IN THE HIGH COURT OF TANZANIA

[COMMERCIAL DIVISION]

COMMERCIAL CASE NO. 83 OF 2006

BALBIL SINGH SAINI.....1ST PLAINTIFF

PARVEEN BALA SAINI.....2ND PLAINTIFF

Versus

SAVING & FINANCE COMMERCIAL BANK LIMITED.....DEFENDANT

BHARYA ENGINEERING & CONTRACTING CO. LTD.....3RD PARTY

Date of last Order: 19th January, 2009

Date of Judgment: 12th February, 2009

JUDGMENT

WEREMA, J

The plaintiffs are a couple. They maintain joint saving accounts known as "golden saving accounts" at the defendant's Dar es Salaam branch. The two accounts are denominated in Shillings (abbreviated as Shs. hereinbelow) and United States Dollars (shown by abbreviation USD or a symbol $). The accounts are numbered 0010002226080 and 001000422260081 respectfully.

It is alleged that in November 2004, the defendant unlawfully withheld the plaintiff's monies deposited in the

accounts and used the sum as a lien for the financial credit facility issued to a third party without consent of the plaintiffs or any of them. It is further alleged that a sum of USD 10,430 was withheld from A/C No.0001 00042226 0081 and a sum of shillings 89,000,000/= was withheld from A/C No.0001 00042226 0080.

The matter was reported to the police but it seems no action was taken. It is possible that the police were satisfied that the dispute was not a matter of criminal dimension but a civil matter. The defendant's position from the beginning is that his action was authorized by the 1st plaintiff in favour of a facility advanced to the third party. The plaintiff's position on the other hand is a complete denial that he never gave the defendant that authority. He did ask the defendant to reverse the transfer transaction but the defendant refused. This suit was therefore instituted with the following prayers:

a) That the defendant be ordered to release the principal sum withheld from both accounts;
b) That defendant be ordered to pay interest at the rate of 25% for the money withheld from each account from the date of attachment to the date of full payment;
c) That defendant be ordered to pay interest at the rate of 25% for the money withheld from each account from the date of judgment to the date of final payment;

d) That the court award punitive damages against the defendant for negligence and for breach of professional duty of care to the plaintiffs. A sum of shillings 20,000,000/= is demanded on this head;

e) That the defendant be ordered to pay a sum of shillings 100,000,000/= as general damages for financial difficulties and psychological sufferings that the plaintiffs experienced for the whole period that the defendant had withheld the accounts unlawfully and without just cause;

f) That costs follow the event in favour of the plaintiffs; and

g) That the court be pleased to grant any other order or relief that may deem fit to grant.

The defendant filed a Written Statement of Defence. He also sought leave to present a third party notice on the ground that this Third Party was a necessary party. Leave was granted by Honourable Justice Luanda, J (as he then was) and a Third Party notice was actually filed on 8th February 2007. In the defence, the defendant concedes that the plaintiffs maintained joints accounts as alleged in the plaint. He pleads further that he had written instructions authorizing any of the plaintiffs to operate the joints accounts. As to the lien, he pleaded that the lien was executed by the 1st plaintiff on or about 16th February 2004. The lien was

in favour of the Third Party. It was signed by the 1st plaintiff and as such is valid and binding on the plaintiffs. He prays for dismissal of the suit with costs.

The Third Party filed a Written Statement of Defence. He denied to have knowledge that the plaintiffs had joints accounts referred at paragraph 4 of the plaint or that the defendant had withheld monies from the accounts held by the plaintiffs as alleged in paragraph 5 of the plaint or that the plaintiff had reported the matter to the police. He admits and is aware of a caucus that is referred to in paragraph 9 of the plaint where he denied any involvement of the transaction leading to the withholding of the accounts as alleged by the defendant. So the line of defence for the Third Party is a total denial of his involvement.

The defendant is firm that the Third party was aware of the lien. After reading all testimonies here, I am satisfied as a fact that the Third Party was, at the time of writing his defence, aware of the withholding of the monies from the plaintiff's account. It seems to me that his Sikh community discussed this matter long before his defence was written. There is evidence and he also conceded that was engaged in that community discussion. The Third Party and the plaintiffs are both from the same community of Sikhs. People of substance, the upright ones, rarely deny issues so obvious to them unless such admission jeopardizes their

interests and denial advances their mischief. This determination that the Third Party was aware of the use of the Plaintiffs accounts as a lien to his loan does not necessarily determine or conclude that he had sanctioned it. It needs proof. Is there evidence to prove this assertion? Let us review the testimonies.

At the Final Pre-Trial Conference before my brother Massati, J (as he then was) parties agreed on four issues. These are the issues on which judgment is required. They are:

1) Whether the plaintiffs executed a lien in favour of the defendants to secure loans and advances to the Third Party;
2) Whether the Third Party ever requested and received the loan in the sum of Shs. 89,000,000/=
3) Whether the defendants acted properly in offsetting the sum of US $ 10,430 and Shs. 89,000,000/= from the plaintiff's account in relation to the Third Party's indebtedness to the defendants; and
4) To what reliefs are the parties entitled?

Three witnesses testified for the plaintiffs. Four others testified for the defendant. These testimonies were taken before my brother Massati,J (as he then was). The evidence was recorded by voice recognition machine. His lordship made

handwritten notes which I found helpful. One witness for the Third Party testified before me whose evidence I recorded in long hand. Massati, J was elevated to a position of Principal Judge before this case was concluded and that is how I came to preside on this case. I have read the handwritten notes of my brother as well as transcripts of the court proceedings, I feel comfortable to make this judgment. I have jurisdiction to do so under the provisions of **Order XVIII Rule 10(1)** of the **Civil Procedure Act**, [**CAP 33 R.E 2002**].

The defendant's pleadings rely fundamentally on a lien instrument which the plaintiff is purported to have signed on 16 February 2004. This was in favour of the defendant and in relation to a facility that the defendant had extended to the Third Party. The lien was tendered and admitted in evidence for the plaintiff as **EXH P1** and by the defence as **EXH D2.** The exhibit was a subject of an examination by police forensic handwriting experts. One of them is Hamad Khamis Hamad. He testified for the Plaintiffs as **PW 1.** He is an Inspector, a handwriting expert with the Forensic Bureau of the Criminal Investigation department of the Police. He was in-charge of the document section. The inspector demonstrated that he had sufficient forensic skills. He is a man of letters. He acquired his skills through training in South Africa, India and also from training conducted internally with assistance of the Federal Bureau of

Investigation of the United States of America. He holds a Masters degree in Philosophy on human rights. His evidence was that he examined the signature on the instrument relied on by the defendant as a lien and compared it with other signatures on the passport of the plaintiff, tender documents and other specimen signatures all supposedly being that of the first plaintiff. He concluded that the signature on the instrument purported to be a lien significantly differed with those signatures signed by the first plaintiff in those other documents supplied to him. A report of his findings was made. It was approved by a Senior Superintendent of Police one H.S Gimbi, a commanding officer of the Forensic Bureau at the time.

This report was tendered in evidence and marked as **EXH P1.** In cross examination by Mr. Kesaria, learned Advocate for the defendant, the witness further described the differences that were noted. His conclusion that those signatures significantly differed did not waver in spite of intense and professional cross examination. However, the technical specifications which he made to enable him to differentiate the strokes in the documents were not tendered. No step was taken by the advocate for the plaintiffs to have them tendered. But I must state that I do not think this has any adverse effect on PW1 testimony or adversely affect the defendant. The strokes were explained to the court in the presence of counsel. If there were any doubts, they could be

cleared through cross examination. The position of law seems to me to be that such an expert may be asked to explain his position, which in this case related to the nature of the strokes, but such an opinion, though relevant cannot be treated as inherently conclusive. The court has to be satisfied and make its own conclusion.

PW1 was shown an examination report issued by ex Assistant Inspector of Police, one Masoud Gumbo who testified as **DW3** for the defence. The witness had also made a report stating that in his opinion the signatures in both documents were wrote by one and the same person. **PW1** disowned the report arguing that the making of the report contravened office procedures and was therefore irregular. His evidence was that Inspector Gumbo was no longer working with the forensic document section and as such did not have authority to examine a document submitted there and issue a report on it. The witness disowned Mr. Gumbo's report as being unofficial. It is not disputed that **DW3** was not in the document section at the time he was wrote the report.

Next in line for the plaintiff's side was BALBIR SINGH SAINI. He testified as PW2. His evidence was that he holds two bank accounts with the defendant's bank which he jointly operates with his wife, Balbin Bala Saini. According to his evidence, he had sometime in November 2004 gone to the bank wishing to

withdraw money but was informed at the counter that though his account had sufficient funds he was not allowed to withdraw any money from that account. He went to see the Manager. He was kept waiting for almost two hours. He was later informed that his accounts were used to guarantee a Third Party facility. He denied to have authorized such a guarantee and refuted the signature on what appeared to be an instrument of lien. This document was admitted as **EXH P2**. He had in Account No. 0001 0042226 0080 with a balance of Shs. 89,809,749.98 but after this withdrawal the remaining balance was Shs. 809,749.98 only. A sum of Shs. 89m/= was reduced. A statement of Account was tendered in evidence for identification only and was marked Identification P1B. In Account No. 0001 0042226 0081 the balance was US$ 18,797.90 but after the withdrawal the balance was reduced to US $ 8,367.90 only. A sum of US$ 10,430 was reduced. This is evidenced in the Statement of Account tendered for identification and marked as Identification P1 A. The defendant was firm that it was the plaintiff's signature which was on the lien instrument.

There was a dispute as to when did the plaintiff became aware of the intention of the defendant to use his accounts in recovery of a Third Party debt. In his evidence, he was firm that it was in November 2004. This was contradicted by information in demand notice issued by his lawyers EXH P3 which show that it was sometimes in September 2004. But I do not think the lapse

of the dates is fatal to his evidence. It does not mean he was lying.

The witness admitted to have known the Third Party as a member of his community, a friend and a relative. He also stated that they had a meeting which was attended to by the chairman of the defendant bank and the Third Party where he was told that he will be refunded of his money after the Third Party pays back the money to the bank. At this point, I do make a special finding that the meeting was held at the office of the General Manager of the defendant Bank and that the matter of the joint accounts of the plaintiff was discussed.

According to the first plaintiff, he denied to have been notified by the bank of the withdrawal of money before that was done and denied to have received a letter referred in the pleadings to that effect. He denied a suggestion by Mr. Kesaria, learned Advocate that a meeting was held between the witness, the Third Party, Mr. Ghosh, Chairman of the defendant's bank, Mr. Jandu and Mr. Dawood Dejan of the defendant's bank where the witness was told that his accounts were to be adjusted in relation to a facility extended to the Third Party. His credibility and veracity were tested through cross examination regarding whether or not he received EXH P3, the letters dated 8th September 2004 which was addressed by the plaintiff bank to the Third Party and copied to the plaintiffs and another letter dated

9th November 2004 addressed to him and copied to the Third Party. The witness denied to have received the November letter but under cross examination he admitted to have received it. He repeated in re-examination to say that he received the two or three letters from the Third Party.

The 2nd plaintiff, wife of the 1st plaintiff, testified as a third witness for the plaintiffs' side. She gave her evidence through an interpreter, Mr. Swaran Singh from Punjab to English and vice versa. She confirmed evidence that their joint accounts with the defendant bank were debited without authority from either of them. She was informed by her husband, the first plaintiff about it. It was her piece of evidence that the Third Party was known to them.

The defendant called three witnesses. Hassan Singano, an assistant credit manager with the defendant's bank testified as DW1. The substance of his evidence is that the defendant had extended a financial loan facility to the Third Party and the bank had difficulties in collecting it. The Third Party defaulted in repayments. The facility was secured by a debenture on the company fixed and floating assets and chattel mortgage on earth moving equipment. That the Third Party offered to provide the bank with an additional security in cash and in April 2004 they gave a lien on the deposit account of the plaintiffs. It was his evidence that he was called into the office of the Bank Manager

and found two people there and one of them was introduced to him as Mr. Balbin Singh Saini. He was given EXH D1 and told to keep the document in the security file of the Third Party. Ordinarily and in the cause of business he verified the signature on that document as that of the 1st plaintiff which signature was familiar to him. It was his evidence that the letters EXH D3 and EXH D4 were delivered to the 1st Plaintiff by post registered mail. These were collectively tendered as EXH D5. According to the witness the adjustment of the loan of the Third Party using the funds of the plaintiffs, was in order on the basis of the lien that was given by the plaintiffs. His evidence was attacked on the ground that the lien instrument which was the central issue of his testimony did not show what it secured.

I think it is easy to deal with this attack. In my view it is an unjustified attack. The instrument sufficiently showed that it secured loans and advances made to Bharya Engineering & Construction Company who is the Third Party in these proceedings. The omission requiring to be mentioned is that it does not show the quantum of liability of the third party. The issue is whether or not the omission is fatal or contrary to prudent banking procedures. It cannot be said that it was unnecessary to do so. I think the whole matter reflects on the part of the defendant's bank a rather casual attitude in the way he dealt with the transactions. These transactions were not

properly documented. They ought to have been properly documented as banking transactions otherwise they look like operations of a casino business.

For the time being, the significant issue is about the signature on the instrument and it is whether the signature appearing on it is that of the 1st plaintiff or not. Mr. Singano evidence is that he did not witness the 1st plaintiff sign it but that it was signed before the General Manager. His evidence is not conclusive on this. Under section 69 of the Evidence Act [CAP 6 R.E 2002] it is the law that:

> **"If a document is alleged to be signed or to be written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his writing".**

Mr. Singano testified that he was familiar with the 1st Plaintiff's signature because the latter was a customer of the bank. Whether this is true will depend on further analysis of the assertion together with what happened in a meeting where he was given the instrument. One thing is obvious and that is that Mr. Singano never saw the plaintiff append his signature on the instrument. His assertion that it was signed before **Mr. Suranjan Ghoshi**, the General Manager of the defendant's bank

did not mention the source of his information. His alleged familiarity with the 1st Plaintiff is questionable otherwise he could not have been introduced to a person who was familiar to him when, if it is true, he was called to the General Manager's office.

Mr. Singano who was a Creditor Manager of the defendant bank did not show previous communications about written demand by the defendant requiring the third party to give additional security for his loan. Usually for the sake of transparency of the banking transactions such demands ought to have been documented in writing. The demand could not have been made verbally. Banking transactions are regulated by prudential rules and such a huge amount of loan could not be treated casually as it was here.

Mr. Masoud S. Gumbo (DW3), a former Assistant Inspector of police testified to be a handwriting expert employed by the Forensic Bureau before he was terminated on 5th June 2007. His evidence was in relation to a disputed signature on an instrument he tendered as EXH D1. There is an error on the transcribed record when it refers to it as Exh D11. This is the same exhibit which was tendered by the plaintiffs as EXH P1 by PW1. After he had examined and compared senior characteristic letters and stroke formation of signature on the instrument and those from other documents, he concluded that the signatures were inserted by one and same person. He insisted that he was an authorized

officer and as such was competent to examine the disputed signature and make a report thereon. His description of procedure was that any gazetted officer was allowed to receive any case; examine it without having been assigned to it by superiors; sign the report made by him on the case; and dispatch it back to wherever it came from. This description seems to be amateur based. In Rules and Command Based Systems for which a police force is, approval of undertakings by senior officers is a norm of highest regard. I doubt it that he would have his way in such a smooth fashion explained in his testimony.

The other witness for the defendant was Mr. Suranjan Ghoshi who testified as DW 2. He was the Managing Director and Chief Executive Officer of the defendant bank. His line of defence is that the lien instrument which the bank took as an additional security for bank facility extended to the Third Party was presented to the bank by Mrs. Balbini Saini, the 2nd plaintiff. I think the reference to Mrs. Balbini could be the failure by the transcriber to translate the recorded sound. If this was a correct reference then it contradicts his evidence that the first plaintiff did not inform his wife, the 2nd plaintiff about the lien. His recorded testimony in examination- in- chief runs as follows:

> *"I am aware of that. We had extended credit facility to Bharya Engineering Company and to the tune of about Shs 200,000,000/= and they were not servicing the loan and it*

(was) going to excesses so we were falling a drop and I was talking with my other colleagues the Branch Manager to get to regularize and to get additional securities so at that point of time Mrs. Balbin Saini lien her deposits with us as an additional security".

I think that can be purged and reference be made to Mr. Balbin Saini, the first plaintiff. Having done that still it is not quite clear how Mr. Balbin's and his wife deposits came to be involved here. There was no written demand for additional security or any request in writing to the plaintiffs informing them about their accounts being used as lien for the non performing facility of the Third Party. However, this witness maintains that the lien was regular. The witness referred to other letters including that which notified the plaintiff that the Third Party has defaulted and that as a result the plaintiff's accounts will be used to adjust the loan of the Third Party.

The last witness for the defendant was one Dawood Kassam Dejan who testified as DW4. The testimony of this witness has not been referred to by the parties in their final submissions. I have not benefited from assessment of his evidence by the learned advocates. His recorded evidence by voice recognition machine became a victim of electronic malfunction recording system and because of the absence of a back up facility for such a system his evidence was lost. I take it, and Mr. Kesaria comes

to my aid on this point, that the nature of his evidence was to corroborate the evidence of Mr. Suranjan Ghoshi, **DW2** in respect of the meeting at the defendant bank which was attended by the first plaintiff as well. Therefore though his evidence is a victim of a malfunction wardrobe, it is not an involving one.

For the Third Party only one witness testified. He is Mr. Sarabjit Singh. His full name is Sarabjit Singh Bharya. He is the Managing Director of the Third Party, a construction company known as Bharya Engineering & Contracting Co. Ltd or in its acronym, BECCO. His evidence is that his company maintains an account with the defendant bank since 2003. He knows the plaintiffs. They are family friends. He never had any business or financial transactions with the plaintiffs. He never asked the plaintiffs or any of them to provide a security for the facility that the defendant bank extended to his company or any credit from them. However, he is aware of the claim by the plaintiffs against the defendant bank about the money that the Bank debited from their bank accounts. He became aware of the debit after he had read the letters he received from the defendant telling them that a sum of Shs 100,000,000/= had been credited into his account to secure his loan as additional security. He later changed this version to state that he learned from the bank statement and also through a circulated rumour within his Sikhs community that he

had defrauded the plaintiffs, who are also members of his community.

Mr. Singh admits that he attended a meeting at the bank. Other attendees were Mr. Jandu, Mr. Ghoshi, (DW2) and the Plaintiffs. In that meeting according to his evidence, the plaintiffs were asking DW2 as to why he had debited their accounts with Shs 100,000,000/=. His testimony is that DW2 explained that he had authority from the 1st plaintiffs. Mr. Singh denied to have ever asked the 1st plaintiff for such assistance. The bank did not show any written evidence that he had allowed his account to be credited. He stated that he did not need additional security because he had a debenture and equipment security which sufficiently covered the bank's exposure risk over the facility. He admitted that the amount credited to his account was beneficial to him but he did not stop the defendant to reverse the transaction.

Those are the facts as depicted from the proceedings. They are long but I think the circumstances and the nature of the case requires exposure to and internalization of the detailed facts. Further, it is clear from these facts that the issues involved here are critical to the banking business as well as commercial law reforms in this country. These reforms ought to, and the law in particular, must head towards complete reliability by its users. On the other hand, the succinct of security documentation and other

arrangements in place to secure credits must maintain integrity and credibility in the market in order to be reliable.

I feel it to be my responsibility as a judge, and I think this is a noble universal responsibility for all judges, to interpret the law in the context which will enforce contracts of parties. This interpretation must aim to create in the credit market certainty of the law and confidence in the integrity of security instruments. It is absolutely important for the Court to provide an accurate and reliable guidance to the credit market.

The critical role played by the lending market in stimulating vibrant economic growth in any country cannot be underplayed or be left to float without protection or regulated according to law. At the same time and with same breadth, the lending institutions must operate within the well established principles to ensure consistency and compliance with the law and prudential rules governing financial institutions. Banks are not casinos and should not be allowed to operate like casinos. They cannot be given unfettered powers to shield themselves unfairly and oppressively, from exposure to risks of lending. Banks must also operate within accountable, responsible and reasonable principles of banking. It is in this context that I have taken the detailed facts and upon which my discussion of this case will be based and guided.

All parties were advocated by learned advocates. They all agreed to submit written concluding submissions. Mr. Semu, learned advocate for the plaintiffs main arguments are that the defendant bank had no authority from the plaintiffs, jointly or individually to debit their accounts. Further, that none of the plaintiffs had entered into any arrangement with the Third Party for the provision of a guarantee for any facility advanced by the defendant's bank to the Third Party Company. It is his argument that the defendant used a false document to debit the plaintiff's account. This is **EXH P2/ EXH D1**. The argument relies on the Forensic Report of the Criminal Investigation Department which is **EXH P4** and the evidence of **PW1** which vindicated the signature appearing on EXH P2/EXH D1 as not that of the 1st plaintiff and therefore by extension, a forged document.

From his submissions, the plaintiffs are upbeat that they never executed a lien over their joint accounts in favour of the defendant in order to secure a facility extended to the Third Party. He criticized DW1 evidence, a creditor officer of the defendant, that he registered a lien which according to the plaintiff was defective for lack of proper execution. According to them DW1 testimonies were merely lies. Mr. Said Masoud Gumbo, DW3 is also discredited. It is asserted that this witness had no authority to make EXH D11 which contradicts EXH P1 made by PW1. He was not at the document examination section

of the Criminal Investigation Department when he alleges to have examined the document.

The plaintiffs' attacks the defendant bank for breaching a duty of care to them in that the defendant never communicated to either of them as joint owners of the accounts about the existence of the purported lien over their accounts. According to them, consent of both was required before the account was debited. The English case of BUCKNGHAM CO. VS LONDON & MIDLAND BANK (1895) 12 TLR 70 was referred to me as authority requiring notice to a customer in such a situation as essential. It is concluded that the defendant bank, on the basis of the facts stated by the plaintiffs, did not exercise a duty of care that was owed to them and was thus grossly negligent or acted deliberately against the plaintiffs.

The case cited above, however, is distinguishable. The facts in that case are slightly different from this one where the defendant alleges that the first plaintiff was not only aware but had approved and appended his signature on the lien. If this be true, the requirement of notice to such a customer may not be necessary. This does not mean that a requirement of notice to another customer holding a joint account can be dispensed with on ground that any of the joint account holders had capacity to operate the account. This issue is dealt with below.

On the part of the Third Party, Mr. Gomba, learned advocate summarizes evidence by concluding that there is no evidence which shows that the Third Party instructed or authorized the defendant bank or the plaintiffs to deal with his account by using it as a lien on any facility or in any other manner. It is presumed by the Third Party that the defendant had made a representation to the plaintiffs, customers of the defendant bank, about the problem of the facility without his connivance or knowledge and as such the arrangement does not create liability for the Third Party. It is said that the defendant did that at his own peril.

My attention was drawn to the case of NATIONAL BANK OF COMMERCE OF COMMERCE VS SAID ALLY YAKUT [1989] TLR 119 as authority for holding that the defendant bank did not in these transactions exercise its duty of care to the customers. This is supplemented with another decision in NATIONAL BANK OF COMMERCE VS PERMA SHOE [1988] TLR 244 which held that a bank owes a duty of care to the customer to inform him promptly of such loss so the customer can take appropriate steps to avoid any loss. Backed up by these authorities, the court is asked to dismiss the defendant's claim against the Third Party with costs.

Mr. Kesaria, learned advocate wrote the defendant's closing submissions. He structured his submissions upon the sequencing of the issues. He concludes that the 1st plaintiff executed a lien in favour of the defendant's bank. This position relies on **EXH**

P2/D1. According to the defence, this was signed by 1st plaintiff who testified as PW2 for the plaintiff's side covering accounts no. 42226-80 and 42226-81 denominated in local Tanzania shillings and United States dollars respectively. Mr. Kesaria, learned advocate submits that although the lien instrument is signed by the 1st plaintiff alone, it still binds the 2nd plaintiff on the basis of Accounts Opening Form tendered and admitted in evidence as **EXH D2A** and **D2B**. The operative wording in the document is to the effect that any one of the two can operate the account and therefore the defendant bank had authority to accept the lien document **EXH P2/D1** when it was signed by any of the two account holders. Put it differently, the defendant's bank had no duty to notify the second plaintiff who was a joint account holder with the 1st plaintiff. This is an issue of significant value to underlining rights of joint account holders. I must state that this seems not to be the law. Constructive notice cannot be inferred to another joint account holder on the withdrawal of amount in order to offset debt or as lien for a facility of a third party.

As to the authenticity of the lien document, the defendant opinion is that the court be pleased to adopt the findings of Inspector Masoud Gumbo who testified as DW2 as authentic on the basis of his seniority and experience as against the testimony and findings of PW1. Secondly, that he was a gazetted handwriting expert. His report was not approved by his superiors

but it is the legal opinion of the learned advocate that there is no requirement for approval of such reports when issued by gazetted officers like DW2. The court is urged to consider the evidence in totality and should it find itself in a quagmire or in position where neither PW1 nor DW2 can be relied upon because of their contradictory findings as officers working in the same department then it should ignore their evidence. The segment of such evidence can be summarized in three items as follows:

a) Testimonies on DW1 and DW3 that the 1st plaintiff signed the lien instrument to provide additional security for his friend and relative and Managing Director of the Third Party;
b) Documentary evidence such as Exhibit D2, a letter dated 8th September 2004, another of 9th November 2004; exhibit D4 being a letter dated 16th November 2004; and exhibit D5, a certificate of Posting acknowledgment of Receipts of the letters;
c) Inference that the 1st plaintiff was aware of the lien instrument and that he was the one who signed it.

On the basis of these submissions, the defendant prays that the court be pleased to answer the first issue in the affirmative.

In respect to the second issue, which is whether the Third Party requested or received a loan of shillings 89,000,000/=, the

defendant prays that it be answered also in the affirmative on the basis of admission by the Third Party. As to the third issue which is whether the defendant acted properly in offsetting the sums of US$ 10,430 and Shs. 89,000,000/= from the plaintiffs accounts in relation to the Third Party's indebtedness to the defendant, the court is moved to answer the question in the affirmative on the basis of exhibits D3 and D4; letters dated 9th November 2004 and 16th November 2004 respectively.

As what reliefs are the parties entitled which is the fourth and last issue, the defendant's opinion is that the plaintiff has failed to discharge the burden of proof on the balance of probability and their claim should be dismissed with costs. I am invited to find the Third Party liable to the plaintiff's claims and not the defendant and that the defendant be awarded costs of the Third Party proceedings.

I must commend all advocates in this case for their lucid arguments in the written closing submissions. However, I am dismayed and disappointed for the glaring insufficiency in researched case law; law on securities and banking law specifically. The tools and engines of research are now abundant and at our finger tips. As I have said above, the lending market whose major players includes corporate lawyers; commercial banks, development banks, micro-finance institutions etc must be given accurate and reliable guidance on the position of law, the

law as is, so that they can avoid making mistakes on one hand; and also to create confidence in the securities that are provided to secure loans, debts or any other facility that a lending financial institution may provide. Written submissions are expected to be well researched and to contain principles of law as developed by courts or as enunciated by eminent jurists. If this is not done, the quality of judicial decisions may suffer and our role in guiding and providing others with accurate and reliable legal positions will be dented. This will not end in a small note but our credibility is likely to be compromised and then, a crisis of confidence of trust in the dispensation of justice and rule of law is likely to occur. That should be avoided by being resilient and vigilant in searching for the law. I leave these comments safely at that.

This matter raises a few issues of legal and commercial significance. The case is partly based on Exhibit D1. The contest is whether or not the 1st Plaintiff signed that instrument. Is the signature there that of the 1st plaintiff. That is not all, the court should answer a side issue, which is whether or not the 2nd Plaintiff was also aware of the purported transaction and whether her consent to the transaction was necessary or not. If I decide that she was entitled and that she was not informed, I have to answer another question which is whether such a finding will affect the validity of the purported lien instrument.

The Third Party is a corporate body. Under the principle of the old case of SOLOMON V. SOLOMON & CO. [1897] A.C 22, those who deal with this company, such as the defendant bank, must be aware that the property or accounts of this company are distinct from that of its members, like Sarabjit Singh. The transactions of and with this company do create legal rights and obligations which are vested in the company itself as opposed to its members. It can enter into agreements with others including its members and it can sue them and they can also sue it. Thus, if Sarabjit Singh was acting for the company which is a Third Party here, the defendant bank ought to have documented these transactions in a manner that show that it was dealing with the company and not Sarabjit Singh. Unfortunately, this has not been the case. Unless a veil of incorporation is lifted, and unless the company is formed on the basis of limited liability, its members are not liable for the company's debts. Even when they are, their liability will be based on their full nominal value of shares or the amount a member agrees to buy. I am sure the defendant bank is aware of these primary matters of corporate law. It seems to me that contrary to the principle, the defendant bank did unnecessarily expose itself to serious risks which it could have otherwise shielded against by documenting transactions regarding EXH D1 with the Company, the Third Party.

The authenticity of EXH D1 is challenged by the plaintiffs. They have not alleged fraud directly but I think that is what it amounts to if the signature on that document is not that of the 1st Plaintiff. Under the guidance of the decisions of the Court of Appeal in SAID SALIM BAKHRESSA & CO. LTD V VIP ENGINEERING AND MARKETING LTD [1996] TLR 309 and another case ALFI EAST AFRICA LTD V THEMI INDUSTRIES & DISTRIBUTORS AGENCY [1984]TLR 256 fraud vitiates agreement. Such agreements are void and unenforceable. That is to say should fraud be held then what EXH D1 stands for will be removed and a void will take its place. Fraud is a criminal conduct. According to R.G. PATEL VS LALJI MAKANJI [1957] E.A 314 allegations of fraud must be strictly proved. Although the standard of proof may not be as heavy as beyond reasonable doubt, something more than a mere balance of probability is required. In KANJI PATEL VS KABAL NOROGE (1971) HCD 336, Spry J confirmed that position. I think the law is settled on that principle for now and that whenever dealing with standard of proof in matters that would otherwise be treated under the Penal Code, the standard of proof is higher. In a civil or commercial case, the standard of proof is on the balance of probability. This is a lower standard and less onerous to prove. The decisions cited above dictates that the onus of proof in civil proceedings when fraud is alleged is higher than a mere balance of probability. I subscribe to such position not because I have to, but because I

am satisfied that it is consistent with established principles of justice.

The principle of law is that the one who alleges must prove. The plaintiff's have the onus of proof and the standard must be more than a mere balance of probability and of course, short of proof beyond reasonable doubts required in criminal law. The defendant are pleading that there was no fraud. The conduct of the 1st plaintiff is central to this matter. First, he denied to have received a letter dated 8th September 2004 which is EXH D3 which was addressed to the Company and copied to the attention of 1st plaintiff. But according to the defence, this letter is referred to in a letter written by the plaintiff to the defendant bank by his lawyers dated December 7, 2004. This letter was tendered and admitted in evidence as EXH P3. It is true that the letter alludes to the fact that a copy of EXH D1 was availed to the Advocates. Let me pose here to reflect on this point. This denial is not proof that the 1st Plaintiff appended his signature on **EXH D1**. It could as well be a result of memory lapse or for his failure to reflect on the questions that were put to him.

The letters of November referred to by the defence and marked as EXH D5 were sent by a registered post. By inference the plaintiffs are presumed to have received the letters and were aware of the contents of the letters. I think once the address to which the registered posts is not in dispute, I will hold that the

plaintiff received the letters on a presumption based on the "postal rule" on transfer of offer and acceptance in contract law which presumes that once a letter has been posted so that the person who posted it had no possibility of reversing the transaction it is presumed that it reached its destination. I will not indulge in finding whether it was read or merely laid at a post box, I will be satisfied that it was read and internalized. But, does this conclude on a balance of probability that EXH D1 was regular and reliable? I think it does not.

We have two handwriting experts' reports on the authenticity of the EXH D1. There is at the moment only one institution responsible for examination of documents suspected to have been procured fraudulently or where such documents are examined for authenticity. That is the Forensic Bureau of the Criminal Investigation Department of the Police. It is a government department and operates under command procedures like any other police state apparatus. It seems that the plaintiffs involved the law firm of **Shija & Associates Law Chambers**. The advocates wrote to the Criminal Investigation Bureau requesting for an examination of documents including EXH D1. All documents that advocates sent to the Bureau are attached to EXH P1. The specimen signatures appended to the Account Opening Form was not one of them.

Examination referred above was done by Inspector Hamad Khamis Hamad. He made a report which was sent to the advocates with a forwarding letter signed not by the examiner but by Head of the Forensic Bureau, one H.S. Gyimbi, Senior Superintendent of Police. The examiner signed the report showing that the examination was conducted under S.205 of the Criminal Procedure Act. He also referred to exhibits which were subject of his examination as:

1. EXHIBIT: "A" a letter dated 16th February 2004 bearing a disputed signature purported to be written by Mr. Balbir Singh Saini;
2. EXHIBITS "B1-B7- One copy of passport, three copies of tender documents submitted to Institute of Judicial Administration Lushoto, Tanzania Institute of Accountancy and Dar Es Salaam Institute of Technology and one sheet of paper bearing specimen signatures purported to be written by Mr. Balbir Singh Saini after being requested and on his normal course of business.

Inspector Hamad observed significant differences of strokes formation between the disputed signature in EXH D1 and the specimen signatures and concluded that they were different. He concluded that the signature in that instrument is not that of Mr. Balbir Singh Saini.

On the other hand, Mr. Masoud Gumbo, Assistant Inspector (**DW3**) also received a photocopy of the letter dated 16th February 2004 bearing a disputed signature. This is EXH D1. He also received a photocopy of account opening form dated 28th November 2003, a photocopy of a passport and photocopy of a specimen signature card dated 28th November 2003 all bearing the signature purporting to have been wrote by Mr. Balbir Singh Saini on his normal cause of business. He discovered significant similarities in characteristic letter and stroke formations. His Report is not dated and does not contain file reference number. It does not show that it was dispatched or approved by his commanders.

The law on evidence of public records is found in S.37 of the Law of Evidence, [CAP 6 R.E 2002]. It provides that:

"Any entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty or by other person in performance of a duty specially enjoined by law of the country in which such book, register or record is kept, is itself a relevant fact."

I have been convincingly asked to consider the Report of Assistant Inspector Masoud Gumbo as the most preferable on the basis of his seniority and the fact that he had been in the bureau

longer than Inspector Hamad. I think it is important to consider not only the issue of seniority here but also compliance with the law and office procedures. The government and particularly the Police force is rule based and command oriented. There is evidence, which has not been dented that Inspector Hamad was the head of documents section of the bureau when these specimens were sent there. Assistant Inspector Gumbo had by then been transferred to another section which does not deal with examination of documents. Mr. Gumbo was a gazetted officer. But that fact alone did not give him unfettered powers to examine any specimen freely. A police bureau is not comparable to a medical clinic where experts are only meeting to work without coordination. It respects a chain of command and disciplined distribution of work. There are a few flaws on his report.

Mr. Gumbo's report does not contain an office file reference number. This is a reference that must be in a register to document a subject that was dealt there. Neither does it contain a date on which it was made. This is unusual for a police report. It is the practice to forward such Reports by a forwarding letter. His report was not sent out in that manner. I have to make a finding here. I do not hesitate in finding as a fact that his report is not an official report from the bureau. It offends the substance of section 37 of the Law of Evidence in every respect.

M.Monir, an Indian jurist, in his book titled Textbook on the Law of Evidence (7th Edn.) refers to Lord Russel test for judging the competency of an expert. The questions that Lord Russel asks are: is he ***peritus***? Is he skilled? Has he adequate knowledge? A footnote defines the expression *peritus virtute official as the holder of some official position which requires and, therefore presumes knowledge of that law.* This witness did not hold an office which required him to examine the document. He was not *"peritus virtute".* I therefore find his evidence unreliable and incredible. His evidence is of no effect.

I am left with the report of Inspector Hamad **(PW1)**. The common denominator of the documents with signatures subjected to the experts is the examination in EXH D1 and the one in the passport. I think for the purposes of banking, the relevant signature would have been the specimen signatures on the bank card. These were not examined by Inspector Hamad. They were not presented to him. Whereas I have no dispute with his observation regarding significant differences between the signature on EXH D1 and that on 1st plaintiff's passport and other specimen signatures, I think on a balance of probability again, the comparison of the signatures in the passport is insufficient to confirm the authenticity of the signature on EXH D1. I have read the provisions of S.48 of the Evidence Act which are to the effect that though the signature on the passport is not relevant but is a

relevant fact as far as it goes to show that the signature on it was duly wrote by 1st plaintiff significantly differ with a signature purportedly appended in EXH D1. The opinion of Inspector Hamad which I have found credible counters the testimony of Hassan Singano (DW1) who stated that he recognized the signature on EXH D1 as being that of the 1st plaintiff. That would be it. When it comes to specimen signatures there is, unfortunately, no comparison.

Mr. Singano own testimony is that he was introduced to the plaintiff and then was given EXH D1 to keep in the file of the Third Party. It seems to me that Mr. Singano did not know the 1st plaintiff before he was called by DW2 to take EXH D1 for safe keeping. The introduction that is talked about by him would not have been necessary. Neither did he indicate to the caucus that he knew him. If Mr. Singano had testified that he had dealt with the 1st plaintiff before and that he did so several times and not in a single encounter my decision could probably have been different. I am not satisfied that Mr. Singano was acquainted with the 1st Plaintiff signature or that he had in his ordinary course of business dealt with his documents so as to invoke the provisions of S.49(2) of the Evidence Act. He cannot be relied upon to guide justice to its right way.

I will answer the first issue in the negative. That EXH D1 cannot support what appears as a lien instrument in favour of the

defendant bank. I would have stopped here but I think this is not the only criteria for allowing the claim.

Any financial institution and, a commercial bank in particular, have a duty to its customers. It is a duty of care. Assuming that EXH D1 is regular and was actually executed by the 1st plaintiff, which I have already held is an incorrect assertion, if that is the case, then the bank did not discharge its obligations to the customers. I have already said, and I will repeat this several times, if the Third Party needed an additional facility and the plaintiffs were willing to offer their deposits as additional security for their friend or relative, the bank had an obligation to request or ask the plaintiffs to seek an independent legal advice before they had executed the charge of their accounts. Looking at EXH D1, it is apparent that the long name of a person who signed it is not indicated. That gives an impression that the defendant bank was reckless. I am not satisfied that in the ordinary conduct of banking business relating to security documents a mere signature, without a full name of a person giving such a security, would be enough to legalize a charge. But the fundamental obligation of the defendant bank, as a creditor, is to take reasonable steps to it satisfaction that the surety, i.e. 1st plaintiff, entered into an obligation freely and with the clear knowledge of true facts and natural consequences that will fall on him or her in the event a third party does not service a

performing asset. I am not bound, but I am highly persuaded by an English case of BARCLAYS BANK plc V O'BRIEN & ANOR [1995] 4 ALL ER 417 which is on this point. If the bank does not do this and the customer is put in a situation like the one in this case, courts will intervene to protect the customer. This position is built out from the decision of Lord Denning M.R in another old case in AVON FINANCE CO. LTD VS BRIDGER & ANOTHER [1985] 2 ALL E.R 281 where he held that:

> "The court would not enforce a transaction entered into without independent advice where the terms of the transactions were very unfair and where there had been an inequality of bargaining power together with undue pressure"

It is clear from the pleadings, and even if I presume that the lien is probably regular, that the bank did not inform the offeree that the debt for which the deposit secured was that of a corporate body and not an individual. The consequences in case of a default are different and adverse in case of the former. The effect of the undertaking was not sufficiently explained along those lines. It seems to me that the bank was only interested to put its books of accounts in line with the regulatory requirement. The interests of the plaintiffs were sidelined. The defendant admits that the plaintiffs were complaining about their accounts being debited. This is a reflection of this lack of effective and

sufficient explanation of the effect of securing such a non performing loan. It is evidence that they did not sanction what the defendant did to their accounts.

I am aware that there is another English decision in the BANK OF BARODA V SHAH & ANOR [1988]3 ALL E.R 24 which is to the effect that there is no obligation in law on the Bank to ensure that a customer received entirely independent legal advice before they executed a legal charge. I have read that decision and I have formed an opinion that Baroda does not depart from the other two cases because here, the Bank had assumed that solicitors who represented the customer would act honestly. My conclusion is that in cases where there are legal advisers there is still on the part of the Bank a duty but in such a situation there is no duty to guarantee a customer that such legal advice would be reliable or accurate. If a customer receives an unreliable or inaccurate legal advice, the Bank will not be liable. The point I need to stress is that here, the defendant Bank had a duty to advise the 1st plaintiff to seek an independent legal opinion. The defendant bank was aware that the plaintiffs had no independent legal advisors and the rule in **Bank of Baroda** is inapplicable to them. They obviously did breach that fiduciary relationship between a banker and customer by not doing so. This is so whether EXH D1 is authentic or a forgery.

The defendant bank never bothered to advice the 1st plaintiff to seek a legal advice and I will hold as I do, that such is one of the ingredients of a duty of care of a banker to a customer which was breached. This court cannot enforce the lien even where I could have found as a fact that the lien instrument had actually been signed by the 1st plaintiff.

There is another line of granting the claim. Mr. Kesaria, learned advocates argues that any of the joint account holders could have regularized the lien instrument. I think that is not the law. If it is, which it is not, then it is an unjust law and repugnant to substances of justice. The 2nd plaintiff is a wife of the 1st plaintiff. The law must protect women not as a matter of public policy but for the prevention of the victimization of one party by another. A wife is likely to be a subject of dominating influence of her husband. A prudent bank cannot take a word of one party to the account as final. The duty of care is not to a joint account. It is to the customers and protection of their monies in the account. It is to both joint holders. I have not been able to find local cases on this point here. I have landed on several English cases. They are not binding on this court because they are post Reception date clause. It seems from a litany of these cases, a development of a notion of or presumption of undue influence by husbands over transactions involving their joint accounts or mortgages. I think the point to take home is that confidential

relationship between husband and wife do not by itself give rise to a presumptlon of undue influence. This was the holding in MIDLAND BANK plc V SHEPHERD [1988] 3 ALL E.R 17 and another English case NATIONAL WESTMINSTER BANK plc v MORGAN [1985] 1 ALL E.R 807. Undue influence is a rebuttable presumption. It can only hold if it is proved that the transactions are manifestly disadvantageous to the wife but not otherwise.

Apparently the purported transactions did not involve the wife, the 2nd plaintiff. Assuming again that the 1st plaintiff signed the EXH D1, he did not involve her and neither did the defendant bank. It is in evidence of Suranjan Ghoshi (DW2) that the defendant bank was aware that the 1st plaintiff did not put the 2nd plaintiff on notice of these transactions. As a banker, the defendant had a fiduciary relationship with her, a relationship of a banker and its customer. The defendant bank ought to have exercised its duty of care to her. This is a rule of equity operating in favour of the 2nd plaintiff, a lady, woman and wife of the 1st plaintiff. These transactions were apparently manifestly disadvantageous to her. This is a sufficient ground, in my considered view, to set aside the lien instrument if I determine that it was authentic. I do not hesitate to do so.

The plaintiffs claim for payment of punitive damages for negligence and breach of duty of care. A sum of twenty million shillings is indicated under this head. A claim is made of Shs

100,000,000/= for what is categorized as general damages for financial difficulties and psychological sufferings undergone by the plaintiffs for the duration in which the defendant withheld their accounts unlawfully. I will consider these heads.

Punitive damages are given by courts of law not merely as pecuniary compensation for the loss actually sustained by the plaintiff but as a kind of punishment of the defendant with a view of discouraging similar wrongs in future. These are claimed not as of a right but are discretionary. In other jurisdictions with well developed financial institutions and self regulating financial markets, punitive damages granted in cases of this nature are quite colossal to the extent that if the principles and rates of calculation are applied in our situation, a bank on the wrong side of the law could easily be a subject of liquidation. That does not mean that our banks should be held at lower standards than other banks in traditional and developed economies. I do not think so. But we cannot close our eyes and souls. We have the duty to balance interests. In balancing societal or community and individual interests, and by taking into account the stages of development that these institutions are in, it will be suicidal to clinch an iron fist in the award of damages to the extent to which the State of New York courts or Delaware Chancery commercial court or courts in the United Kingdom would be pleased to award without fear of backlashes.

It is a major finding of this court that the defendant bank acted contrary to prudent banking principles by acting in breach of its obligations; and doing so without reasonable care and without exercising reasonable skills of a banker. The conduct is deplorable requiring a commensurate pecuniary punishment. The amount claimed here is not much for such a deplorable conduct but I think in the circumstances a sum of Shs 10,000,000/= will be an appropriate reprimand from this court. In the circumstances of this case, this penalty is sufficient to act as a deterrence to discourage such wrongs in the future. I therefore award Shs. 10,000,000/= as punitive damages in favour of the Plaintiffs. The amount will attract interest at the court rate of 12 percentum from the date of judgment to the date of final payment.

I have considered the claim for general damages in the sum of Shs.100, 000,000/=. I regard this to be on the high side. I sympathize with the Plaintiffs for they must have had mental anguish on finding that their joint accounts were depleted. The amount involved is not a small amount of money for the class of the plaintiffs. In JACKSON MSETTI VS BLUE STAR SERVICE STATION [1997] TLR 114 my brother Mrema J, as he then was, granted the plaintiff damages under this head. It is the duty of the court to exercise its judicial discretion and base its determination on principles of law and other factors. The

quantum of damages in this case must aim to restore the plaintiffs, as far as money can do it, to a position they would have been if the wrongful conduct by the defendant could not have happened. I am generally guided by a decision of the Court of Appeal in SAID KIBWANA & GENERAL TYRE EA LTD VS ROSE JUMBE [1993]TLR 175. I am mindful that this pecuniary restoration is, to a very large extent, aided or supplemented by other modes of restoration of value such as interest on the amount awarded and on the amount wrongfully debited from the account. On that basis, the amount claimed appears to me to be on rather high side. I am settled in my mind that the amount of Shs. 20,000,000/= is the most ideal quantum to be awarded here. This is the amount I should award as general damages. Therefore I do award a sum of Shs.20,000,000/= as general damages in favour of the plaintiffs. This amount will attract interest at the court rate of 12 percentum from the date of judgment to the date of final payment.

Further, the defendant bank is hereby ordered to release the principle sum of the money withheld from both accounts as prayed in the plaint. These will be paid with interest at the rate of 20 percentum from the date of wrongful debit or attachment of the accounts to the date of final payment. The defendant bank is condemned to costs of the suit for the Plaintiffs and for the Third Party. the costs shall be taxed accordingly. In view of this

judgment the case against the Third Party is dismissed on the grounds set out in this judgment.

F.M.Werema,

JUDGE

The Judgment is read on this 12th day of February, 2009 in the presence of Parties and the Court clerk.

Words: 10,583

I Certify that this is a true and correct
of the original/order Judgment Ruling
Sign _____
Registrar Commercial Court Dsm.
Date 13/2/09