IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISON)
AT DAR ES SALAAM
COMMERCIAL CASE NO.68 OF 2007.

ANNA BABU t/a E & L CATERING SERVICES.....PLAINTIFF

VERSUS

AKIBA COMMERCIAL BANK.....DEFENDANT

JUDGMENT

MRUMA J

The plaintiff is a business woman trading in a registered name of E&L Catering Services. In September 2006 she opened a bank account **no. 050000001270 in the name of E & L Catering Services** with the defendant's bank at its Kijitonyama branch. Thereafter, she made several deposits and withdrawals the last being on 21st September, 2006 in which transaction she withdrew shillings 1,000,000/=.

On 12th October, 2006 she applied for and managed to secure a bank statement of her account whereupon she discovered that there were three unauthorized withdrawals made in the account totalling shillings **2,000,000/=.**

On 12th January, 2007 she wrote a letter to the defendant's bank explaining about the "forged" withdrawals and complaining on the

mistreatment she had received from the defendant officials. The defendant did not take any step, but denied any responsibility.

On 18th June, 2007 the defendant's bank wrote to the plaintiff informing her that the existing bank/customer relationship between them has ceased and her account with the bank shall be closed. Following that letter the plaintiff's account with the bank was actually closed and a cheque for money therein amounting to shillings 5,266,900/= was issued in plaintiff's favour.

The plaintiff has now come to this court complaining that as a business woman providing catering services to customers, she has suffered economical loss, embarrassments and inconveniences as a result of cessation of her account with the defendant's bank which was the only bank account she was maintaining. That is the bone of contention which led her to seek this court's intervention.

The plaintiff's claims against the defendant is for shillings 92,110,000/ being her money unlawfully withdrawn from her account and damages for inconveniences caused and loss of business. The plaintiff is also claiming interests on the decretal sum at the rate of 30% per annum from the date when the cause of action arose to the date of judgment, further interest at court's rate from the date of judgment till payment in full and costs of the suit.

The defendant as expected has denied any liability and has put the plaintiff to the strictest proof of her claims. The defendant asserts that all the withdrawals in the account were effected by the plaintiff herself.

At the commencement of the hearing court framed the following issues for determination:-

1. Whether or not there were any unauthorized withdrawals made in the plaintiff's account.
2. Whether or not the plaintiff was mistreated, embarrassed and harassed by the defendant's officials when following up unauthorized withdrawals
3. Whether the plaintiff suffered any damages
4. To what reliefs are the parties entitled.

Each party called three witnesses to testify for her case. A brief summary of their evidence will be of service at the outset. I shall start with the plaintiff's case.

Led the learned counsel Mr. Daimu, **PW.1** (plaintiff herself) told this court that she is a business woman dealing with catering services. She said that she started doing this business since 1994 after she graduated in hotel management course from YMCA in Moshi. In the year 2005 she opened a bank account with the defendant's bank at Kijitonyama branch in her registered business name of E&L Catering Services. After

the account became operational she made several deposits and withdrawals, the last one being in September, 2006. She continued to tell the Court that in January, 2007 she discovered three consecutive withdrawals which were not authorized by her. She said that she queried about the withdrawals, but instead of assistance from the defendant's officials, she got harassed, mistreated and embarrassed. She complained to the defendant's branch manager but in vain, instead her bank account was closed down and as a result of which some of her cheques were not honoured. She reported the matter to the police. An investigation was carried out on the three signatures appended on the withdrawal forms for the respective withdrawals, and that the results showed differences between her undisputed signatures and the disputed one. This led to opening of criminal charges against one **Neema Aron Tarimo** who was an employee of the defendant in the capacity of cashier at teller no.2 and who used to serve the plaintiff.

PW1 tendered in evidence various documents including her business license **(Exhibit P2),** TIN number **(Exhibit P1)**, bank statement **(Exhibit P3)**, complaint letter **(Exhibit P4)**, notice of intention to terminate relationship, **(Exhibit P 5)** letter of closure of the account with a cheque to the tune of 5,600,000/= **(Exhibit P6),** 11 paying/deposit slips **(Exhibit P7)** Photostat copy of a cheque amounting to 192,000/= **(Exhibit P8)**,

and two demand letters **(Exhibit P9)** sent to the defendant by her advocates.

PW.2 is D2813 DCPL Emmanuel of Kijitonyama Police Station. His testimony was brief and geared towards the facts that he was assigned a duty to investigate the theft allegation at the Kijitonyama Akiba Commercial Bank branch which was reported by the plaintiff. That having recorded the plaintiff's statements he proceeded to the bank and requested for the cash withdrawal forms purporting to authorize the payments which were disputed by the plaintiff. He asked the plaintiff to sign in other papers and compared the signature together with her signature in her letter to the defendant. The witness testified further that he took the same and forwarded them to the Forensic Department of the Police headquarters whereby after further examination of the disputed and undisputed signatures of the plaintiff it was detected that there were some differences on the letters and stroke formation. This, led to the arrest of one Neema Aron Tarimo, the bank teller who was attending the plaintiff.

On cross examination PW2 stated that the arrest was because Neema was working in teller number 2 where all the alleged unauthorized withdrawals were made and because she was the one who appeared to

have approved the payment and because she used to serve the plaintiff.

PW.3 is E.2912 DSGT Yohanes Joseph Mgendi of the Police headquarters in the Documents Examination Department. He testified that on the **25/5/2005** he received from PW2 a packet of documents containing withdrawal forms of Akiba Commercial Bank dated **12/10/2006**, **13/6/2006** and **2/11/2006** respectively all bearing disputed signatures and a letter bearing undisputed signature of the plaintiff which was taken on her normal course of business. He sated further that he examined the documents by using a **VS 5000** technology and produced a report which was to the effect that there was no similarities between the disputed and undisputed signatures. The differences he said, were found in the letters and stroke formation and it is on the basis of this he formed opinion that the disputed and undisputed signatures were different. This report which was labelled KJN/IR/575/2007 was admitted and marked as exhibit **P.10**.

That was all on the plaintiff's case.

For the defendant case, **DW.1** is Neema Aron Tarimo a bank teller working with the defendant's bank. She testified that she know the plaintiff and she used to attend her among other customers. She remembers that one day the plaintiff requested for her bank statement

after making some deposits. After she received the statement she claimed to have noticed unauthorized withdrawals in her account. DW1 referred her to the supervisor Mrs Juliana Francis Swai DW3. The witness said that after the complaint various specimens' signatures of the plaintiff were taken and after some scrutiny, the Supervisor, Operation Manager, the Managing Director and herself were of the view that it was the plaintiff herself who made the withdrawals. In respect of the criminal case in which she was charged, DW1 told the court that she was called by the police and was informed that she was being accused of forging and stealing. Consequently she was charged before the Resident Magistrate Court of Dar es Salaam at Kisutu. The case dragged in court for about three years. However she was found not guilty and was acquitted. She told the court that the plaintiff was a liar and wanted to enrich herself unjustly.

DW.2 is Godbless Francis Tumaini, Head of recovery at the defendant's bank, who at the material time was the branch manager at the defendant's branch of Kijitonyama. He said that the plaintiff complained to him about there being several withdrawals of her monies from her account without her knowledge. According to DW2 he asked the plaintiff to sign on a piece of paper and after comparing the specimen signatures and her old signature he formed an opinion that the signatures were similar to that in her bank card, a fact which he said

was conceded by the plaintiff but still denied to have withdrawn the money.

The last defence witness is **Mrs. Juliana Francis Swai (DW.3).** She testified that she know the plaintiff as their ex-customer at Kijitonyama Branch. That at one time she received her complaints of unauthorized withdrawals. She said that after receiving the complaints the bank mounted preliminary investigation first by examining and comparing the plaintiffs' signatures which they found to be different. According to this witness the signatures were not similar, though the bank teller DW1 had told them that it was the plaintiff who withdrew the money. It is further testimony of DW3 that although they assured the plaintiff of thorough investigations over the matter, but before they could do that they received a notice of a criminal charge against DW1. She said that, after the notice the bank decided to close the plaintiff's account but before doing that they notified her of that intention by giving her a 30 days' notice. She stated further that the plaintiff's account was not closed until after the expiry of the thirty days notice when they issued her a banker's cheque to withdraw her monies in their bank.

In relation to the criminal charges against DW1, she said that DW1 was acquitted.

On cross examination by Mr. Daimu counsel for the plaintiff, DW3 told the court that the withdrawal procedures were that; a client would proceed to the counter and produce a bank card, the teller in the counter would compare the signature with the specimen signature kept by the bank and if she is satisfied that the signatures are similar, the customer is allowed to withdraw the money she wants. The witness testified further that the bank did not go on with the investigations because the plaintiff had decided to open a criminal case and therefore they had to wait for the results of that case.

Explaining the plaintiff's complaint, DW3 told the court that after compared the signatures in different vouchers they discovered that they were different but the handwriting was the same. She said that until the time of hearing of this case they had not discovered for sure who withdrew the money and they were waiting for the end of the criminal case. The witness said that their investigations ended in looking at and comparing the signatures and did not go further after concluding that the signatures were the plaintiff's signatures though they were different. On allegation of mistreatment of the plaintiff, DW3 stated that she was not informed and therefore she is not aware of any case of mistreatment of the plaintiff by bank officials.

That was the testimonies of the witnesses of the both sides.

Counsels preferred to make final submissions. I must thank them for their brilliant and well researched submissions which has been of great assistant to me in rendering down this judgment. I will revert to them in the course of my judgment.

To me, I find the whole fracas to revolve around the first issue formulated. That is **whether or not there were any unauthorized withdrawals made in the plaintiff's account with the defendant's bank**.

Obviously, the first premise would be whether the monies were withdrawn in the first place. This is a fact which is not contended to by both parties. But, whereas the parties do agree that there were withdrawals, they are at variance as to who did the withdrawals. The question therefore is; who did the withdrawals and whether she/he had the authority to do so?

It is in the evidence of DW3 during cross-examination that the procedure in withdrawing cash money from the bank is that; the customer would introduce herself to the bank teller by producing her bank card together with the withdrawal forms duly signed by her. The bank teller will compare the signature in the withdrawal forms and the bank card together with that in a specimen signature of the customer which is kept by the bank. If the teller is satisfied that the signatures are

similar, she would allow the customer to withdraw from her account the amount she wishes to withdraw and the cash will be handed over to the customer.

One undisputed fact (which even the defendants' own witnesses concede to) is that the signatures in the withdrawal forms and those that they asked the plaintiff to sign in a piece of papers for comparison purposes were different, or at least it kept on changing. This piece of evidence is corroborated by exhibit **P.10** the forensic handwriting report which state categorically that there are differences between the disputed and undisputed signatures of the plaintiff.

I find this to be credible evidence corroborating the plaintiff's claim that there were unauthorized withdrawals in her account. In my view, the bank teller concerned was supposed to make sure that the signature of the customer who is before her and who signs the withdrawal forms in her presence is similar to the specimen signatures kept by the bank and the signature in her bank card. In the case at hand when defence witnesses were asked about their efforts to verify their allegation that it was the plaintiff herself who made the withdrawals despite the differences they noticed in the disputed and undisputed signatures of the plaintiff, they all conceded that the signatures were not similar but they said that they gave their own opinion which they formed after

examining the specimen by a naked eye that although the signatures were not similar but nevertheless it was the plaintiff who did the withdraws complained of. They did not establish the basis of their findings.

Counsel for the defendant in his final submission seems to impress that the report is not credible for its emanating from what he calls calculated omission. Explaining, and of course without any legal ground to base his explanations, the learned counsel says that the signatures were tested on withdrawal forms against pay-in slips and a letter done after the alleged claims had arisen, which, according to him would suggest that the plaintiff knowing what she was up to, could not produce the signatures which were identical or consistent for that matter.

With due respect, I do not find credence in this line of reasoning. In the first place, counsel for the defendant did not take any step or lead any evidence to substantiate the suspicions he had over the expert hand writing report (Exhibit P10). He did not object to the said expert report or at least cross-examine **PW3** on this particular point.

Section 110 (1) of the **Evidence Act,(Cap.6 R.E.2002**) clearly puts a burden on he who alleges to prove. The plaintiff has been able to discharge her burden. She alleged that the signatures in the withdrawal

forms were not her signatures. She has brought an expert, D. Station Sgt Yahones Joseph Mugendi (PW3) who has ably demonstrated the differences in the signatures and supported the plaintiff's assertions. The defendant on the other hand concedes that the disputed and undisputed signatures are different but without any legal or factual base insists that it is the plaintiff who did the withdrawals. In the absence of any concrete evidence to support these allegations that it was actually the plaintiff who did or orchestrated the withdrawals, the defendant cannot be said to have been able to discharge the burden placed on it by section 110(1) of the Evidence Act. Submissions from the bar to try to dislodge evidence (the forensic report) given under oath in a dock cannot stand.

Furthermore counsel for the defendant submitted that during cross examination **PW.3** testified and revealed that exhibit **P.10** was a copy printed, retrospectively dated and signed by the police officer at the instance and request of the plaintiff's lawyer. At page 5 paragraph three of his final submissions the counsel submits that:-

> *"the anomaly which we would note and submit against in this connection is the fact that the credibility if the said report, though admissible in law as evidence, is watered down by subsequent preparation of a document which was previously produced and*

used for different purpose/cases for there is still large room to adulterate the same to suit the latter objective".

In my considered view, that line of argument was quite unnecessary and proceeded on incorrect recital of the testimonies at the hearing. **Why?** because, first it is not true that or to say the least not reflected in the evidence on record that on cross examination the **PW.3** testified and revealed that Exhibit **P.10** was a copy printed; retrospectively dated and signed by him, at the instance of the plaintiff's lawyer. Rather, his testimony, on cross examination, relates to how and when he acquired his knowledge and experience, the basis of his report, equipments used in examination of the signature and who requested him to prepare the report (i.e. the plaintiff's counsel).

It is not correct therefore to assert that the report is not credible on the ground that it is the plaintiff's counsel at whose instance it was prepared, neither can it be discredited for mere reason that it had been used as evidence in another court of law. I know of no law or legal principle which bars calling into evidence in a civil case, any material evidence which had been used in evidence in a previous criminal case, unless declared inadmissible.

In the instant case, counsel for the defendant did not object to its admission, let alone adducing any other piece of evidence to contradict

it either at the time it was tendered or during the defence case. Thus, in view of the evidence on record, I find that the signatures on the withdrawals forms are not signatures of the plaintiff and there is no evidence whatsoever that it is the plaintiff who orchestrated the signing thereof.

The next question is; on whose shoulder should the withdrawals be placed; this question will not detain me much. I have found as a matter of fact that both parties do agree that the disputed and undisputed signatures are actually different. In their testimonies DW1, DW2 and DW3 do concede that even in their internal investigations they realized that the signatures were different but they relied on the explanation given by DW1 to the effect that actually it is the plaintiff who withdrew the money to form the opinion that it is the plaintiff who signed on the withdraw forms.

It is trite law of evidence that where any matter is required by law or rule of procedure to be reduced into the writing no oral evidence shall be given at the expense of the writing itself **[See Section 100 of the Evidence Act]**. In the present case it is the evidence of DW1 and DW2 that it is the bank procedure for a teller to compare the signatures of the customer before allowing her to withdraw the money. Because the bank has conceded that the signatures on the material withdrawal forms differ from the specimen signature of the plaintiff which is in

their custody and her signature in the bank card, it goes without saying that the unauthorized withdrawals should be placed on the bank's shoulder as it allowed withdrawals despite the fact that it knew or ought to have known that the signatures were different. It does not matter whether it is the plaintiff or any other person who did the withdraws provided that the signature in the withdrawal forms differs from the approved signature of the plaintiff which is in the bank card and bank server, the bank should be blamed for allowing the withdraws. It is the practice of the bank that customers are allowed to withdraw their monies only when they use the same signature which they used in their bank card signed at the time of opening of the account.

The third issue is about harassment, embarrassment and mistreatment of the plaintiff by the defendant's officials. This issue will not detain me much. The plaintiff alleged harassment, mistreatment and embarrassment by the defendant when making follow-ups on the alleged misappropriation of her monies. I look into evidence submitted to see if there is anything to prove the allegations. All what I see is a letter to the defendant titled **"YAH: UPOTEVU WA FEDHA A/C 050000001270"(which forms part of Exhibit P4)** and specifically of more help would be a paragraph related to the allegations. This is paragraph 8 and partly paragraph 9, which are reproduced hereunder:-

"Lakini cha kushangaza na kusikitisha supervisor alikuwa anaongea kwa ukali kwangu na kuniamuru nilipe zile pesa Tshs.15,000/= nikaenda kwa Yule msichana aliyetaka kunionyesha kile kitabu na nilipofika kwenye dirisha kwa ukali alianza kunisemesha kuwa mimi ni muongo ninataka kuiibia Banki na kusema mimi huwa ananiona nina mawazo ninapokuja hapo Banki alitoa maneno ambayo hayakustahili kwangu na mbele ya wateja".

In his testimony PW1 did not say anything in relation to the harassment complained of and the submissions by her counsel does not render any assistance to this court in relation to the allegations. The words referred "***maneno ambayo hayakustahili***" are not substantiated therefore not proved. The words like "***muongo,anataka kuibia bank***" which would actually amount to harassment had not been so precisely and succinctly proved not only by the plaintiff but by any other person or on-lookers who were present (in this instance the customers who allegedly were present at the scene, or the man said to have accompanied the plaintiff on the material day at the bank). And I do not find anything of assistance in the counsel's final submission on this issue. Thus, I am of the considered view that the plaintiff has not

proved the issue of harassment, embarrassment and mistreatment on the balance of probability and therefore the same cannot stand.

Now, ***whether the plaintiff suffered any damage and to what reliefs are the parties entitled to***. The plaintiff averred at paragraph 15 and 16 consecutively that:-

> *15. That the plaintiff is a business woman providing catering services and the account maintained by the plaintiff in the defendant bank was the only bank wherein the plaintiff put her money for business with the defendant*
>
> *16. That, as a consequence of cessation of her account the plaintiff has suffered economical loss, embarrassment and inconveniences. She has not been able to withdraw money from her account and she has been unable to pay her suppliers she took much time to resolve the problem to enable her to continue the business but in vain....."*

Apart from a list of potential clients, certificate of registration, and TIN number, the evidence in support of the instances pleaded such as economic loss, embarrassment and inconvenience so as to constituting

damage ensuing from loss of the said 2,000,000 are scanty and so wanting. Counsel for the defendant has referred this court to numerous English authorities including that of **Gibbons versus Westminster Bank Ltd (1939)3All ER, and Maco Door and Window Hardware (UK) Ltd versus Her Majesty's Revenue and Customs [2008] 3 All ER 1020,** and has submitted that the plaintiff being a trader is entitled to substantial damages without even pleading and proving actual damage. In essence he pegs his submission on the facts that holding of a business license, being a registered tax payer, employing some assistants, spending several days seeking solution of her problems instead of fully engaging in expanding her business would automatically entitle her to the damages. He concludes that in such circumstance the plaintiff suffered a lot.

I would agree with the defendant's counsel in principle but only to the extent of the practical definition of the term damage which is the harm that proceeds out of a wrong or injury perpetrated by the defendant but unless substantiated, say by showing how much she owed to her assistants, how much she owes the Tax Authorities for reason of the said unauthorized withdrawals, the plaintiff cannot be entitled to any damages in that category. No evidence had been adduced to prove that the plaintiff has suffered any harm in terms of her time which she could otherwise have spent in pursuing of her business or because she was

unable to withdraw or that she has been unable to pay her suppliers etc. For instance no single supplier was summoned to testify in this case and explain how the plaintiff had failed to pay for the supply he made for reason that the defendant's bank closed its account or allowed unauthorized withdraws.

In the event therefore, I would answer issue No 3 in the negative. That is to say there is no evidence that for reasons of unauthorized withdraws and closure of bank account, the plaintiff suffered damages as stipulated under paragraphs 15 and 16 of the plaint.

The last issue is about the reliefs.

I will start by stating the obvious that the relationship between a banker and a customer is a substance of contract. The standard, though not necessarily comprehensive analysis of the contents of that contract can be found in the judgment of **Atkins L.J.** in **Joachimson Versus Swiss Bank Corporation[1921]KB 110**, in the case involving an implied duty of care on the part of the bank to repay on demand where at 127 he stated that:-

> *"I think that there is only one contract made between the bank and its customer. The terms of that contract involve obligations on both sides and require careful statement. They appear upon consideration to include the following provisions. The bank undertakes to receive money and to collect bills for its customer's*

account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch, and as such written orders may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery."[Emphasize mine]

From the foregone principle of the banker-customer relationship, the following can be gathered;

i) There is an obligation on the Banker to repay the customer upon demand and according to instructions and therefore,

ii) The customer must authenticate the cheque (repayment order) by his signature and must do so carefully so as not to guide forgery.

That is so because the nature of this relationship actually impose upon the banker duties of a debtor as against the creditor, and therefore it would be illogical and illegal to proceed to debit the account of the creditor without sure proof of his demand such as authenticity of signatures or bank cards for that matter. That is an exercise, which in the words of the counsel for the defendant, and to which I verily agree, requires intense scrutiny prior to customer's cash withdrawal.

It appears to me that in the present case the defendant overlooked such exercise during all of the three consecutive contentious withdrawals.

But, could be that this was caused by the plaintiff's breach of its duty in this relationship? To answer this self posed question it is imperative to examine the extent of the duty of a customer in such relationship and particularly that of exercising a duty of care in drawing the repayment orders so as to guard against forgery. The extent to which the customer has a duty to guard against forgery was clearly articulated in the cases of **The Keptighalla Rubber Estate Ltd versus The National Bank of India (1909)2 KB 1010** and expounded more by the Privy Council in the case of **Tai Hing Cotton Mill Ltd Versus Ling Chong Hing Bank Ltd and Others [1986] AC 80**. Their Lordships in the latter case stated that the customer, is not under a duty to take reasonable precautions in the management of his business with the bank to prevent faulty cheques

(repayment orders or more appropriately in the instance case, the withdrawal forms) being presented for payment, nor is he under a duty to check his periodic bank statement so as to enable him notify the bank of any unauthorized debit item, because such wider duties are not necessary incidents of the banker-customer relationship. Since the banking business is not the business of the customer but that of the bank forgery of signatures is a risk of the service which the bank offers.

It follows therefore that, if the banker pays out upon payment orders (including withdrawal forms) which are not customer's; it is acting outside its mandate and cannot plead customer's authority in justification of its debiting the customer's account. More succinctly stated all what that principle entails is that, if such signature is forged then the payment is not according to the customer's instructions and therefore the bank is not entitled to debit the customer's account because the right so to do emanates from the mandate manifested by authentic signature of the customer on the drawn repayment order.

This, suffice to reiterate that it is a risk of the service which it is the banker's business to offer.

I now turn to the question of determining the magnitude of the damage so as to award the prayers. My Richter scale in this exercise will be **Zuberi Agustino Versus Ancient Mugabe (1992) T.L.R 137, Masolele General Agencies Versus African Inland Church Tanzania (1994) T.L.R**

192 (Unreported), where the principle that specific damages must be specifically pleaded and proved was re echoed.

Firstly, a prayer for payment of 92,110,000/=. The gist of this prayer seems to me to be embodied in paragraphs 3 and 9 of the plaint which I respectively reproduce hereunder:-

> *"That the Plaintiff's claim against the Defendant is for the sum Of Tshs.92, 110,000;- being the Plaintiff's money unlawfully Withdrawn from her account and damages for inconvenience Caused and loss of business."(Underlining is my emphasis)*

> *"That the statement revealed several unauthorized cash withdrawals from the plaintiff's account, on 12th October, 2006 shs 500,000/= and on November, 2006, Tshs. 200,000/= making the total of 2,000,000/= of unauthorized withdrawals.....".*

[I think there is a typing omission error here]

That notwithstanding, since there are oral testimonies and documentary evidence in respect of the correct amounts of withdrawals, I will disregard the error in this part of the pleadings.

I have already found as a matter of fact that some of the damages claimed have not been proved. For instance the plaintiff's counsel has submitted that the plaintiff wanted to utilize the money to buy a motor vehicle to facilitate her catering business and that she is a tax payer,

employed assistants and had spent a number of days seeking solution of her problem instead of engaging in expansion of her business and therefore she suffered a lot. In such circumstance counsel submits, the courts have been granting substantial damages to a trader even if he has not pleaded and proved special damages. He backed his view with the case of **Westminster (Supra).** As stated earlier this was not stated by the plaintiff herself in her testimony nor was it specifically pleaded and I have already ruled that it affords no proof in any event.

Going by the principles laid down in **Zuberi Agustino Versus Ancient Mugabe (1992) T.L.R 137 and Masolele General Agencies Versus African Inland Church Tanzania (1994) T.L.R 192** it is clear to me that specific damages must be specifically pleaded and proved. The plaintiff's pleadings, her oral testimony and her counsel's submissions, are off-standards and I find no flavour in the cited authorities on obvious grounds that first, in the name of the great principle of *stare decisi* I am not bound by the said authority and secondly, they are distinguishable from the present case with respect to the subjects of claim. There is no evidence whatsoever to show how the figure of Shillings 92,110,000/= was arrived at.

In the event I find that the plaintiff has failed to substantiate the claim of shillings 92,110,000/= and I reject it.

However, in view of cash withdrawal forms and the testimony of PW1 which is not seriously challenged by the defendant it is clear that shillings 1,300,000/=, 500,000/= and 200,000/= were withdrawn without the authorization of the plaintiff. She is therefore entitled for reimbursement of that amount.

She is entitled to reimbursement of her monies debited in her account without her authorization. Since the monies amounting to **2,000,000/=** has been proved to have been withdrawn from her account at the defendant's bank without authorization, I enter judgment to the plaintiff against the defendant to that extent.

Prayers **ii, iii, and IV** are in respect of interest at commercial rate from the date the cause of action ensued to the judgment then from the date of instituting the suit to the date of judgment and on court rate from date of judgment to full satisfaction respectively. I should state the obvious that this prayer is not misplaced. The plaintiff has missed the prospect of placing her monies at interest as a result of the unauthorized debits made by the defendant to her account. Interest is, therefore, payable.

In the case of E**astern radio services versus R.J Patel,(1962) e.a.818 and Y.F Gulan Hussein versus Somaliland Shipping Co ltd [1959] E.A 25** the court held that where a successful party was deprived of the use of goods or money by reason of wrongful act on the part of the

defendant, the part who has been so deprived of the use of money to which he is entitled should be compensated for such depravation by ***the award of interest*** (emphasis mine)

Now, with respect to the second prayer, the plaintiff did not substantiate as to when was the date of cause of action between the three consecutive different dates of unauthorized withdrawals, and the date when she discovered the same. In the **Tai Hing Cotton Mill case (Supra)** such interest was awarded form the date the plaintiffs had issued writs to the effect of notifying the banker of the wrongful debiting. Their Lordships had these to say

> *"In the circumstances of this case interest should run from 15 May 1978: for by issuing its writ on that day the company required the banks to eliminate the unauthorized debits from the relevant current accounts and to repay what was due".*

I fully subscribe myself with that finding and so guided I order that interest should run from the date the plaintiff notified the defendant's bank in writing that is on the 12th January, 2007 until this judgment.

Regarding the rate of interest, the plaintiff did not assist this Court on the basis of the rate of 30% per annum she is claiming. The closest information which could render assistance to me on this is the prevailing lending interest rates in the country which indicates that the prime lending rate in Tanzania is between 16.03% to 21% per annum. I

accordingly award the plaintiff an interest on the decreed amount at the commercial rate of **20%** from 12th January, 2007 till the judgment. I grant her further interest at the rate of **7%** on the decreed sum from the date of this Judgment till full satisfaction.

In summary therefore, judgment is hereby entered for the plaintiff to the extent explained hereinabove. The plaintiff will also have her costs of the suit.

A.R.MRUMA,

JUDGE

1/6/2011

Coram: Hon. A.R.Mruma, Judge

For the Plaintiff: Mr. Daimu for the Plaintiff.

For the Defendant: Mr. Moris for the Defendant

CC: J. Grison.

COURT: Judgment delivered this 1st day of June 2011.

A.R.MRUMA,

JUDGE

1/6/2011

6,100 - Words