

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
CIVIL CASE NO. 45 OF 2010**

TANZANIA FORESTRY RESEARCH

INSTITUTEPLAINTIFF

VERSUS

NATIONAL MICROFINANCE BANK PUBLIC

LIMITED COMPANYDEFENDANT

26/02&31/05/2016

JUDGMENT

MWANDAMBO, J

The parties to the suit are customer and banker respectively for a considerable period of time. The plaintiff, which is a Government institution, is headquartered in Morogoro where it opened several bank accounts with the defendant at one of its Branches known as Wami in that region. A dispute has arisen in relation to certain of the plaintiff's debit transactions in its special Account which it (the plaintiff) alleges that it did not authorise, resulting into a loss of Tshs. 364,677,874/= . The instant suit which is founded on negligence seeks to recover not only the said loss but also damages for breach of duty, interest and costs.

The facts material to the dispute are as follows. Sometime on 27 January, 2002, the plaintiff opened an Account with the Defendant's Wami branch in Morogoro styled as TAFORI Special Account No. 6801044597. The account number was later changed to SA 2212505652. That account was in addition to other accounts already in existence specifically TAFORI General Account No. 22111000010. To operationalize the Account, the plaintiff fulfilled certain conditions notably filling in of a specimen signature card (exh. P1) containing names and specimen signatures of officers authorised to sign documents for the purpose of withdrawals from the Account. These were in two categories namely; **A** and **B**. In addition, the Defendant issued an identity card affixed with the Account signatories' photos and signatures in each category (exh. P2). According to exhibit P1, any withdrawal from the Account would be honored by way of filling a withdrawal form bearing one signature from each category. It is common ground that the account was at all material times operated smoothly per the instructions contained in exhibit P1. It is equally not in dispute that the key person in the operation of the Account was Astophel Buja Mwakalasya, as the plaintiff's Accountant also a signatory in category B. The name of this gentleman features predominately in the saga leading to the suit. Sometime on 12 November, 2009, the said Astophel Buja Mwakalasya tendered a letter of termination of his employment on a short notice and this aroused suspicion on the Chief Executive Officer of the plaintiff (PW1) who, on 13 November, 2009 sent a team of his staff to enquire with the defendant's Wami branch about the status of the special Account. The enquiry entailed, amongst others, asking for the supply of a bank

statement of the said Account. Contrary to the plaintiff's expectations, the printed statement supplied by the defendant indicated that the Special Account had a paltry balance of Tshs 20, 883, 239/= much less than the amount which ought to have been available in the Account. After considerable engagement with the defendant, the plaintiff demanded to be supplied with copies of all withdrawal forms and statements between the date of opening the Account and 13 November, 2009 but the defendant was able to supply only some of them. Having examined the copies supplied, the plaintiff convinced itself that a number of the withdrawals from the Account were suspicious in that they were contrary to the "*conditions for operating the Account*" in several respects including forgery in signatures of the authorised signatories as well as withdrawals above *agreed limits*. There being no solution to the dispute, the plaintiff instituted the suit which is strongly resisted by the defendant.

Before the trial commenced for hearing, my predecessor (Sheikh, J) adopted issues proposed by counsel and recorded them as follows:

1. Whether on the 11th May, 2009 the defendant bank did provide the plaintiff with a Bank statement indicating that the plaintiff special Bank Account No. SA 22 12505652 had a balance of Tsh. 542,302,411/32.
2. Whether on the 16th September, 2009 the defendant bank did provide the plaintiff with a statement indicating that the plaintiff special Account No. SA 2212505652 was worthy TZS 454, 561, 1152 (sic!) as at the close of business on 14th day of September, 2009.

3. Whether the Defendant bank operated/ managed the plaintiff's TAFORI Special Bank Account No. SA 2212505652 as per and in accordance with the plaintiff's mandate as supplied to the defendant bank.
4. Whether the defendant bank acted negligently to wit, no authority from the plaintiff) to authorise unauthorized payment and thus loss of TZS 364,672,897/= to the plaintiff.
5. In the alternative to issue No. 4 above whether the defendant was negligent in management of the plaintiff's special Bank Account No. SA 221505652.
6. Whether the plaintiff has suffered has any loss as a result of the defendant's negligence.
7. To what relief are the parties entitled to.

The plaintiff who is represented by Mr. Joseph Sang'udi learned Advocate from R. K. Rweyongeza & Co. Advocates fielded three witnesses in proof of its case. Two of the witnesses were signatories to the special Account in category A whilst PW3 testified in his capacity as the plaintiff's Director of Finance and Administration.

Dr. Ladislaus Nshubemuki was the first witness for the plaintiff. This had been a Director General of the plaintiff for eight years between April, 2002 and January 2010 when he retired from service. This witness (PW1) testified that he remembered to have requested the defendant bank to open a special account in which he was a signatory to it in category A together with Evarist Sabas Kessy PW2. He (PW1) produced in evidence a specimen signature card as well as an identity card in relation to the

Account both of which were admitted as exhibits P1 and P2 respectively. According to PW1, the mandate (instructions) for the operation of the special Account were contained in a letter written to the defendant's bank branch but was not able to give particulars of the said letter neither did he tender it as part of his evidence. PW1 told the court that the operation of the said account was such that all withdrawals above 2,000,000/= were subject to one week's notice by a letter signed by one signatory from each category. According to PW1, the plaintiff could withdraw without notice any amount not exceeding Tshs 2,000,000/= by filling in withdrawal forms signed by signatories in the manner prescribed in exhibit P1 provided that not more than two withdrawals were allowed per week and not more than eight withdrawals per month.

It was PW1's testimony that any withdrawals of more than 2,000,000/= without notice were subject to a surcharge of 1% of the amount in excess of the allowed limit. PW1 produced in evidence thirteen letters which were admitted as exhibit P3 collectively which intended to establish the existence of conditions for the operation of the special Account over and above exhibit P1. PW1 impressed upon the court that the plaintiff complied with all the conditions for the operation of the Special Account and in some occasions it received bank statements obtained from the defendant by its Accountant (Astophel Buja Mwakalasya). PW1 made reference to two copies of the said statements one indicating a credit balance of Tshs 542,302,411/34 as of 30 April, 2009 and the other one showing a credit balance of Tshs 454,561,113/32 as of 16 September, 2009 and the Court admitted them in evidence as exhibits P4 and P5

respectively. However, PW1 got shocked when on 13 November, 2009 he received a bank statement indicating a credit balance of Tshs 20,883,239 which meant that more than Tshs 303,000,000/= was missing from the Special Account. As a result of the loss of money from the said Account, PW1 caused enquiries to be made with the defendant's Branch Manager demanding to be supplied with full bank statements as well as all withdrawal forms but managed to get only some of them in several batches rather belatedly after several reminders through a covering letter admitted in evidence as exhibit P7. Copies of withdrawal forms were tendered by PW1 and the court admitted them as exhibit P6 1 through 32 inclusive. PW1 identified each of the copies of the withdrawal forms with mixed feelings in that that according to him while some of them appeared to be genuine others were not. The latter had forged signatures purporting to be his whilst in fact they were not. He blamed the defendant for honoring requests on forged signatures and for lack of cooperation. To prove requests to the defendant to be supplied with copies of withdrawal forms and letters for transfer of money from the special Account to the general Account, PW1 produced in evidence letters written to the defendant's Wami Branch which were admitted in evidence as exh. P. 8 collectively. At the end of his testimony, PW1 prayed for judgment by way of refund of the amount withdrawn from the Special Account without authority as well as damages, interest and costs.

In cross examination by Mr. D. Kambo learned Advocate for the defendant, PW1 reiterated that the bank statements (exh. P4 and P5 were brought to the plaintiff by Astophel Mwakalasya but was unable to tell

whether the stamps thereon were genuine or not although I see nothing unusual for him to say as he did. He also told the court that forgery of the signatures on the withdrawal forms were not confirmed by handwriting experts besides casual signature comparison.

The second witness (PW2) was Evarist Sabas Kessy who, like PW1 had already retired from the service of the plaintiff where he was a director of Research Production till 2011. PW2 was a signatory to the special Account together with PW1 in category A. This witness repeated most of what PW1 had stated in relation to the operation of the Special Account. In addition, PW2 stated that the Special Account was operated in such a way that there were no cash withdrawals from it rather transfers to a general Account according to an agreement with the Defendant. However he did not recall having seen the said agreement. Similarly, PW2 could not recall instances where the plaintiff instructed the Defendant to transfer the funds from the Special Account to a general Account and the amount involved (if any). This witness could not tell the amount the plaintiff deposited into the Special Account and like PW1, he disowned some of the signatures in the withdrawal forms (exh.P6) saying that they were forged and blamed what he and PW1 called suspicious transactions on the plaintiff's own Accountant (Astophel Buja Mwakalasya) as well as the defendant saying that it acted beyond its mandate. PW2 could not however confirm having seen any other instructions in relation to the operation of the Special Account other than exhibit P1.

The last witness for the plaintiff was Kaisi Ambindwile Mwaikambo (PW3). Unlike PW1 and PW2, he was still in the service of the plaintiff

having been employed in the year 2008 as its Director of Finance and Administration. Similarly, unlike PW1 and PW2, this witness was not a signatory to the Special Account but he was aware of its existence upon joining the plaintiff on 1 August, 2008. PW3 who boasted himself as a holder of MBA and CPA testified that his duties included supervision of the preparation and finalization of the plaintiff's final accounts for audit and coordination of Finance and Human Resources functions. Like PW1 and PW2, this witness narrated the purpose of the Special Account and identified the signatories to it which included Astophel Buja Mwakalasya in category B who is said to have left employment on a short notice on 13th November, 2009 in a mysterious manner. PW3 told the court that the sudden departure of his subordinate who had all along been responsible for preparation of the plaintiff's books of Account and operation of the special Account excited the plaintiff's management curiosity. As it were, upon enquiry with the Defendant's branch Manager whom he went to see personally on 13 November, 2009, revealed that the Special Account had been heavily overdrawn leaving a balance of Tshs 20,833,000/= an amount which was too insufficient to clear a cheque they had earlier drawn but not yet deposited by the said Mwakalasya. Upon being supplied with a bank statement up to 13 November, 2009, PW3 and his team came to learn that the special Account reflected withdrawal transactions on that very date and two days earlier. That revelation led to a request for photocopies of all withdrawal forms and a detailed bank statement from the date Account was opened to 13 November, 2009. PW3 stated that despite the promises made by the Defendant's branch manager, the requests were

not promptly acted upon neither did the Defendant supply all copies of the withdrawal forms. Having examined the bank statement supplied on 13 November 2009, PW3 stated that the bank balance differed with the plaintiff's balance in its books of Account on the same date which indicated a credit balance of Tshs 385,561,113/52 per exhibits P4 and P5. However, PW3 did not produce in evidence any books of account to back up his statement. All in all, PW3 told the court that an examination of the copies of documents supplied by the Defendant's branch revealed that there were departures from the standing instructions for the operation of the Special Account in that in some cases payments were made without genuine signatures in category "A" while in others payments exceeded sanctioned limits. Commenting on exhibits P6, PW3 stated that there were several shortcomings which suggested that the defendant acted beyond the mandate given to it exemplified by frequent withdrawals from the Special Account in some cases more than one withdrawal per day. The witness impressed upon the court to find that the Defendant was in breach of the agreement resulting into a loss of Tshs 364,677,874/52 which the plaintiff unsuccessfully demanded for a refund and hence the institution of the suit. In cross examination, PW3, stated that the plaintiff's accounts were audited annually and during the process, the plaintiff through his department used to ask confirmation of the account's balances from the Defendants and specifically, the Defendant confirmed that the special Account had a balance in excess of 500,000,000/= as of 30 June, 2008 but he did not produce any documentary proof in court. Likewise, apart from making reference to audited accounts, PW3 did not tender copies of said

audited accounts in his evidence. Like PW1 and PW2 this witness attributed the blame on the loss to Astophel Buja Mwakalasya's mysterious departure and the bank but could not tell if there was any employee of the bank who had been implicated in a criminal case involving the loss. With that, the plaintiff's case came to an end.

The defendant called only one witness one Emmanuel Bushiri (DW1) who was the defendant's branch Manager at Wami Branch between March, 2008 and March, 2013. DW1 was aware of the Special Account as well as the mandate contained in exh. P1. He denied knowledge of any other mandate or agreement for the operation of the special Account than exhibit P1. In relation to exhibits P4 and P5, DW1 stated that the Defendant never issued any bank statements to the plaintiff in May and September, 2009 by way of exhibits P4 and P5. According to DW1, exhibits P4 and P5 had several shortcomings distinguishing them from genuine bank statements issued by the bank in the ordinary course of business. Such shortcomings include the type of rubber stamp impressed on the exhibits quite alien to the bank, unknown signatures in the exhibits, font size and format of the transactions being in sharp contrast with the genuine bank statements per exhibits D1, D2, D3, D4 and D5 he tendered in his evidence.

As regards frequencies of withdrawals from the Special Account, DW1 told the court that the plaintiff was free to withdraw cash from the Special Account on demand through duly filled in and signed withdrawal forms in as much it could transfer money to another account. Regarding supply of certificate of account's position for audit purposes, DW1 confirmed that the bank supplied such certificates one of which showing the special Account

position as of 30 June, 2009 but the plaintiff did not express any disagreement or complaint with it prior to institution of the suit. As to failure to act on the plaintiff's request for supply of copies of withdrawal forms, DW1 told the court that the plaintiff was given enough copies for her to verify its Account's position while waiting for the rest. All in all, DW1 was adamant that the Defendant was not negligent in any way in operating the plaintiff's Special Account but acted within the parameters of the mandate contained in exh P1. In cross examination, DW1 reiterated that there was only one set of instructions in relation to the operation of the Special Account per exhibit P1. In relation to the commission charged on withdrawals in excess of 2,000,000/= without notice DW1 stated that the Bank was entitled to charge that commission regardless of any standing instructions from the plaintiff. At the end of his testimony, DW1 prayed for the dismissal of the suit with costs. That marked the end of the Defendant's case and conclusion of the trial.

At the closure of the trial, the court ordered counsel to make their final submissions in writing. The learned counsel duly filed their respective written submissions on the date ordered and I am grateful for their industry in addressing the court on their respective positions. Whilst I will try to pay regard to their submissions, for obvious reasons I will not touch on each and every argument counsel covered in their submissions. With that I now move to make my determination on the issues framed in the light of the evidence adduced and counsel's submissions.

The leaned Advocates argued issues No. 1 and 2 together and I think rightly so due to their interrelation. The learned Advocate for the plaintiff

urged the Court to answer both of them in the affirmative because, according to him, PW1, PW2 and PW3 had adduced sufficient evidence to prove that the Defendant supplied bank statements by way of exhibits P4 and P5. It was Mr. Sang'udi's submission that the credit balances on the respective dates tallied with the Plaintiff's books of accounts. It was the learned counsels' further submission that the defendant's attempt to disown the said exhibits was of no avail because it had not led any evidence to distinguish the font size in exhibits P4 and P5 from the ordinary font used by the Defendant. At any rate, the learned counsel argued, the Defendant failed to cooperate with the Plaintiff in supplying bank statements despite several requests and reminders as evidenced by exhibit P8. Not unusual, Mr. Daibu Kambo, learned Advocate for the defendant urged the Court to answer both issues against the Plaintiff. The learned Advocate submitted that exh. P4 and P5 did not originate from the Defendant according to DW1's testimony. It was the learned counsel's submission that the testimonies of PW1 and PW2 pointed clearly that it was Astophel Buja Mwakalasya who brought the said documents to the Plaintiff's management rather than themselves obtaining them personally from the defendant. The learned Advocate submitted further that the Plaintiff had a duty to call its former Accountant to explain the source of the said exhibits and the fact that it did not call such an important witness entitled the court to draw an adverse inference against the Plaintiff on the authority of **Hemed Said V. Mohamed Mbilu** [1984] TLR 113.

There is no gainsaying that the Plaintiff's case is largely hinged on exhibits P4 and P5. As the pleadings and evidence will bear testimony,

there is a huge dispute on the veracity of the said documents based on the evidence of DW1. Before I consider the probative value of the said documents, I find it necessary to address my mind to their propriateness in the light of the issues under consideration. There is no doubt that exhibits P4 and P5 purport to be computer printer outs of TAFORI special Account No. SA 2212505652. They are, for that matter part of banker's books governed by section 76 of the Evidence Act, (the Act). Cap 6 R.E 2002 as amended by the Written Laws (Miscellaneous Amendments) Act (Act No. 15 of 2007). Such documents can only be received as evidence when supported by proof as stipulated under sections 78 (2) of the Act that it was made in the usual ordinary course of business and that the same are in the custody of a bank (see section 78A of the Act as amended by Act No. 15 of 2007). In terms of section of 78 (2) of the Act, proof may be given by a partner or officer of the bank orally or by an affidavit. Short of meeting the preconditions set out under the aforesaid provisions a bankers book cannot be received (admitted) in evidence. I take note that exhibits P4 and P5 were admitted as part of the Plaintiff's evidence without any objection from the defence. However, their admission does not make them to be conclusive proof of the contents of what they purport to be. Accordingly, much as I cannot at this stage disregard them, I will not attach much weight to them because their evidential value has been seriously diluted by lack of proof that they were made in the usual ordinary course of business let alone the proof as required by section 78(2) of the Act that they were in the custody of the Defendant. Indeed, there is sufficient evidence through the Plaintiff's own witnesses that the exhibits P4 and P5 were at all

material times not in the custody of the Defendant but in the Plaintiff's custody having been brought by to the plaintiff by a person who has not been called to give evidence to prove the source thereof. That evidence gives credence to DW1's testimony who denied having issued such documents to the Plaintiff on the material dates or at all. To put it differently, the Defendant has disowned the existence of exhibits P4 and P5 as part of its banker's books and thus there is no probative value in the said documents to prove that the Plaintiff's special account No. SA 2212505652 had any credit balances on the amounts indicated therein. At any rate, the Plaintiff who had the burden to prove on both issues did not produce in evidence its own books of Accounts to match with exhibits P4 and P5 but worse still, it did not call its erstwhile Accountant to explain how and where he obtained those exhibits which the Defendant denied supplying in its written statement of defence. As rightly submitted by the learned Advocate for the Defendant in the absence of palpable explanation from such a material witness as Astophel Buja Mwakalasya who is said to have brought exhibits P4 and P5, the court will be justified in drawing adverse inference against the Plaintiff on the authority of **Hemed Said V. Mohamed Mbilu (supra)** which I am in entire agreement with. Unfortunately, even PW3 who boasted to be coordinating finances functions with the Plaintiff did not make any credible evidence in support of the credibility of exhibits P4 and P5.

The learned Advocate for the plaintiff has impressed upon me that I should find that PW1 and PW2 were credible witnesses who had faithfully worked with the Government to their retirement who had no

interest in making lies to the Court. Whilst one may be tempted to go along with the submissions by the plaintiff's learned Advocate, the circumstances of this case dictate a different approach. Without saying much about any lie, there is no dispute that both PW1 and PW2 were senior officers of the Plaintiff until their retirement. It is equally common ground that the duo were signatories to the special Account in category **A** and furthermore there is little or no doubt at all that the funds in the special Account were public funds some of which allegedly withdrawn in mysterious circumstances during their tenure of office. The two gentlemen had interest to serve in order to save their faces and thus if credibility has anything to go by, it is highly doubtful that their credibility would be free from suspicion. In the upshot, having regard to the shortcomings in exhibits P4 and P5 as well as the unsatisfactory oral testimony from the Plaintiff's witnesses, I find and hold that the Plaintiff has not discharged its burden to prove its case in issue No. 1 and 2 which I answer in the negative. I now move to issue No. 3 which seeks to enquire whether the Defendant operated the special account in accordance with the mandate.

It is noted that the third issue was framed on the understanding that the plaintiff supplied to the defendant instructions for the operation of the special Account over and above those contained in exhibit P1. The determination of the issue will therefore depend on the existence of the said instructions. Noncompliance with instructions in exhibit P1 is dealt with separately in issue No 4 and 5. The learned Advocate for the plaintiff has invited the Court to hold that the plaintiff has proved both the existence of the said instructions and breach of it regardless of its failure to tender it in

evidence. The learned Advocate took the view that the fact that the Defendant did not deny the contents of para 7 of the amended plaint was sufficient proof of existence of the mandate. It was the learned counsel's submission that there was proof regarding requirement of seven days' notice for all withdrawals in excess of Tshs 2,000,000/= as well as a commission of 1% of the amount in excess of 2,000,000/= where no prior notices were given as evidenced by para 7 of the amended plaint which stands undisputed in the Defendant's written statement of defence. Further proof according to the learned Advocate was through withdrawal forms (exh. P6) showing frequent withdrawals and in many cases beyond 2,000,000/= contrary to the mandate. The learned counsel for the Defendant submitted that the evidence of PW1 supported by exhibit P1 indicate that no other mandate was given to the Defendant by the Plaintiff other than exhibit P1 which the Defendant complied with to the letter. It is common ground that all witnesses for the Plaintiff made reference to an agreement for the operation of the Special Account but no such agreement or mandate was tendered in evidence containing terms and conditions for the operation of the Special Account other than exhibit P1. This the Plaintiff's Advocate readily acknowledge in his submissions. Notwithstanding the absence of the said agreement/ mandate apart from exhibit P1, the learned Advocate invites the Court to infer existence of additional mandate from the pleadings, exhibits P6, DI, D2, D3, D4 and D5. With respect, I do not think that there is any merit in the Plaintiff's suggestion as I will endeavour to explain shortly. To start with, the Defendant denied categorically the existence of any conditions stated

in para 6 of the amended plaint requiring the plaintiff to provide strict proof. It is, in my view highly inconceivable that the defendant who had denied the existence of the said conditions could suddenly admit of their existence in the next paragraph of its defence. Secondly, the withdrawal forms (exhibit P6) by themselves cannot establish that there were any special conditions for the operation of the Special Account including limits in the withdrawals and the amount permitted for each day or month. According to the evidence of DW1 which remains uncontroverted, the plaintiff was entitled to withdraw money from its account on demand upon filling in and signing withdrawal forms per exhibit P1 and the defendant was contractually bound to honour its customer's instructions. DW1's evidence is consistent with the generally accepted principles governing banker customer relationship one being that there is an implied term in the contract between the banker and its customer that the former promises to repay the latter a sum equivalent to that paid into his hands- see: **Sheldon and Fidler's Practice and Law of Banking 11th Edition** at page 25. In the absence of any terms to the contrary, one cannot successfully argue as the plaintiff does that defendant acted beyond the mandate by allowing cash withdrawals as it did provided the instructions in exhibit P1 were met. Thirdly, charging commission on excess amounts through exhibits D1, D2, D3, D4 and D5 cannot serve as evidence of the existence of special conditions in the light of the evidence of DW1 who stated that the Defendant was entitled to charge the commission regardless of the existence of the alleged mandate. In the absence of specific instructions, it will be unsafe to rely on the transactions in exhibits D1, D2, D3 and D4

and D5 as proof of the existence of such instructions. Consequently, since the plaintiff has not discharged its burden to prove the existence of any mandate or instructions apart from exhibit P1, I will answer the third issue against the plaintiff. In other words, the defendant was under no obligation to comply with non-existing instructions in the operation of the Special Account.

Issues No 4 and 5 are dedicated to an enquiry on negligence that is to say; did the defendant act negligently in operating the Special Account leading to a loss of Tshs 364,672,897/= ? The learned counsel for the plaintiff preface his submissions on the issue by reference to the definition of negligence from Black's Law Dictionary 7th edition referred to in **The Loans And Advances Realisation Trust (LART) v. Barclays Bank Tanzania Limited**, Commercial case No 54 of 2005 (unreported) in which Massati, J (as he then was) articulated the ingredients of negligence in the context of the banker customer relationship. There is no doubt that the case reflects a sound and correct position of the law but its relevance to the instant suit is a different matter altogether. The learned advocate for the plaintiff invited me to hold that the defendant acted negligently by authorizing cash withdrawals from the Special Account beyond agreed limits. I have already held in the preceding paragraphs when dealing with the third issue that the existence of limits in withdrawals from the Special Account has not been established and I would thus agree with the defendant's learned Advocate that there can be no basis upon which the defendant could be held liable in negligence in the manner submitted by the plaintiff's counsel.

The learned Advocate for the plaintiff submitted further that the defendant breached its duty of care to the plaintiff by authorizing cash withdrawals on forged signatures of the signatories in category A per the testimonies of PW1 and PW2. The learned Advocate urged me to find that forgery was sufficiently proved by both witnesses who stated in their respective testimonies that their signatures in some of the withdrawal forms and letters for transfer of funds from the special Account were a forgery. Despite the absence of proof of forgery by an independent evidence, the learned Advocate would me find that proof by the persons who disowned their signatures in the disputed withdrawal forms was enough relying on commentaries from **The Law of Evidence, 3rd Edition by Professor I. H Dennis** at page 506, para 12.12. dealing with proof of handwriting and signature. The learned advocate invited me not to believe the evidence of DW1 in relation to the genuineness of the signatures in the withdrawal forms because he did not personally examine the signatures at the bank's counter at the time the withdrawals were being made. According to the learned Advocate, the best persons to prove that the signatures in the withdrawal forms matched with specimen signatures in exhibit P1 should have been the bank tellers or at best their supervisor and the fact that none was called to give evidence spoke volumes of unfavourable evidence against the defendant. The learned advocate for the defendant submitted that the plaintiff has not discharged its onus of proof of forgery and thus the two issues ought to be answered negatively.

It is common ground that forgery a serious allegation as it were was not pleaded as such by the plaintiff. It just featured in the testimonies of

PW1 and PW2. But even if it was pleaded, it required strict proof to be sustained. There is sufficient authority for that proposition from case law a few of which will suffice for the purpose of this judgment. In **Omary Yusuph V Rahma Ahmed** [1987] TLR 169, the Court of Appeal held that the law was already settled that when the question whether someone has committed a crime is raised in civil proceedings that allegation need be established on a higher degree of probability than that which is required in ordinary civil cases, the logic and rationality of that rule being that the stigma that attaches to an affirmative finding of fraud justifies the imposition of a strict standard of proof. Earlier, the defunct Court of Appeal for East Africa expressed similar stand discussing standard of proof in cases involving fraud holding that allegations of fraud must be strictly proved though the standard of proof may not be so heavy so as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required- see **Ratilal Gordhanbhai Patel V Lalji Makanji** [1957] EA 314 at p 317. Admittedly the two cases involved proof of fraud but I see no difference in the application of the rule in both cases which are criminal in nature. With respect the plaintiff has not discharged its standard of proof not only on a higher standard but also on mere balance of probabilities. Whilst the two witnesses claim that their signatures were forged, the defendant through DW1 claims that the signatures in the withdrawal forms are genuine and match with the signatures in exhibit P1 and thus the defendant cannot be taken to have acted negligently in authorizing cash withdrawals from the special Account. The learned advocate for the plaintiff would have me find that since it is the same

persons who say their signatures were forged they must be believed because they are the best persons to say so rather than the defendant's witness who did not witness the signing. That argument assumes that the signing of the withdrawal forms was done by the signatories at the bank's counter in the presence of the tellers which is not supported by any evidence on record and I propose to attach no weight to it. Be it as it may, the reliance on the commentaries in the book above cited has no much assistance to the plaintiff in the context of the facts in this suit because such commentaries could only be relevant if the witnesses were being called to prove their signatures rather than disowning what the defendant says it is their signatures. In my view, in cases such as where there is a dispute as to the genuineness of the signatures the plaintiff ought to have led sufficient evidence through independent witnesses specifically a handwriting expert for the court to form an opinion on the claim of forgery and if credible contradict DW1's version. Such independent evidence was more relevant since it is clear that the withdrawal forms were presented by the plaintiff's own Accountant whose signature is not disputed. It would have been a different matter altogether had there been evidence that the withdrawal forms were not authored by the plaintiff's authorized accountant and this is where the failure to call him as a witness attracts more questions than answers. In the circumstances, I am unable to agree with the learned counsel that forgery has been proved to exist in exhibit P1 thereby justifying making a finding that the defendant was negligent in the management and operation of the special Account. Lastly on the issue of pattern of withdrawals as a reason for the defendant to be suspicious of

the transactions. The learned advocate for the plaintiff has invited me to hold that the pattern was too suspicious to have eluded the defendant's curiosity to alert the plaintiff on the authority of **The Loans And Advances Realisation Trust (LART) v. Barclays Bank Tanzania Limited** (supra). That case has little application here for two reasons. One, I have already accepted the evidence of DW1 above that the plaintiff was entitled to draw funds from its account on demand provided that there was sufficient balances but subject to fulfilling the requirements contained in exhibit P1. Two, unlike in LART's case, there is sufficient evidence in this case that the person who presented the withdrawal forms and collected cash from the defendant's counter was no other than its own Accountant who was a signatory to the Special Account. Unlike in LART's case in which the amounts were fairly large and for that matter attracting cause for alarm, in the instant case the pattern of cash withdrawals were in the region of Tshs 2,000,000/= and these would not have constituted an act of negligence on the part of the defendant thereby causing loss to the plaintiff. In the upshot, having regard to the evidence on record I answer issue 4 No and 5 in the negative.

Since I have found no evidence to hold the defendant liable in negligence when dealing with issue No 4 and 5 above, the answer to issue No 6 which seeks to determine whether the plaintiff suffered any loss as a result of negligence must be an obvious one that is to say; no loss could have been sustained in the absence of negligence. At any rate even if I were to find the defendant liable in negligence, I would be reluctant to say that the plaintiff suffered any loss by way of the amount of money alleged

to have been withdrawn from the Special Account .This is because, as the learned advocate for the defendant has rightly submitted such loss has not been proved by the evidence on record: According to the plaintiff, the only basis for establishing existence of funds in the special account is no other than exhibits P4 and P5 but as I have already held that the said exhibits have no evidential value worth of belief to sustain the claim for loss. That takes me to the last issue dedicated to reliefs.

Having regard to the findings on the issues framed, it is obvious that the plaintiff has not discharged its burden of proof on the standard required in civil cases. Consequently, I dismiss the Plaintiff's suit in its entirety with costs. Order accordingly.

L.J.S Mwandambo

JUDGE

31/05/2016

Delivered in court in the presence of Joseph Sang'udi counsel for the Plaintiff and Daibu Kambo counsel for the Defendant this 31st day of May 2016.

L.J.S Mwandambo

JUDGE