Court further, that, the Plaintiff had in its employment, an accountant in the name of Stanley Murithi Mwaura whose tasks included: raising vouchers after verification of invoices as well as registering cheques in cheque dispatch book/cheque register. He was, as well, tasked with making sure that cheques are signed by both signatories before being issued to the payees or taken to the Bank. The Plaintiff's cheque register used to show the cheque serial number, date, as well as the name of the payee.

According to Pw-1, in the year 2016, the Plaintiff applied for and was granted an overdraft facility from the Defendant's Bank. Although the loan was approved by the 2nd day of May 2016, it was however not uploaded to the Bank System of the Defendant immediately, a fact which necessitated the Plaintiff to make special arrangements with the Bank Manager whenever there was a need to raise cheques to enable payments to suppliers.

Pw-1 tendered in Court Defendant Banks' Letters of Offers dated 19th January 2012, 12th March 2013, 22nd February 2014, 16th March 2015, 5th May 2016, and 30th May 2018 all of which were admitted collectively as **Exh.P3**. Pw-1 told this Court that, on the 2nd day of May 2016, Pw-1 had asked the accountant, Mr Stanley Murithi Mwaura, to prepare a check list of all cheques in respect of the Plaintiff's respective suppliers, whose invoices were due for payment. He did so because, he wanted to arrange with the Bank Manager as the overdraft was yet to be uploaded to the Bank's computer system.

Pw-1 testified that, upon looking at the prepared Cheque List, he realized that, the serial numbers of the recorded cheques were not in a sequential order as there were gaps of three cheques. Upon cross-checking with the dispatch register, Pw-1 could not get the dispatch register and was informed that it was taken by Mr Stanley Murithi Mwaura in the morning of that day, though upon asking Stanley, the latter responded that he returned

it to its usual place. However, upon diligent search, Pw-1 could not locate its whereabouts.

It was the testimony of Pw-1, therefore, that, having noted the anomaly in the cheque list, he decided to cross-check with the counter foils which further revealed to him that, three missing cheques were paid to their regular suppliers. However, and still unsatisfied, Pw-1 decided to apply for a Bank Statement from the Defendant Bank, whose dates ranged from October 2011 to 4th May 2016. The Bank Statement was tendered in Court and was admitted as **Exh.P2.**

Pw-1 told the Court further that, it was from the Bank statement that he was able to uncover fraudulent transactions involving two payees, namely Stano Enterprises and Stanley Murithi Mwaura, who were regularly paid by the Plaintiff while the Plaintiff had not transacted any business with them. Moreover, Pw-1 was of the view that, the mandated signatories had no record of signing any cheque in favour of those two payees.

Besides, Pw-1 testified that, having reported the matter to the Police and upon investigation, the Police were able to recover forged 99 cheques used to pay M/s Stano Enterprises and Mr Stanley Murithi Mwaura. The 99 cheques and specimen signatures and handwriting of Mr Stanley Mwaura and, that of Pw-3 (Ms Vida Zacharia) whose signature was forged, were

taken for further forensic expert analysis with a view to find whether there was forgery of the cheques or not.

According to Pw-1, at the end of the day, Police results proved that the 99 cheques were indeed forged. The forged cheques were tendered in Court and admitted as **Exh.P1.** According to Pw-1, the forged cheques were cleared by the Defendant without any confirmation (calling back the Plaintiff) whereas, at the time of opening the bank account, the Mobile Phone Numbers of Pw-1 and that of his co-director (Pw3) were availed to the Defendant.

In his further testimony, Pw-1 told this Court that, when clearing the cheques, the Defendant's employees acted carelessly by not making thorough comparison of signatories' specimen signatures uploaded in the bank system, which specimen signatures were taken by the Defendant at the time of opening the account, and those in the forged cheques, which were obviously different.

In the course of his testimony, Pw-1 tendered in Court as well, copies of Judgment of the RM's Court at Kisutu in **Crim. Case No.188 of 2016** and Judgment of the High Court, in **Crim. Appeal No.160 of 2018.** This Court took judicial notice of the judgements and admitted them as **Exh.P4.** In both judgements, the two Courts found the accused/Appellant Stanley Murithi Mwaura guilty as charged and, he was sentenced to serve a seven years jail term. Besides, Pw-1 tendered three (3) demand letters

which the Plaintiff had sent to the Defendant requesting for a refund of the stolen money from his account. These were admitted as **Exh.P.5**.

During cross-examination, Pw-1 told this Court that, three cheque leaves went missing in his office and the cheque register was not seen on the 2nd May 2016 but he was told by one Mr Linus Kinabo, who also testified before the RM's Court, that, it was Mr Mwaura who had taken it the other day and did not return it. He stated that, though he tendered no documents in regard to that, all such information are found in the proceedings of Kisutu Resident Magistrate Court, admitted as part of **Exh.P4**.

Pw-1 also stated, during cross-examination, that, the Bank Statement he asked from the Bank on the 3rd of May 2016 was collected by an agent, one Mr Winston Mwakyusa, whom he had authorised to collect bank statements and was introduced to the Defendant. He stated, however, that, such statements were taken directly to Mr Stanley Murithi Mwaura's accounts office, as he was an accountant by profession whom the Plaintiff had entrusted on him all issues of accounting and banking reconciliation since he possessed accounting expertise.

Pw-1 told this Court that, his discovery of the fraudulent payments to Stanley Mwaura and Stano Enterprises was on 3rd of May 2016, the day when he received the Bank statement. He admitted, however, that, auditors used to carry out auditing each financial year but did not disclose any anomaly to the Plaintiff

and, that, the company used to file tax returns to the Tanzania Revenue Authorities each year.

He told this Court, however, that, all directors of the Plaintiff are not learned in the accounting skills or bank reconciliation issues and, for that matter, solely depended on the professional skills of the Company Accountant, Mr Stanley Mwaura, whom they trusted. Pw-1 told this Court that, the forged cheques were 111 but those tendered in Court were 99 cheque leaves.

He also admitted that, there was a handwriting report which was relied upon in the Criminal case No.88 of 2016 at the RM's Court, Kisutu. He told this Court that he was unaware of the fraud until 2nd May 2016 and, that, his first port of call in terms of reporting the incident, was the Police and not the Bank.

When shown page 31 of **Exh.P2,** Pw-1 admitted that, therein it reads:

> "NOTE-1: The items and balance on this statement should be verified and bank notified of any discrepancy within 30 days."

Nevertheless, Pw-1 explained further that, the Bank was not notified because, whenever the Bank Statements were collected by Mr Mwakyusa, they used to be sent to Mr Mwaura's office as an Accountant given that Pw-1 was unlearned in the accounting profession.

However, after the theft was uncovered, Pw-1 had asked Mr Mwakyusa who picked the Bank Statement from the Defendant to deliver it directly to his office, instead of that of the Accountant, and, that, such was the time he discovered the two payees- Stanley Murithi Mwaura and Stano Enterprises whom the Plaintiff never had transactions with.

During cross-examination Pw-1 stated as well that, the Bank officials were to blame as they did not do their job rightly although they were not sued in the criminal case but testified as witnesses. He stated that, throughout the period when the fraud persisted, the Defendant Bank never called on him, not once concerning payments to Stano Enterprises or Stanley Mwaura. According to Pw-1, he used to renew the Bank Overdraft each year because the business was not performing well and, that; the borrowing was done without knowing that the borrowed monies were also leaking out through other means.

During his cross-examination, Pw-1 denied there being negligence on the part of the Plaintiff simply because he had trusted Mr. Mwaura as the Plaintiff's employee. He also denied to have given him the cheque book so that he could steal from the Plaintiff but that; he had trusted him as a professional. He told the Court that, he used to keep the cheque book in his own drawer or that of his co-director and issued it to the Accountant only, him being the right person as he wrote the cheques.

While under cross-examination, Pw-1 went on telling this Court that, the Plaintiff is claiming over **TZS 2.3 billion** as loss and **TZS 200 million** as general damages for breach of contract. He told the Court that, the contract breached was the payment mandate signed when the Plaintiff opened its account with the Defendant as during that time Pw-1 and Pw-3 signed the specimen signatures card and inserted their biometric marks on it. He stated that, the signature specimen form had the signing mandate where the Plaintiff and the Bank agreed that the two directors shall sign together.

Pw-1 told this Court further that, in every issued cheque the Bank (Defendant) had a duty to ensure that the signatures on it conform to what is on the specimen signature card issued to the Bank. When shown **Exh.P4**, Pw-1 admitted that, indeed the Court had ordered that the accused Mr Mwaura was to return the stolen monies to the Plaintiff. However, Pw-1 told this Court that, the person who should pay him is the one who cleared the cheques contrary to the signing mandate.

He told this Court that, for all years that passed, he was bound to a vicious cycle of borrowing because the borrowed monies were being stolen and the entire overdraft was almost equal to the amount stolen and paid out by the Defendant contrary to the mandate to pay.

During re-examination, Pw-1 referred to page 7 of **Exh.P4**, (the judgement of the lower court, which was affirmed in the High Court decision) where the trial court had stated that:

> "the number of cheques involved .... were many and if the Bank Officers at Azania Bank were careful enough this couldn't happen. The care was very poor and questionable over their integrity; anybody who is reasonable could link the Bank, that is Azania Bank, with this evil act by the accused which lead (sic) to defraud Professional Paint Centre Ltd, with TZS 911.382,335. 50."

He stated that, if the Defendant Bank would have exercised its duty to the Plaintiff as its client, the theft would not have taken place. He also stated that, nowhere in the judgements of the Court was the Plaintiff restrained from suing the Defendant.

The second witness for the Plaintiff who testified was F.8215 D/CP Aristides Mashauri (Pw-2). His witness statement was admitted as his testimony in chief and, he also tendered in Court a Police Forensic Report which was admitted in Court as **Exh.P.6**.

In his forensic investigation, Pw-2 told this Court that, he noted that, the undisputed signature of Pw-3 and the disputed signatures on the **Exh.P1** to have stark differences. When he

compared the undisputed handwriting of Mr Stanley Mwaura and the handwriting in **Exh.P1**, he also found that the same bore similar characteristics in letter stroke formation, consistent pen pressure and skills.

Upon being cross-examined, Pw-2 told this Court that, he compared the undisputed signature specimens with those in the cheques and, that; all such were brought together with the disputed ones which were alleged to have been signed by Pw-3 (Vida Ahmed Zakaria). He admitted not to have seen the specimen signature form in the Bank but, stated that, he did his examination of the specimen brought to his attention *vis-a-vis* those on Exh.P1. He said that, the specimen signature at the Bank was not the one disputed and, for that matter, he had no reason to work on it.

The third witness for the Plaintiff's case was Ms Vida Ahmed Zakaria (Pw-3) whose witness statement was also admitted as her testimony in chief. She told this Court that, as a co-director with Pw-1, their Company maintains an account with the Defendant Bank and, they are the only persons with mandate to sign in all payment cheques issued by the Plaintiff.

She further told this Court that, on 2nd May 2016 their cheque register went missing and, that; her co-director (Pw-1) was informed that, their accountant Mr Stanley Muirithi Mwaura had taken it. She testified that, the cheque register was never seen again.

Pw-3 testified further that, a week later she was summoned to the Police for questioning about the office procedures and taking of her specimen signature. She was also shown 99 cheques (**Exh.P1**) purporting to have been signed by her but she denied that fact or having ever authorised payments to Stanley Murithi Mwaura and Stano Enterprise. According to Pw-3's testimony, the Defendant was in breached of the contract of banking by paying Stanley Murithi Mwaura and Stano Enterprise on the strength of forged signatures. She maintained that, when the Plaintiff opened the bank account Pw-1 and Pw-3's specimen signatures and Mobile phone numbers were taken as safeguards.

Pw-3 told this Court that, although her mobile phone number had been issued to the Bank and was in the mandate file, she never received any confirmatory call from the Defendant when authorising payments from the account to any beneficiary, as they now do, a fact which she believed could have deterred the fraud.

During cross-examination Pw-3 admitted that her co-director used to sign blank-cheques but she is also a co-signatory and, the ordinary users of the cheque books were herself, Pw-1 and the Accountant (Mr Mwaura). She denied that the Plaintiff allowed the cheque books to be easily accessed and, stated that, the same were kept by the directors and issued only when needed by the accountant for purposes of issuing cheques to suppliers.

During re-examination, Pw3 told this Court that; she was informed by the Police that her signature had been forged.

The last Plaintiff's witness was Mr Zakaria Cassim Zakaria (Pw-4). In his testimony in chief filed in Court, he told this Court that he is a financial consultant working with *ZA Advisory Limited* to provide professional advisory services and holds a Bachelor's degree in economics and Finance from University of Nottingham, a Master's degree in Infrastructure Investments and Finance from University College of London (UCL) and he is also a chartered accountant with Association of Certified Accountants in the UK.

Pw-4 told this Court that, in March 2021, he was approached by Pw-1 who engaged him to do a calculation regarding opportunity costs from money which was fraudulently transferred from the Plaintiff's account. He told this Court that, he was provided with 99 cheques (**Exh.P1**) and the Plaintiff's bank statement (**Exh.P2**). After his interview and analysis he noted that **TZS 911,382,335.50** were indeed fraudulently obtained from the Plaintiff's account between December 2011 and April 2016.

Pw-4 stated further that, upon calculating opportunity costs, which he defined as the potential benefits that the Plaintiff lost after succumbing to fraud as it had no funds available for investment or use in normal operations, Pw-4 told the Court that, the **TZS 911,382,335.50** could have yielded **TZS**

1,184,126,277.88, if invested in 10yrs Treasury Bonds during an open auction by the Bank of Tanzania.

Pw4 testified that, to find the business loss suffered, he considered several investments options which included investment in real estate, treasury bonds (T-Bonds), listed company shares, fixed deposits, and unit trusts (UTT) and chose T-Bonds over the rest due to the fact that they are backed by Government, relatively risk free, have transparent and verifiable data, and are negotiable and offer competitive rate returns.

As regards the methodology, Pw4 told this Court that, he had applied a standard buy-and-hold strategy used in financial markets in his calculations. He stated further that, had the buy-and –re-invest strategy been used, the additional reinvestment returns estimated to be **TZS 1, 117, 063,220.55** would have been realised. Pw4- tendered in Court an opportunity costs "Memo" he prepared for the Plaintiff, which was admitted as **Exh.P7**.

During cross-examination, Pw-4 admitted that, from the 1st bond on the list, the maturity date would be 20th December 2021 as it starts with the earliest which would be 21st February 2022 and the latest would be 14th April 2026. He admitted also that, it would be right to state that, prior to the redemption dates of the bond, there would be no profits earned by the Plaintiff as at any point the Plaintiff can quickly sell the bond and realise profits before the redemption date. So far that was the case for the Plaintiff's side.

Upon closure of the Plaintiff's case, the Defendant case opened and the Defendant called two witnesses to support its case. These were: Ms Doris Swai Mallya, (Dw-1) and Ms Grace Wang'anyi (Dw-2). In her testimony in chief which was filed in Court, Dw-1 stated that, from 2014 to 2016, she worked with the Defendant in the capacity of Bank operation supervisor at Masdo Branch providing services to customers, including cash deposits, withdrawals, processing of cheques etc. She tendered in Court the Plaintiff's Account Statement and certificate of authenticity and these were admitted as **Exh.D1 (a) and (b)** respectively. She also tendered in Court two Register Books named "Bank Statement Issue Register" which were collectively admitted as **Exh.D-2**.

Dw-1 told this Court that, the Plaintiff does indeed maintain an account and also a cheque book with the Defendant Bank, **Account No.0001000143673**. She also admitted that, in the said Bank Account, the Plaintiff appointed Pw-1 and Pw-3 as signatories of its respective account and, that, the Plaintiff had filed specimen signature with the Bank and such was uploaded in the Defendant's system.

Dw-1 further testified that, through the Plaintiff's introduction letter dated 11th August 2011, the Plaintiff had appointed one Winston Emmanuel Mwakyusa as its authorised personnel or agent who was mandated to collect from the Bank, statements, account balance and present to the bank

statement/balance slip on behalf of the Plaintiff. Dw-1 tendered in Court **Exh.D.4**, which is the respective letter of introduction.

Further still, Dw-1 stated in paragraph 9 of her witness statement, that, she attended the Plaintiff several times through its directors and its authorised agent, and did so diligently and carefully in all its transactions, ensuring that, all the Plaintiff's instructions to the Defendant were honoured by following all required procedures on cheque clearance. She stated that, between 2011 and 2016 the Defendant received and cleared checks drawn by the Plaintiff in favour of various payees, among them, being Stanley Murithi Mwaura and Stano Enterprises.

According to Dw-1, the cheques in favour of Stano Enterprises and Stanley Murithi Mwaura were presented by the Payee to KCB and Equity Bank (as collecting banks) respectively who then endorsed the name of the payee at the back of each cheque, the payee's stamp and phone number. She told this Court that, it was the respective collecting bank that communicated with the Defendant to liaise if the respective signatures on the cheques presented for payments are similar to the ones appearing in specimen signatures appearing in the Defendant's system.

Dw-1 went ahead stating that, upon checking the cheques presented by the Plaintiff to the Defendant she confirmed that, the respective cheques drawn in favour of Stano Enterprises and Stanley Murithi Mwaura were among the cheques appearing in the cheques presented by the Plaintiff for payment and, that, upon

cross-checking on the signature for verification the Defendant confirmed that, the signatures were similar or the same.

Dw-1 stated that, after the signatories' confirmation, the cheques presented for payment becomes genuine, as the Defendant's officials who verified the respective cheques confirmed that the respective cheques were genuine. She stated that, the Defendant was surprised in 2016 when the Palintiff claimed that 101 cheques paid to Stano Enterprises and Stanley Murithi Mwaura, were forged.

According to Dw-1, the Plaintiff had told them that the signatories used to sign blank cheques and left the cheque book with another signatory and that, this tendency gave their employee a chance to fill payment details in the respective cheques and present the same to KCB Bank and Equity Bank to process payments.

Dw-1 did as well tell this Court that, it is not the duty of the Defendant to inquire whether the Payee is the customer's supplier or not or to question if the payee is entitled to receive payments from the customer. She admitted, however, that, what the Defendant Bank does is to consider whether the signature appearing on the cheque is similar to that appearing in their system. She surmised that, the checks drawn in favour of Stano Enterprises and Stanley Murithi Mwaura were cleared as they were signed by the Plaintiff's signatories.

Dw-1 testified as well that, from 2011 to 2016, the Defendant, upon the Plaintiff's requests, was issuing the Plaintiff with Bank Statements for a fee on a monthly basis. She relied on **Exh.D2** to show that such bank statements were issued and the Plaintiff did not raise any query on their inaccuracy, including the payments to Stano Enterprises and Stanley Murithi Mwaura, while it was indicated that the customer had a duty to do so within a month's time from the date of issuance of the Bank Statement.

It was a further testimony of Dw-1 that, the customer is also under the obligation to keep the cheque book in a safe manner and notify the bank in case of loss of cheque book or a leaf therein. She told the Court that, the Plaintiff used to apply for new cheque books time after time and tendered in Court **Exh.D3.** She told this Court that, by requesting new cheque books without disclosing missing cheque leafs to the Defendant the Plaintiff confirmed that, all cheque leaf's were properly used and there was no stolen or missing cheque leaves.

Dw-1 told this Court further that, after the incident of forgery, and the arrest and charging of Stanley Murithi Mwaura, the Plaintiff directors (Pw-1 and Pw-3) did testify that, they used to sign blank cheques which were left to the said Stanley Mwaura who filled the payment details. She also stated that, the Court in **Criminal Case No.88 of 2016** ordered that the said Stanley

Murithi Mwaura should repay the Plaintiff the lost **TZS 911,383,335.50**.

During cross-examination, Dw-1 did admit that, she testified in Criminal Case No.88 of 2016 at Kisutu RM' Court that monies were stolen from the Plaintiff's account. She said at the time she truly believed so as the first person to go though the cheques for their approval for payment was Ms Grace Wang'anyi (Dw-2) and later she came in for a final approval. She told the Court that, if they are in doubt whether a cheque was properly signed, they would call back but, at the time, such a system/practice was not there. She also said that, she never had any doubt about the 99 cheques as all signatures resembled the specimen signature in the system.

When shown the WSD and whether any defence of contributory negligence was pleaded therein, Dw-1 admitted that, there was no such a defence. She, however, denied that, as bank officials they were negligent on their part. She stated that, she learnt of the negligent acts of the Plaintiff after her claims that monies had been stolen from her account, but since 2011 no complaint was made out. Even after being shown **Exh.P4** and what the court sated on page 7; Dw-1 insisted that, the Defendant was careful.

When asked whether the Bank has ever received blank cheque or one signed by a single signatory, Dw-1 remained silent. Upon being further cross-examined, Dw-1 admitted that, if

the Defendant has any doubt, then a call back to the client would be made. However, Dw-1 stated that, such a practice would be applied whenever a cheque had bounced. She also said at Kisutu RM's Court they had gone to testify as Bank officers who were approving payments.

The second Defence witness was Ms Grace Wang'anyi who testified as Dw-2. She offered a similar testimony in chief as that of Dw-1. In particular, she testified that, at the time of clearing cheques, the Defendant followed all established procedures while verifying the signatures of the Plaintiff's signatories and there was no negligence on the Part of the Defendant.

During cross-examination, Dw-2 admitted that, she was one of the witnesses who testified in Criminal case No.88 of 2016 in Kisutu Resident Magistrates' Court and that, she went to testify in respect of monies stolen from the Plaintiff's account held at the Defendant's Bank. She also admitted that, between her and Dw-1, she was the either the first person to do verification of payments followed by Dw-1 or vice versa. She stated that, what they do is to cross-check on the signatures and, that; she did the verification against the signature held in the Defendant's system, which is a scanned copy of the Specimen Mandate Card.

She also admitted that, she never used the hard copy of the Specimen Mandate Card. She, however, denied that, there was any practice of calling back on customer to verify a cheque but

admitted that, such was only done when there was insufficient amount of funds. Even so, she did admit that, other instances which would entail calling back a signatory for confirmatory purposes include when there is discrepancy on signatures. She said that, they only knew of the problem after the complaint by the Plaintiff but when they looked at their Bank System they were satisfied. She admitted that, at Kisutu RM's Court she did not tell the Court that the Plaintiff was negligent.

During re-examination, Dw-2 told this Court that, by then the Defendant used to look at the signatures kept in her system and whether the cheque was for the amount stated, stamped and endorsed at the back, and, whether it was signed according the mandate, its validity date and the amount in words and figures.

At the end of the day, the Defence case came to a closure and the learned counsel for the parties prayed for time to file closing submission, which they duly filed. I will, thus, consider their submissions as well and the testimonies and the documentary materials tendered in court before I render my verdict. However, before I analyse the evidential materials laid before me, let me reiterate some few basic principles worth noting.

In the first place, it is a cardinal principle that, whoever alleges must prove. Section 110 and 111 of the Evidence Act, Cap.6 R.E 2019 and a host of cases, both reported and unreported, do affirm to that. See, for instance, the case of **Jasson**

Samson Rweikiza vs. Novatus Rwechungura Nkwama, Civil Appeal No.305 of 2020 (unreported). In that case, the Court of Appeal, citing with approval its earlier decision in the case of **Paulina Samson Ndawavya vs. Theresia Thomasi Madaha,** Civil Appeal No. 45 of 2017 (unreported), was of an emphatic view that:

> "...the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason...Until such burden is discharged the other party is not required to be called upon to prove his case. The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party..."

Secondly, unlike in criminal cases, where proof is to be established beyond reasonable doubt, proof in civil cases, as in the suit at hand, is only done on the balance of probability. In the

same case of Jasson (supra) the Court of Appeal did cite with approval the English case of **Miller vs. Minister of Pensions** [1937] 2 All. ER 372 in which, it was stated that:

> "If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly\ but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other; then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in civil case. That degree is well settled. It must carry a reasonable degree of probability, but not so high as required in criminal case. If the evidence is such that the tribunal can say- We think it is more probable than not, the burden is discharged, but, if the probabilities are equal, it is not..."

Thirdly, it is trite, as a matter of law, that, when any part raises or relies on negligence, such fact must have been pleaded, particularized and must be proved. This was emphasised by this

Court in the case of **East Coast Oils and Fats Ltd vs.TBS, TRA and AG**, Commercial Case No.1 of 2020 (unreported).

In that above cited case, this Court, citing the decision of the Nigerian case of **Bububakar & Another vs. Joseph & Another** (SC 10/20020[2008]9 (06 June 2008) and, stated that:

> "He who pleads negligence should not only plead the act of negligence, but should also give specific particulars .... In a case of negligence the facts which gave rise to the negligence must be comprehensively and delicately pleaded. The facts must be pleaded in minute details almost to the letters of the alphabet. Nothing should be left unpleaded...."

Guided by the above principles, let me now proceed in resolving this matter at hand. In this case the first issue which I am called upon to establish is as follows:

> Whether the 111 cheques paid in favour of Stanley Murithi Mwaura and Stano Enterprises were forged.

First, let me state here that, although the issue was agreed to be in reference to 111 cheques, in Court only 99 cheques were tendered as **Exh.P1**. That being stated, however, it does not mean that, such will have effect in what I am about to consider under

this first issue, i.e., the question about forgery and the clearance of the alleged forged cheques.

In her closing submissions, the learned counsel for the Defendant has reiterated the principle regarding burden of proof and she has correctly made it out that, the burden of proving that, the 111 cheques presented for encashment were forged, lies on the person who alleges, i.e., the Plaintiff. The Counsels for the Defendant have, as well, correctly submitted that, since the allegations involve issues of fraud which is akin to a crime, the Plaintiff's duty to prove is slightly beyond the normal standard in civil cases.

That is a correct position of the law stated in the case of **Hidaya Ilanga vs. Manyama Manyoka** [1961] EA 705. In that case, the Court was of the view that:

> "...in all cases where an allegation is made in civil cases akin to a crime such as fraud, proof must be more than mere balance of probabilities."

If I may add, in civil cases, the more serious the allegation the higher the degree of probability required; even though it needs not, in a civil case, reach the very high standard required by the criminal law. The case of **United Africa Press Ltd vs. Zaverchand K Shah** [1964] 1 EA 336 does also lay emphasis on that. In that case the Kenyan Court of Appeal, citing the case of

Doe D. Devine v. Wilson (1855), 14 E.R. 581, was of the view that:

> "If indeed, by the pleadings in a civil case, a direct issue of forgery or not be raised, the onus would lie on the party asserting the forgery, and this would be more like a criminal proceeding, but even then the reasons for suffering a doubt to prevail against the probabilities, would not, in their Lordships' opinion, apply."

That being said, the question that follows is whether the Plaintiff has been able to discharge its burden of proof to the higher levels or degrees of probability given the serious nature of the allegations. To find out, one has to analyse the kind of evidence tendered by the Plaintiff in support of an affirmative finding in respect this issue. In an endeavour to prove the first issue to this suit, Pw-1 tendered in Court 99 cheques which were admitted as **Exh.P1**. These were part of those alleged to have been forged.

According to the Plaintiff, the cheques (**Exh.P1**) were forged cheques and, in an attempt to prove that such were forged cheques, Pw-1 testified and told this Court that, the issue of forgery was reported to the Police and a **Criminal case, No.88 of 2016** was filed at Kisutu RM's Court and, one Stanley Murithi Mwaura was found guilty and was convicted of, among other

offences, the offence of forgery and obtaining money by false pretence.

Tendered and admitted in Court as **Exh.P4** were two judgements, one being the Judgement of the trial Court and the other one being that of the first appellate Court which upheld the trial court's findings. This Court is privy, as well, and acting under section 59 (1) (d) of the Evidence Act, do take judicial notice of the fact that, the said Stanley Murithi Mwaura appealed to the Court of Appeal and, recently, the Court of Appeal handed down its judgment (in **Stanley Murithi Mwaura vs. Republic**, Criminal Appeal No.144 of 2019) dismissing his appeal in its entirety.

In their closing submissions, the learned counsels for the Defendant have submitted in respect of the value of **Exh.P4** that, being judgements in criminal case, they do not bind this Court in civil proceedings. That is indeed a correct position of the law and I am alive to it.

In essence, every judgement is peculiar on its own since each is based upon the facts of each particular case and, further, that; a judgement in a criminal case is not the same as one in civil suit, even though the same may be arising out of the same facts.

However, when a judgement in a criminal case is tendered in Court as part of evidence, it has some relevance to it. In our jurisdiction, its relevancy to the respective suit in which it was tendered will be considered in the light of what section 43A of

the Evidence Act, Cap.6 R.E 2019. That position was firmly reflected in the case of **Charles Christopher Humphrey Richard Kombe t/a Humphrey Building Materials vs. Kinondoni Municipal Council,** Civil Appeal No.125 of 2016 (unreported). The section 43A of Cap.6 R.E 2019 provides as follows, that:

> **"A final judgement of a court in any criminal proceedings shall,** after the expiry of the time limit for an appeal against that judgement or after the date of the decision of an appeal in those proceedings, whichever is the latter, **be taken as conclusive evidence that the person convicted** or acquitted was guilty or innocent of the offence to which the judgement relates."

In **Christopher Humphrey's case** (supra), the Court of Appeal considered the provision and held a view that, the section (i.e., section 43A of Cap.6) is too plain to admit any other construction than what it says. The Court held a view, therefore, that, a trial Court in subsequent civil proceedings is not bound by either conviction or acquittal in a criminal case based on the same facts.

However, my careful reading and understanding of the judgement of the Court of Appeal does not tell me that, the learned Justices of the Court of Appeal ruled out the relevancy of

previous decisions in criminal proceedings when such are considered in any subsequent civil case based on the same facts. If that was to be the position, which I believe it is not, then, such would have rendered section 43A of the Evidence Act, Cap.6 R.E 2019 useless.

In my view, therefore, **Exh.P.4** (and the subsequent judgment of the Court of Appeal for which this Court has taken judicial notice of it) (collectively) are relevant and conclusive evidence of the fact that, Mr Stanley Murithi Mwaura was convicted and, that, his conviction was based on, among others, the proof that, he had forged a signature of one of the signatories of the Plaintiff to obtain monies from the Plaintiff's account.

In other words, and taking into account **Exh.P4**, I gather, **firstly**, that, there being now a final judgment of a Court of Appeal concerning the allegations of forgery of the 99 cheques tendered in Court as **Exh.P1**, there is already in place a conclusive evidence, but conclusive only to the extent or in respect of the fact that, Mr Stanley Murithi Mwaura was convicted of among others, the offence of forgery of the 99 cheques, which were as well tendered before this Court as **Exh.P1**.

But that fact alone does no more than proving that Mr Stanley Murithi Mwaura forged cheques and obtained monies from the Plaintiff's account illegally. Stated otherwise, it prima facially tell us that the cheques tendered as **Exh.P1** were held by

the Court as having been forged and monies from the Plaintiff's Account were debited and credited in Mr Stanley Mwaura's accounts held at KCB Bank and Equity Bank (T) Ltd.

However, that prima facie evidence in itself is not and cannot be conclusive evidence in this subsequent civil case and cannot solely be relied upon to conclude that the cheques submitted, i.e., **Exh.P1** in this civil suit, were forged cheques. More proof will, therefore, definitely be needed and, the burden of proving that the cheques were indeed forged still lies on the Plaintiff.

In that regard, the central question that demands a concrete response is whether the Plaintiff has been able to discharge that requisite burden (both legal and evidential) to the required standards. This Court is, therefore, bound to make a finding to that effect, depending on the evidence which is laid before it by the Plaintiff who, in accordance with what sections 110 and 111 of the Evidence Act provide, has the duty or bears the burden of proof.

In effort to provide such proof, apart from tendering **Exh.P4** in Court and alleging that the 99 cheques (**Exh.P1**) were forged, the Plaintiff moved to a **next level** or **second** step of calling Pw-2 (a forensic expert), and Pw-3 (the person whose signature was at issue). I have had time to assess the testimony of Pw-2 and Pw-3 who testified before me. In my view, the

testimony of Pw-2 and Pw-3's brought in or rather infuse more cogency and potency to the Plaintiff's case.

To begin with, in her testimony, Pw-3, whose signature was the one at issue as having being alleged to be forged, did testify before this Court that, her signature was forged and she never signed the cheques tendered as **Exh.P1**. That oral testimony of hers, was corroborated by the testimony of Pw-2 who tendered in Court a forensic report (**Exh.P6**) which established that, Pw-3's signature was at variance with the signature appearing on **Exh.P1**, meaning that, the signature on **Exh.P1** was not her own signature.

I do take note of the Defendant's contention that, the signature in the cheques (**Exh.P1**) was similar to the specimen signature in the possession of the Defendant's system. The learned counsel for the Defendant has contended that, the alleged specimen signature from the system was 'purportedly removed from the **Exh.P6**.

In my view, however, such a contention by the counsels for the Defendant is an untenable afterthought because, nothing of that sort was raised by the Defendant's counsels in the course of trial before this Court and, to add salt to the injury, the Defendant never raised any objection to the admissibility of **Exh.P6**, leave aside the alleged fact of mutilation or removal of part of it, which, had it been raised, would have placed a shadow of doubt on the reliability of **Exh.P6**.

Moreover, looking at **Exh.P6**, the disputed signature and the specimen signature of Pw-3, which Pw-2 rendered explanations regarding their differences, are within **Exh.P6**. In his testimony, Pw-2 did tell the Court that his comparison of signatures was not based on the specimen from the signature specimen card in the Bank but specimen signature of Pw-3 taken for comparison with the signatures on **Exh.P1**.

Besides, since the Plaintiff called to her aid expert witness who established that, the signatures of Pw-3 in **Exh.P.1** were forged and, thus, made out a prima facie case that **Exh.P1** were forged cheques, the evidential burden shifted to the Defendant who ought to have proved that the purported signatures on **Exh.P1** alleged to be of Pw-1 were not forged signatures but similar or corresponded with the mandate specimen signatures which was withheld in the Defendant's own system or the specimen card which Pw-1 and Pw-3 signed when they opened the Plaintiff's account.

In essence, once the party bearing the *onus* of proof has made out a *prima facie* case, his opponent is burdened with an *onus* of rebuttal. Should s/he fail to discharge this *onus* of rebuttal, the *prima facie* evidence would be regarded as sufficient evidence for purposes of discharging the main *onus* of proof. See, for that matter, the South African case of **Senekal vs. Trust Bank of Africa Ltd** 1978 (3) SA 375, at 382-383A.

Put differently, it is the Defendant who should have now tendered evidence, be that of the specimen signature it keeps in the bank or otherwise, to discredit the evidence of Pw-2. In my view, the failure on the part of the Defendant to tender in Court such evidence, which evidence was in its own possession, entitles this Court to draw adverse inference on the Defendant in whose custody such evidence was.

Finally, are the testimonies of Dw-1 and Dw-2 who readily admitted in Court that the 111 Cheques (including those presented as **Exh.P1**) were indeed cleared in favour of Mr Stanley Murithi Mwaura and Stano Enterprises. During cross-examination, Dw-2 did expressly admit that, she did not tender the hardcopy of the specimen signature or mandate form in Court.

The duty to tender the hardcopy of the specimen signature or mandate form in Court as counter evidence to the fact already substantiated by proof that the signature of Pw-3 was forged was now the duty not of the Plaintiff but the Defendant through Dw-1 or Dw-2. I shall further elaborate on that, below, but in my humble view, up to that extent, it is all clear to me that, the Plaintiff's evidential burden regarding the fact that the cheques were forged, was rightly discharged.

In view of the above considerations, it is my conclusive findings, therefore, that, despite the Defendant's mounted denial that the forgery was not proved, all the three points above

combined, firmly discharge the Plaintiff's elevated burden of proving that the cheques were forged and, for that matter, the 1st issue herein is affirmatively answered.

The **second issue** was premised on the question whether the Defendant had acted negligently. The issue was framed as follows:

> Whether the bank acted negligently in paying the cheques in favour of Stanley Murithi Mwaura and Stano Enterprises.

As it may be gathered from the Plaintiff's pleadings, the Plaintiff has raised both the issue of breach of contract and negligence. Ordinarily, one may indeed blend the two legal phraseologies "breach of contract and negligence" especially when dealing with an issue questioning the professional conduct of a party to a suit. The allegations of breach of contract and negligence, therefore, suggest existence of a violation of the terms of a contract by failing to carefully carry out one's contractual obligations.

It is also worth noting that, negligence is a tort, and, in an action for negligence, it is as well competent to allege and prove the existence of a contract for the purpose of showing the relationship of the parties, out of which arises the common law duty to use ordinary care. In this respective suit, the Plaintiff has alleged that, the Defendant had acted negligently in such a way that her conduct was in breach of its obligations under the contract between the parties, and facilitated a fraud which

occasioned huge and specific loss amounting to a total of **TZS 2,395,518,977.38**.

The particulars of such a breach and negligence were set out in paragraphs 6 and 7 of the Plaint and I see no need to reproduce them here. Suffices it to state that, such particulars were given and negligence was pleaded, hence, the same is in line with the principle I earlier intimated here above as expounded in the case of **East Coast Oils and Fats Ltd** (supra).

In approaching the 2nd issue, therefore, two things need to be established namely:

> (a) whether there was any contractual relationship between the Plaintiff and the Defendant and, if so, was it breached?
>
> (b) If the first question will be in the affirmative, then the next will be whether the breach of it was due to any negligent conduct of the Defendant.

I will commence my discussion by looking at the first question which I raised in relation to the 2nd issue, i.e., ***whether there was any contractual relationship between the Plaintiff and the Defendant and, if so was it breached?*** Ordinarily, when a customer opens a bank account, there is established a bank-customer relationship. In this case, it is an undisputed fact that, since 2011, the Plaintiff maintains and operates a Bank Current Account, **No.001000143673**, with the Defendant Bank at Masdo

Branch in Dar-es-Salaam. The message which one gleans from this undisputed fact is, therefore, that, the parties had a contractual relationship.

However, it is worth noting that, although such a bank-customer relationship is of contractual nature, their contractual relationship is not an ordinary one. That fact was emphasized by this Court, in the case of **Equity Bank Tanzania Ltd vs. Jonnelly TZ Company Ltd,** Civil Appeal No.37 of 2020 (HC) (unreported).

Citing Q.C. Ross Cranston, in his book titled **Principles of Banking Law,** 2nd Edition, Published by Oxford University Press, UK ISBN: 9780199253319, October 2002, at page 133, this Court noted that:

> "Central to the bank-customer relationship is contract. ... **The banking contracts are slightly different from other legal contracts based on the unique relationship** between the customer and the bank in payments, rescheduling, and so forth." (Emphasis added)

A discussion concerning the nature of a bank-customer's relationship was also aptly explained by His Lordship Galeba, J.A, in the case of **Ecobank Tanzania Ltd vs. Future Trading Company,** Civil Appeal No.82 of 2019 (Unreported). In that

case, the Court of Appeal stated, at pages 27-28 of the typed judgement, that:

> "... in banking the relationship of a banker and its customer, is a fiduciary one. The banker is a trustee and the customer, a beneficiary. This is because of the massive control that a banker has over the depositor's funds and the unfettered prerogative it has to use the money without consulting its owner vis-a-viz almost no powers that a customer remains with. The latter position, into which a customer is placed by the relationship, attracts in its favour immense protection of both the law and the courts. The upper hand that the bank enjoys with the money brings it within the grip of section 115 of the Evidence Act in circumstances where there is a state of uncertainty as to the money's security or availability. That section provides that: "In civil proceedings when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him". **The point we want driven home is that, it was upon the appellant**

> **bank to prove that it was not at fault in the disappearance of the respondent's funds, because it was the sole custodian of the money.**" (Emphasis added).

Moreover, in the case of **London Joint Stock Bank vs. Macmillan and Arthur** [1918] AC 777 (HL), Lord Finlay LC was also of the view (at 789), that:

> "The relation between banker and customer is that of debtor and creditor, with a super added obligation on the part of the banker to honour the customer's cheques if the account is in credit. A cheque drawn by a customer is in point of law a mandate to the banker to pay the amount **according to the tenor of the cheque.**" (Emphasis added).

From the above cited cases, I am in a respectful agreement that, the law treats the relationship between banker and customer as being contractual in nature and, that, the parties herein were in a contractual relationship. The next step to establish, therefore, is whether there was any breach of such a contractual relationship by the Defendant bank.

Essentially, breach of contract is a material non-compliance with the terms of a legally binding contract. In the banking business scenario, breach of mandate does not only

arise because the bank has wrongly refused to make a payment but may ensue from different scenarios.

One of them is failure on the part of the banker to take care of the property deposited by the customer with or without charge as it is the duty of the banker to look after the property, or failure on the part of the bank to put up with any mandate a customer gives e.g., when the bank has wrongly made a payment without proper authority.

In the present case at hand, the second scenario applies. It was the testimony of Pw1 that, the Plaintiff and the Defendant had a signed payment agreement (Mandate) which was signed when the Plaintiff opened its account with the Defendant and signed the specimen signatures and, that, they even inserted their biometric marks on the specimen card.

The problem which Pw-1 raised on the part of the Defendant, however, is that, the Defendant's act of clearing the 111 cheques in favour of Stanley Murithi Mwaura and Stano Enterprises was done contrary to the signing mandate. If so, was that act one amounting to breach of contract on the part of the Defendant? In my considered view, it was an outright breach of the bank-customer contractual relationship. I will explain further.

In the **first** place, it is on record that, the Plaintiff signed and, the Defendant kept in her custody, a Signature Specimen Card which had the Signature Mandate whereby the Plaintiff and the Bank agreed that only the two directors of the Plaintiff (Pw-1

and Pw-3) shall together sign, if any amount was to be withdrawn from the Plaintiff's account.

However, from the testimonies of and the evidence tendered in Court by Pw-1 (**Exh.P-1** and **Exh.P4**), and Pw-2 (**Exh.P6**) and Pw-3, all these witnesses established that, **Exh.P1** had a forged signature of Pw-3. Despite such a fact, it is on record that, when **Exh.P-1** (the forged cheques) was/were presented by Mr. Stanley Murithi Mwaura and Stano Enterprise, the Defendant cleared them and monies were debited from the Plaintiff's Account.

In my view, in every issued cheque the Bank (Defendant) had a duty to ensure that its signatures conforms to that which was/is on the specimen signature form issued to and kept by the Defendant Bank. Failure to do so will, in my humble view, constitutes a breach of mandate which, in essence, is a breach of the bank-customer contractual relationship.

To bolster that point of view, I am fully persuaded by the decision of **Van Zyl, J.**, in the case of **Di Giulio vs. First National Bank of South Africa Limited** (A1080/2001) [2002] ZAWCHC 33 (19 June 2002) who stated, at paragraph 22 as follows, that:

> "Who and under what circumstances a person may be authorised to sign a cheque on behalf of the client must necessarily be contained in the

contract of mandate underlying the relationship between the client and the bank. **If, as in the present case, a list of persons with such signing powers is furnished to the bank, it in fact becomes part of the mandate. Should a cheque then not bear an authorised signature or signatures, as the requirement may be, the bank would be acting in breach of the terms of the mandate if it should honour such cheque and debit the client's account with the amount thereof.**" (Emphasis is mine).

In the case of **International Commercial Bank Ltd vs. JADECAM Real Estate Ltd**, Civil Appeal No.446 of 2020, (CAT) [unreported], the Court of Appeal of Tanzania did provide a somewhat similar position as above. In that case, the Court has an opportunity of considering, among other things, instructions given by a Respondent Client to the Appellant Bank, and which the latter never adhered to.

In short, the Court of Appeal of Tanzania had the following to say in view of that non-adherence to the client's previously issued instructions:

"One of the long established rules governing the relationship between a banker and its customer

> requires the bank to act on its customer's instructions. See for instance: Sheldon and Fidler's Practice and Law of Banking 11th Edition at Page 49. The Appellant was bound to act on the Respondent's instructions failing which; she did so at her own risk."

From the foregoing discussion, therefore, it is my respectful view that, by clearing the cheques which were bearing one unapproved signature as per the mandate, the Defendant was in breach of the contract. In their defense Dw-1 and Dw-2 stated that, the cheques were cleared because at all times the signatures were verified as against the specimen signatures held in the Defendant's system and were found to be okay.

However, these witnesses (Dw-1 and Dw-2) did not testify that way before the Kisutu Magistrates' Court or present a denial that the alleged forgery did not take place. It is on the basis of their testimonies and other material evidence that Mr Stanley Murithi Mwaura was convicted of forgery, among other offences. As such, their current denial does very much cast a shadow of doubt on their credibility as well since they are the same people who testified before the RM's Court at Kisutu.

Such a dramatic shift of the position even if this be a civil case and not a criminal case as the one at the RMs Court where they appeared as witness, also raises my eyebrows because, Dw-1

and Dw-2 never submitted in this Court, evidence of the Specimen Signature which they used to make their comparative verifications.

To my understanding, that was a fact within own knowledge and, it is now well established, as once stated by the Court of Appeal in the case of **Ecobank Tanzania Ltd vs. Future Trading Company** (supra), that:

> "The upper hand that the bank enjoys with the money [in a customer's account] brings it within the grip of section 115 of the Evidence Act in circumstances where there is a state of uncertainty as to the money's security or availability. That section provides that: "In civil proceedings when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him".

Put differently, I am of the opinion that, the fact that the alleged Pw-3's signature on **Exh.P1** was comparable to the one on the specimen form (card) held by the Defendant bank upon verification, as alleged by Dw-1 and Dw-2 in their testimony, was a fact within the knowledge of the Defendant. As such, the burden of proving it cannot be shifted to the Plaintiff but rest with the Defendant Bank.

In that regard, one would have expected evidence being lead by the Defendant to that effect, including production of the specimen card itself before the Court, but alas, as it is said of Shakespeare's proverbial account, "*expectation is the root of all heartache.*" The headache this Court was left with is that the Defendant never produced the specimen signature card alleged to be used by Dw-1 or Dw-2.

All said, the gist of the matter is that, the first question is fully established in the affirmative, i.e., the Defendant was in breach of its contractual obligation since; she had a duty to ensure that the authorized signatures of account holder tallies with the specimen recorded with the bank. Given that there is proof that the signature of Pw-3 was not the same as the one used on the forged cheques (**Exh.P1**), then, the Defendant cannot come out of the hook.

It should also be remembered that, in the case of **London Joint Stock Bank Limited** (supra), the Court stated that, a cheque drawn by a customer is in point a mandate to the banker to pay the amount "**according to the tenor of the cheque**". The apparent tenor of the cheque here includes its drawer's signature as well. When clearance is effected contrary to that mandate, then a breach is occasioned. Having so stated let me proceed on to examine the second part of the second issue.

The second part of issue number 2 was that, if the first part was affirmatively responded to, **whether the breach of it was**

due to any negligence on the part of the Defendant. The Plaintiff has maintained, through the testimony of Pw-1 and Pw3 that, the Defendant's employees Dw-1 and Dw-1, acted negligently. However, the Defendant, through the testimony of Dw-1 and Dw-2, has denied that. Now, was the Defendant negligent?

In law, negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. In essence, three things need to be established to hold someone liable on negligence. These are

1. presence of a legal duty to exercise due care on the part of the party complained of towards the party complaining the former's conduct within the scope of the duty;
2. Breach of the said duty; and
3. consequential damage that flows from it.

In this present suit, I have established, in the first limb of the 2nd issue that, the Defendant had a duty of care which arose out of the contract of banking she had with the Plaintiff. The Plaintiff has alleged that, such obligation was breached as the Defendant's employees carelessly cleared 111 cheques contrary to the mandate.

In her Written Statement of Defence, the Defendant has denied that her employees acted negligently. She stated in paragraphs 4 and 6 thereto, that her officers (Dw-1 and Dw-2) had "**double checked the signatures appearing on the specimen signature card** (form)" maintained in her system and "**made a call back for verification**" before transferring funds.

The Defendant stated as well in her defence that, her officers namely Grace Wang'anyi (Dw-2) and Doris Swai Mallya (Dw-2)"at all time of clearing the cheques followed all proper procedures while verifying the said signatures and made a call to Directors/shareholders of the Plaintiff, namely Vida Zakaria Hamil and Ahmed Zakaria Hamil for further verification before debiting the Plaintiff's account."

However, in their testimonies in chief and during cross-examination, Dw-1 and Dw-2 told this Court a completely different story on the aspect of calling back the signatories for verification purposes. Their story on that aspect was contrary to what the Defendant stated in paragraph 4 and 6 of the Defence filed in this Court. In law, it is an established principle that, parties are bound by their own pleadings.

The case of Paulina **Samson Ndawavya vs. Theresia Thomas Madaha,** Civil Appeal No.45 of 2017 (CAT) (unreported) does establish that point. Besides, in a more recent case, the case of **Tom Morio vs. Athumani Hassan & Others**

(Civil Appeal 179 of 2019) [2022] TZCA 114 (16 March 2022) the Court of Appeal noted that:

> "Knowing that parties are bound by their pleadings as stated in the case of Scan-Tan Tour Ltd v The Catholic Diocese of Mbulu, Civil Appeal No. 78 of 2012 (unreported), the 1st respondent was thus expected to lead evidence supporting the averments in the pleadings. ....The pleadings and later on his evidence rendered the 1st respondent's pleadings questionable since the averment in the pleadings and evidence were at variance and easily led to a conclusion that the averment was a fabricated story, if not a pure lie."

The above holding equally applies to the case at hand. In particular, the Defendant was expected to lead evidence in Court consistent with her pleadings. The Plaintiff on the other hand, did establish, through the testimony of Pw-1 and Pw-3 that, their mobile phone numbers were availed to the Defendant when the Plaintiff opened her bank account with the Defendant and, that, they were never called back by Dw-1 or Dw-2 when the cheques were being cleared. That testimony remained intact or unchallenged by the Defendant.

It is also on record, however, that, Pw-3 told this Court that, since April 2021 the Defendant Bank started to call back Pw-3 before clearing any of the Plaintiff's cheques. Had the Defendant done so since 2011, this being a practice which any reasonable banker would do especially when there is clearance of large sums of money, the fraudulent incident which ravaged the Plaintiff's account would have been averted.

It is clear, therefore, that, failure on the part of the Defendant to call and verify the signatures on **Exh.P1** was a gross inadequacy that falls short of established banking standards. As I stated earlier herein, citing the decision of the Court of Appeal in **Ecobank Tanzania Ltd vs. Future Trading Company,** (supra), the Court of Appeal held a view that, since the relationship between a banker and customer is a fiduciary one:

> "... The ... position, into which a customer is placed by the relationship, attracts in its favour immense protection of both the law and the courts. ..The point we want driven home is that, it was upon the appellant bank to prove that it was not at fault in the disappearance of the respondent's funds, because it was the sole custodian of the money." (Emphasis added).

In the context of the above bolded wording by the Court of Appeal in the Ecobank's case (supra), it is clear therefore, that, the Defendant could only be cleared from being at fault if evidence was led to that effect, which evidence would have included the specimen card held by the Defendant which Dw-1 and Dw-2 said they relied on to clear the cheques. However, as I stated earlier above, that piece of evidence was not brought before the court to counter the evidence of Pw-1, Pw-2 and Pw-3 despite the fact that, a copy of it was attached to the Written Statement of Defence.

Since an exhibit attached to pleading do not automatically form part and parcel of court's exhibits, the annexed specimen was of no use to me. Besides, and, as I stated herein earlier, the non-production of the specimen card permits this Court to draw a negative adverse inference on the part of the Defendant. That is to say, the Defendant well knew that, the signature on the specimen card was not similar to those signatures on **Exh.P1**.

On that point, I am fortified by the case of **Meek vs. Leming** [1961] 3 All ER 148 in which the Court was of the view that, any Court is entitled to draw an adverse inference against a party who deliberately conceals a vital document. Indeed, as the Plaintiff's learned counsel submitted in his closing submissions, had such specimen card been submitted, this Court could have relied on section 75 of the Evidence Act, Cap.6 R.E 2019 to appreciate the two disputed signatures.

There was, as well, no evidence that, Dw-1 or Dw-2 called back on the Plaintiff's signatories to verify any of the signatures in **Exh.P1**. The Defendant had the phone numbers of the signatories as testified by Pw-1 and Pw-2 and that was nowhere disputed. In the case of **Shalimar Flowers Self Help Group vs. Kenya Commercial Bank**, Civil Cause No.17 of 2015, the High Court of Kenya was of the view that:

> "... a bank has a duty under its contract with the customer to exercise reasonable care and skills in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skills is an objective standard applicable to bankers.... I will thus hold a view that, where a bank is faced with a cheque from a body corporate or government, the bank duty to inquire into the validity of the cheque goes beyond the mere signatories to the cheque and beyond the paying bank and customer."

The above holding of the Kenyan Court is sound and I readily associate myself with it as that is what every reasonable banker would do and that is also what any prudent customer of any bank would expect from her banker.

From the foregoing discussion, therefore, I am satisfied that the Defendant's failure to take all necessary precautions, including calling back the signatories of the Plaintiff to confirm or verify each of the cheques before authorizing payments constituted negligence and a flagrant breach of her duty to act with reasonable care and skills. The second issue is consequently responded to in the affirmative.

The third issue is:

> whether there was negligence on the part of the Plaintiff in handling the cheque book.

In her testimony, both Dw-1 and Dw-2 testified that, the Plaintiff was negligent in handling the cheque book, hence, making it easier for the incident of forgery to take place. The gist of their testimony was that, Pw-1 used to sign blank cheques leaving them and the cheque book with Pw3.

In principle I do not think their testimony will support their allegation of contributory negligence on the part of the Plaintiff. I hold so because, the Plaintiff's signatories who had the mandate to authorise payments are/were two (i.e., Pw-1 and Pw-2) and, the mandate to clear any cheque was dependent on such a cheque having been duly signed by the two signatories.

It will also be noted that, when Dw-1 was cross-examined regarding whether the Bank had ever received a blank cheque or one signed by a single signatory, Dw-1 remained silent. Indeed, there was no evidence that both signatories used to sign blank

cheques leaving them open for someone else to fill whatever amount s/he wished. Had it been so, that would be a different story.

Likewise, there was no evidence that the mandate to sign was for any of the signatories but, the fact remained that, no payment could be made in the absence of the two signatures of both Pw-1 and Pw-3.

I also find it worth citing the English case of **The Kepitigalla Rubber Estate Limited vs. The National Bank of India** [1909] 2KB 1010 where the Court was of the view that:

> "It is the duty of the customer of a bank in issuing mandates to the bank to take reasonable care so as not to mislead the bank; but beyond the case that must be taken in or immediately connected with the transaction itself, there is no duty on the part of the customer to take precautions in the general course on his business to prevent forgeries on the part of his servants." (Emphasis added).

In my view, it is also a losing battle to say that the Plaintiff was negligent in not discovering the fraud earlier enough given that each month a Bank statement was issued. As Pw-1 testified, even though he used to receive bank statements each months, he was not a professional person who could interpret it and that is why the Plaintiff hired a professional accountant to deal with

such matters relating to the handling of accounting and bank reconciliation matters.

All in all, the fact remains that, fraud was detected and the culprit who perpetrated it was convicted. That fact, nevertheless, does not warrant the Defendant to act negligently in performing its duties or act without reasonable care and skills.

Perhaps I should refer to the Indian case of **Canara Bank vs. Canara Sales Corp. & Another**, AIR 1987, SC 1603 reported (1988) LRC (Comm) to drive home that point. In that case, whose facts are more or less similar to the facts in case, the Chief accountant of the account holder maintained the company's account and had custody of the cheque books, forged 42 cheques for a total of **Rs 326,047.92.** Upon discovering the fraud, a suit was filed against the bank for wrongfully encashment of the aforesaid cheques.

In its defence, the Bank contended that, the Company should be stopped from claiming the amount because of its own negligence and because it acquiesced in, and ratified the payments. The bank had also argued that, for the whole period of 4 years the Company never raised a complaint or any objection even though it received monthly Bank Statements.

In the course of its deliberations, the Indian Supreme Court rejected the Bank's arguments and, held that, the Bank could only escape liability if it could establish that the Company knew of the forgery. On the issue of delayed discovery of the fraud despite

receiving the bank statements monthly, it was the Courts view that, inaction of a customer does not by itself give a leeway for the bank to escape its liability.

In view of that Indian persuasive authority, the only way the Defendant Bank in this suit can escape liability is if it shows that the Plaintiff was aware of the fraud but acquiesced with it or establish some other voluntary acts that caused the Defendant to be misled when clearing the cheques. If, for instance, it was established with certainty that the Bank called back on the signatories for confirmations and they misled the Defendant bank, then, that would have been a different story to tell altogether. However, nothing of that sort was established.

Taking into account all what I have laboured to discuss here above; I do find that, the third issue is to be responded to in the negative. The Plaintiff cannot in any way possible be held to have contributed to her fate. By the way, nowhere also in the Defendant's defence was any defence of contributory negligence was pleaded. The principle remains that, if contributory negligence is relied upon as a defence, it shall be affirmatively pleaded by the defendant or defendants, and the burden of proving such contributory negligence shall rest upon the defendant or defendants.

The final issue is: ***To what relief are the parties entitled?*** In my view, the Plaintiff has discharged her burden of proof to the requisite standards and is entitled to reliefs. However, there is

more to say on the kind of reliefs the Plaintiff is entitled to get. In her plaint the Plaintiff has prayed for a number of reliefs, one of them being **"opportunity costs"** due to fraud perpetrated on its account.

A discussion regarding opportunity costs is a discussion governed by the doctrine of loss of chance. In essence, "opportunity costs" are basically a category of costs falling under the class of "special damage" or "consequential" damage. In law, "special" or "consequential" damages must be **strictly proven** and **pleaded specifically**, failure of which they will be rejected. In this case, the Plaintiff did specifically plead for opportunity costs. However, was such strictly proven?

It is worth noting that, the wording "strictly proven" means that, the Plaintiff bears a stricter burden of proof to discharge if his claim is to sail through. In essence, losses of chance questions are assessed in two stages. In particular, the Plaintiff must satisfy this Court as regards the "causation of the damages" or a "but-for-test" as well as satisfying the Court over the issue of "quantum of damages".

Under the first limb, there has to be a demonstration of whether the chance would have been taken in the first place, but for the breach and, the Plaintiff will need to establish that s/he would have taken the chance on the balance of probabilities. Failure to discharge the two requirements will disqualify the claim for opportunity costs.

In an effort to prove opportunity cost, the Plaintiff called Pw-4 to testify. In my view, however, the testimony of Pw4 cannot support the amount claimed to be loss resulting from opportunity cost. I hold so because, what Pw-4 submitted as **Exh.P7** was based on remote futuristic assumptions which are purely matters of chance.

I find it also worth noting, however, that, while I do share a view that all calculations of damages by courts are hypothetical, and if one was to define opportunity costs as amounting to what would have been if the Defendant had not committed a blameworthy act, still the question of proof of what would have been and the evidentiary burden to strictly establish it to its requisite standard, is inescapable. Ordinarily, the Plaintiff must show and convince the Court that, it was more probable than not that the Defendant's breach or omission caused the loss of opportunity of the extent claimed by the Plaintiff.

However, it will not be of any help to portray the Plaintiff's loss as a chance that could have taken place compared to where the Plaintiff explain it from a pragmatic approach in terms of, let's say a past record of business activities which were crippled because of the Defendant's act or omission. Such past records are more certain in predicting the future than a mere chance that is absolute hypothetical or presumptive.

Perhaps I should borrow a leaf from Hamer, D, 1999, **"Chance Would be a Fine Thing: Proof of Causation and**

Quantum in an Unpredictable World" [1999] 23 M.U.L.R, page 557 at 562, who stated that:

> "While the past appears dead, fixed and closed, the future is seen as living, plastic and open. The future appears governed by chance, but there is no chance about the past. A putative past event has either happened or not happened. Consequently, we may feel certain that it rained yesterday while only having in mind the probability of it raining tomorrow." (Emphasis added).

What I gather from the above quote in relation to the issue of opportunity costs claimed by the Plaintiff is that, a merely hypothetical or presumptive trajectory of what the Plaintiff could have earned in future cannot be used on its own to prove, with certainty, that, such could have been earned. Rather, and in essence, the evidence which this Court would require is one that is concrete or tangible, let's say, from the past records of a similar kind of investment portfolio.

It means, therefore, that, the issue whether the Defendant caused or was to blame for the consequential presumed losses presumed to be suffered by the Plaintiff may not just be easily established in the manner Pw-4 seems to put it. That being the case, I am of a firm view, as well that, even if **Exp.P7** may be relied on to establishes a possibility that the Defendant's breach

or tortuous conduct caused the loss in opportunity on the part of the Plaintiff, on its own it is not enough evidence. In the case of **Alexander vs. Cambridge Credit Corporation Ltd,** [1987] 9 N.S.W.LR 310 at 319, the Court was of the view that:

> "in order to succeed it [is] necessary for the Plaintiff to show [and], **in the relevant sense,** [that] the Defendants' breaches caused the loss that they claim."

To me, if I contextualise the above quote in the present discussion, it means that, there must be an established or demonstrable causal link between the act or breach or omission complained of and the loss suffered as opportunity cost if the Court is to grant any relief. In relevant sense, such a causal link could be past evidence if such existed in the past and is evidenced by a past record of such an investments activity which was now constituting a denied or denial of opportunity to re-invest as what Pw-4 envisaged in **Exh.P7.**

In the case at hand, however, there is no cogent evidence tendered to show that the Plaintiff had any past record of investing in long term and risk-free government securities, which is the kind of investment portfolio chosen by Pw-4. Besides, even if such was the evidence, it is worth noting, as once pointed by one IMF Economist, Mr **Jose' Viñals,** Financial Counsellor and Director of the Monetary and Capital Markets Department of the International Monetary Fund (IMF), that: "*One thing is now very*

clear: government bonds are no longer the risk-free assets they once were."

From the above observations, it is as well be clear to me that, although Pw-4's calculations of lost chance or opportunity cost was derived from a proposition that investments in long term government securities was **"risk-free"**, given the current unpredictable global economic crisis that has persisted in various global markets to the extent of making long cherished principles to be sending many to their drawing boards, one would have expected an 'appreciable margin of risks', i.e., a "percentage of risk" in **Exh.P7,** which could have been based on the "current knowledge about security markets", bearing in mind what economic experts such as **Jose' Viñals** whom I have cited here above portrays.

I am also reminded of the words of Brennan and Dawson, JJ in the case of **Malec vs. J.C. Hutton Pty. Ltd** [1990] 169 C.L.R 638, that, "damages founded on hypothetical evaluations defy precise calculations." That being said, it follows, therefore, that, the Plaintiff has not ably discharged its strict burden of proving the consequential damages or opportunity costs she has claimed, and, for that reason I will decline from granting that kind of relief.

In its pleadings the Plaintiff did also plead for payment of general damages to the tune of TZS 200,000,000/=. In law, general damages are payable to a party who suffers due to breach

of contract but he must only plead such without prescribing a quantum since the quantum to be paid is paid at the discretion of the Court. See: for that matter, the cases of **Cooper Motor Corporation Ltd vs. Moshi/Arusha Occupation Health Services** [1990] TLR 96 and **Fredrick Wanjara, M/S Akamba Public Road Service Limited A.K.A Akamba Bus Service vs. Zawadi Juma Mruma**, Civil Appeal No. 80 of 2009 CAT [unreported].

In my view, therefore, the Plaintiff, having suffered in the hands of the Defendant as a result of the latter's breach of the agreed mandate, is entitled to payment of general damages.

In the final analysis, and save for what I stated here above in relation to the claim for "opportunity cost or lost chances", this court makes awards of reliefs to the Plaintiff which are to be paid to her by the Defendant as follows:

1. That, the Defendant is ordered to pay the Plaintiff **TZS 911,382,335.50** being the amount lost due to fraud occasioned by negligence on the part of the Defendant.
2. Payment of general damages amounting to **TZS 150,000,000.**

3. Interest on item No.1 above at a **commercial** rate of 14% per annum from the date of filing this suit to the date of judgement;
4. Interest on item No.1 and 2 above at a Court rate of 7% per annum from the date of this date of judgement to the date of full satisfaction thereof.
5. Costs of this suit are to be paid by the Defendant.

It is so ordered

Right of Appeal Explained.

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HON. DEO JOHN NANGELA
JUDGE