

3. Mr. Bahati Sam Director
4. Mr. Mugisha P. Dan Director

They were empowered to authorize all payments of the Association. The mandate to the Bank, especially as regards withdrawals of funds from the Account was to be by *“either of the 2 signatories”*. The General Secretary was to be the Principal Signatory. The opening of the Account No. 1510350275 actualised on 23/3/2002. The Plaintiff’s case is that on 29/9/2003, the Defendant wrongfully and negligently paid out Shs.50,000,000- on their Account thereby causing a loss to the Plaintiff. The Defendant’s case is that it acted prudently, honestly and carefully as a Banker in paying the cheque.

The following points are uncontested:

1. That the Plaintiff operated C/A No. 1510350275 in the Defendant Branch at Kasese.
2. That there were 4 signatories to the Account including Mugisha P. Dan, the Principal Signatory. He was also the General Secretary/Coordinator.
3. Shs.50m was deposited on the Plaintiff’s Account on 29/9/2003 by the Vice Chairman. It was by cheque. It was deposited at 11 a.m and withdrawn at 1 p.m, same day.
4. Mugisha P. Dan is now at large, being sought by police.

Two issues were framed for determination:

1. Whether the Defendant was negligent in paying a sum of Shs.50m out of the Plaintiff's Account.
2. Whether the Plaintiff is entitled to the reliefs sought.

Counsel:

1. Mr. Mugogo Edward for the Plaintiff.
2. Mr. Mubiru Stephen for the Defendant.

I now proceed to make a resolution of the above issues but before I do so, let me comment briefly on the term negligence.

It is a tort, actionable at the suit of a person suffering damage in consequence of the Defendant's breach of duty to take care to refrain from injuring him. In the words of Alderson B, in **BLYTH -VS- BIRMINGHAM WATER WORKS CO. (1856) 11 EX.**, at P. 784, it is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent reasonable man would not do. So negligence is really neglect of some care which we are bound to exercise towards somebody else. The degree of care which the law requires is that which is reasonable in the circumstances of each case. However, persons professing

a special skill must use such skill as is usual with persons professing such skill. The burden of proving negligence is on the party alleging it.

I now turn to the evidence as adduced by both parties. First, the Plaintiff's evidence.

PW1 Constantine Bwambale (52) is a businessman of Kasese and a member of Busongora Development Association Ltd, a micro finance institution which lends money to people in Kasese. He is its Vice Chairman. He is also a Vice Chairman of a sister company, Bakwanye Trading Company, which exports coffee and cocoa. The latter company lends money to the Plaintiff. Around 15/08/2003, the Plaintiff resolved that it borrows money to make its account operational. Money on the account had been lent out to farmers; they were not expecting funds soon; and yet their benefactors, the Donors, were about to visit them. So to make the Plaintiff's account operational, they borrowed money, Shs.50m, which they deposited on the account by cheque on 29/9/2003 in Kasese. The money was supposed to go back to Bakwenye Trading Co. Account as soon as the visit of the donors ended. The donors did not turn up as expected. The following day, he went to check on the Account and found that the money had been removed only two hours after it had been banked. He contacted the area Bank Manager who told him that the money was withdrawn by the Plaintiff's Secretary Manager from the Bank branch on Entebbe Road, Kampala. He ascertained that the whole amount of Shs.50m had been withdrawn from the account by Mugisha P. Dan, the

Plaintiff's Secretary General/Co-ordinator/Principal signatory to the account. He used a cheque purportedly signed by the said Mugisha and himself (PW1). Mugisha was believed to be an honest man before this incident. He had custody of the cheque book and company stamp. Their protection was the belief that signatories were honest people and that only cheques bearing genuine signatures would be honoured.

PW2 Ezati Samuel (46) is a handwriting expert. He was given the cheque in question and asked to determine the genuineness of the signature attributed to PW1 Bwambale. He came to the opinion that the two signatures appearing on the cheque attributed to Bwambale were not put there by hand. They were not original because they did not have evidence of fresh or live fluid ink or ball pen ink. He came to the conclusion that the signatures were copies of Bwambale's genuine signature, transferred to the cheque electronically. In his view, the impugned cheque was a built up document.

For the defence, DW1 Tumuhimbise Deus (46) was the Defendant's Manager in Kasese at the material time. On 29/9/2003 Bwambale banked a cheque of Shs.50m on the Plaintiff's Account. The account was immediately credited with the same amount, this having been an internal transfer, that is, from one account to another within the same branch. Later that day, he received a call from one Florence Magembe, an Accountant with the Defendant's branch at Entebbe Road. He was asked to confirm whether Shs.50m had

been banked on the Plaintiff's account and he confirmed so. After about 2 weeks, he learnt that the money had been withdrawn fraudulently.

DW2 Ominya Boniface Aluki (33) was a Banking Officer with the Defendant, Entebbe Road, at the time. One Mugisha went to him with a cheque for payment. He ascertained that there was money on the account. He also ascertained that the cheque presenter's signature was genuine. He sent an override to his Senior Manager, a way of seeking authorization to pay depending on the amount involved. The Manager refused to authorize payment. He called for the cheque and the payee. Later, he went back, picked the cheque and paid him. The Manager did not tell him why he had rejected the override. The Manager, DW4 Dismas Wandera, said he first declined to sanction payment because of the big amount involved and the fact that funds had just been put on the account and were being removed. So he sought more details before authorising payment. He called for the cheque and checked the signatures against the available information in the system. He was satisfied that the cheque had been signed in accordance with the Plaintiff's mandate to the Bank. He also contacted the Accountant in the same branch who told him that she knew the payee personally and that the area manager Kasese had confirmed to her the genuineness of the payment on the Plaintiff's account. He then authorized payment. Later, Bwambale went to him and expressed shock at the payment. The cited Accountant was Florence Magembe, DW3. She said she knew the payee

personally as their customer as well as a relative to her sister's husband. On 29/9/2003 he went to her and said he was expecting a payment. He checked the Plaintiff's account and found that Shs.50m had been deposited there. Because of the amount involved, she sent an override to the manager who, as we have already seen, sought verification from their colleague in Kasese. Upon the Kasese Manager confirming to them the genuineness of the deposit on the Plaintiff's account, she advised the manager, DW4, to pay and the payee was indeed cleared for payment. In her view, she did her best because the payee was personally known to her and she knew that he was the principal signatory to the account.

The thrust of the Plaintiff's case is that the said payment was never authorized by the signatories to the account as per the written mandate to the Defendant. That the principal signatory forged the co-signatory's signature and colluded or connived with the Bank Officials who authorized the instant withdrawal of such hefty sum of money from the account. Its argument that the Defendant cannot escape liability is based on its belief that it was an implied term of the contract between the Defendant as Banker and the Plaintiff as customer that the Defendant was obliged and under duty to observe reasonable skill and care in and about executing the Plaintiff's orders/instructions, including cheques drawn on the Plaintiff's Account. It is contended that by paying the money to Mugisha without further inquiry the Defendant was negligent and in breach of contract.

In reply to all the above, the Defendant contends that the said cheque had the proper requirements to show that the Plaintiff had mandated the payment of such a cheque to Mugisha P. Dan. That in any case, what Mugisha did as Secretary General of the Plaintiff was in the course of and within the scope of his employment as such. It is further argued that the Plaintiff as Mugisha's employer was the author of its own loss in allowing him to access the cheque, to operate the account and to collect payment.

I have very carefully addressed my mind to the able arguments of both counsel.

It is perhaps a case without a comparable precedent in this country. From the evidence of the handwriting expert, PW2, which has not been controverted, the two signatures on the impugned cheque were not put there by hand. They are not original. They are copies of the genuine signature of PW1 Bwambale which were electronically transferred to the cheque. I accept that evidence. This therefore renders the cheque a built up document.

This now leads me to the issue as to whether the Defendant was negligent in paying the money out of the Plaintiff's account.

I have looked at the Bills of Exchange Act, Cap 68. Section 59 (1) thereof provides:

“(1) when a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the endorsement of the payee or any subsequent endorsement was made by or under the authority of the person whose endorsement was made or under the authority of the person whose endorsement it purports to be; and the banker is deemed to have paid the bill in due course, although the endorsement has been forged or made without authority.”

Subs. 2 applies to a draft or order, other than a bill or cheque. It is therefore not of any help to us.

On the evidence before me, I need only to be satisfied on the balance of probabilities that one or the other of the parties was negligent. This Court is cutely aware that Banks always warn customers that cheque books must be kept in a secure place. Usually, the words are printed prominently in the cheque book itself. That is fair enough. Problems arise when the cheque book itself, or a few cheques out of it, are stolen and presented to the Bank by the likes of Mugisha in this case, who has forged the signature of a Co - signatory. The answer is not quite obvious. Invariably, the banks plead, and the Defendant has so pleaded herein, that when a cheque duly signed by a

customer is presented before a Bank, it carries a mandate to the Bank to pay. I think for as long as the cheque has been duly signed by the customer, there should be no problem. In the instant case, the customer to the Bank was not Mugisha or Bwambale. These were mere signatories to the Account. The customer was a company, the Plaintiff herein. I must stress this fact because a company is a legal entity distinct from its members. So what is the law when a Bank encashes a forged cheque or does not take steps to ascertain a forgery?

I have already made reference to S.59 of the Bills of Exchange Act. The Bank appears to be protected if the payment is in good faith and in the ordinary course of business.

I am of the considered view that the Court must draw a distinction between those situations where the Plaintiff's cheque is altered, for example by adding in additional figures in words, this being accomplished by the customer leaving spaces which facilitate the fraud; those cases in which the customer leads the bank to believe that irregularity is condoned; those cases in which the proximate cause of the loss is something that the customer has done which induces the bank to believe that the collection and payment of the cheque is in order; and those cases, like the instant one, **where the signatures of the authorised signatories to the account are forged.**

The instant case is one where the fraudster is still at large, being sought by police. I think it goes without saying that any signature on a bill that is forged or placed on the bill without authority of the person whose signature it purports to be, that forged or unauthorized signature is wholly inoperative. It is meaningless and of no legal consequence for whatever it is worth as far as that bill is concerned. The duty of care that the banker owes the customer is clearly expounded in **London Joint Stock Bank Ltd -Vs- Macmillan and Arthur [1918] AC 777** and a number of other cases. The principle established in that case is that:

“the contract between banker and customer gives rise to a duty upon the customer to take usual step and reasonable precautions in drawing a cheque to prevent fraudulent alteration thereof which might occasion loss to the banker.”

From the above, the principle relates to cheques that are drawn in such a way by the customer as to facilitate fraud thus occasioning loss to the banker. From the decided cases, for instance **The Kepitigalla Rubber Estates Ltd -Vs- The National Bank of India Ltd [1909] 2 KB 1010**, the general principle is 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 care 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 of carrying on his business to prevent forgeries on the part of his servants.”

I think this is fairly obvious. Criminals are criminals. No one ever gets to know what they are thinking until they strike. There are very few local authorities on the matter. I have seen **Development Consultants International Ltd -Vs- Nile Bank Ltd HCCS No. 867/1998**, unreported, which learned counsel for the Plaintiff has graciously availed to me. The principle of law stated therein is not any different from what I have stated above. Outside the jurisdiction, the Supreme Court of India considered an almost similar matter in **Canara Bank -Vs- Canara Sales Corp. & Others Air 1987 SC 1603** reported **[1988] LRC (Comm) 5**.

In that case, the Chief Accounts Officer of the company (the account holder), who maintained the company's accounts and had custody of the cheque books, forged 42 cheques for a total amount of Rs 326,047.92 between 1957 and 1961. A suit was filed against the Bank for wrongfully encashing the aforesaid cheques. The bank contended that the company was stopped from claiming the amount because of its own negligence and also because it acquiesced in and ratified the payments. It pointed out that the company had not raised any objection over a period of 4 years even though it received monthly statements. The Supreme Court turned down their arguments and

held that the Bank could escape liability only if it could establish that the company knew of the forgery. On the issue of the delay to discover the frauds, the Court observed that inaction of the customer does not by itself afford satisfactory grounds for the Bank to escape its liability.

From the authority above, the only way the banker can escape liability would be if it can show that the customer was guilty of some voluntary act that caused the banker to be misled into paying the cheque. It is not enough to say that the customer had taken the employee into his service without sufficient inquiry as to his character or that the forgery was of such high standard that no ordinary banker could have detected it at the time the cheque was presented and/or negotiated. With respect, it is precisely for this reason that there are usually added safeguards, usually by way of Internal circulars to staff, providing guidelines and assistance to bank officials to take extreme care and precautions in dealing with customers' funds. In the instant case, I have considered the steps taken by the Defendant's servants before they authorized the payment to Mugisha. This was a case where money was deposited in Kasese around 11 a.m and almost at the same time, a person was in Kampala taking it all from the Account. The hurry, according to DW4 Wandera, caused him to reject DW2 Ominya and DW3 Florence Magembe's overrides. In other words, his conscience warned him that all may not have been well. In these circumstances, it was not enough for them to inquire from the Kasese Manager as to the genuineness of the deposit.

The money was on the account for all to see. Having formed the suspicion as they did, it would have been sufficient if they had themselves raised PW1 Bwambale on phone or through DW1 Tumuhimbise to confirm the fact of Mugisha's authority to withdraw such a heavy sum of money which had been deposited in Kasese when he, Mugisha, was already in Kampala. I am saying so because the Defendant did not lead any evidence to show that Mugisha or any other Official of the Plaintiff for that matter had ever taken funds in that fashion to raise inference that this was the Plaintiff's preferred way of transacting business on its account.

For the Defendant to succeed in its defence it must show that the Plaintiff's loss was attributable to its own negligence which must be linked to or immediately connected with the transaction itself and must have been the proximate cause of the loss. In my view, the Defendant has failed to establish such negligence. The inexcusable lapse in Judgment of its officials caused Mugisha to walk away with such a hefty sum of money. If Bwambale had been contacted when Mugisha was still before them, this case wouldn't be in Court. He would have been arrested there and then and the Plaintiff wouldn't be raising any complaint at all against its own Bank. The Plaintiff cannot escape its liability merely because the state of the art at the time would not easily expose the forgery on the cheque. Such a defence is untenable in this computer age, e-commerce and cyber-crime. There must be assurance to customers that their money is safe in the Bank. If the

handwriting expert could so easily detect the problem on the cheque, there no reason why the Bank cannot employ people of the same specialized skill to detect electronically scanned and transferred signatures on to the bills of exchange. In my view, in case of the slightest doubt, as happened to DW3 Magembe and DW4 Wandera, the Bank must apply high-tech methods to detect such forgeries or else be prepared to make good losses occasioned to their customers.

In these circumstances, I have come to the conclusion that the only defence which would have successfully disposed of this matter in the Defendant's favour would have been evidence that the fraud was committed with the knowledge, actual or constructive, of the Plaintiff. No such evidence was adduced in this case. From my analysis above, the Defendant was negligent in paying the money as it did.

I would answer the first issue in the affirmative and I do so.

The 2nd issue is whether the Plaintiff is entitled to the reliefs sought. I think it is. The law will not suffer a wrong to be without a remedy. It is entitled to the refund of its money that was removed from its account on a forged cheque. It is thus to be refunded the sum of Shs.50,000,000- as prayed.

As to the damages for breach of contract, this of course denotes the kind of damage which the law presumes to follow from the wrong complained of. It is trite that one of the duties of counsel in an action for general damages should be to put before Court material which would enable it to arrive at a reasonable figure as general damages. In this respect, counsel owe a duty to their clients as well as to Court so that Court arrives at a reasonable award. In the instant case, all that Plaintiff's counsel did was to lay down the principles on which general damages are assessed and paid. He did not propose any figure.

I have considered the Plaintiff's evidence that its principal business is to lend, with interest, money to the rural poor in Kasese. From its own evidence, the money which the fraudster disappeared with did not belong to it. It belonged to Bakwanya Trading Co. It had just been deposited on the Plaintiff's account to give a rosy picture of the account to the donors. The money had simply been entrusted to the Plaintiff. It was not for its operations. Accordingly, while I do not accept the defence argument that the Plaintiff should have no claim to it, I'm of the considered view that once the funds are refunded to it, the Plaintiff's woes will end. Considering the position of the fraudster in the company and the manner in which the fraud was executed, I am inclined to the view that this is not a fit and proper case for an award of general damages. I have therefore not awarded any.

As regards interest, the Plaintiff seeks interest at Commercial rate from the date of the accrual of the cause of action till payment in full. From the evidence of PW1, Bakwanye Trading Co. was a sister company to the Plaintiff. The Plaintiff was in the habit of borrowing money from that company. It is not indicated whether this was with or without interest. In view of the evidence that this was money not meant for the use of the Plaintiff and Bakwanye Trading Company is not party to this case, it is fair that the decretal amount starts to earn interest at commercial rate of 25% per annum from the date of Judgment till payment in full. I so order.

As regards costs, the usual result is that the loser pays the winner's costs. A successful party should only be denied costs if it is proved that but for his conduct, the action would not have been brought. In view of my finding that the Plaintiff was not involved in the fraud, it will be paid the costs of the suit.

In the final result, Judgment is entered for the Plaintiff against the Defendant.

The following orders are made:

- i. Refund to it of Shs.50,000,000- (fifty million only).
- ii. Interest on (i) at the rate of 25% per annum from the date of Judgment till payment in full.
- iii. Costs of the suit.

Yorokamu Bamwine

J U D G E

08/07/2005