IN THE HIGH COURT IN TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 80 OF 2007

CHARLES ROBERT MAGOA---------- PLAINTIFF

VERSUS

AKIBA COMMERCIAL BANK ---------- DEFENDANT

JUDGMENT

BUKUKU, J

Mr. Charles Robert Magoa, a natural person carrying on business for gain, herein referred to as the plaintiff is suing Akiba Commercial Bank, a limited liability Company carrying on banking business in Tanzania, herein referred to as the defendant. The plaintiff is praying for judgment and decree against the defendant for:

(i) Payment of T.shs.90,000,000/= being damages for loss of business and inconvenience;
(ii) Interest at Commercial rate from the date when the cause of action arose to the date of judgment;
(iii) Payment of interest on the decretal sum at Court's rate from date of judgment till full satisfaction of the decretal sum;
(iv) Costs of this suit; and
(v) Any other relief(s) the Court may deem fit to grant.

The plaintiff is suing the defendant for wrongly debiting his account hence causing him inconvenience and loss of business. He averred that, sometimes in March, 2007, he deposited T.shs. 46,340,000 vide cheque No. 187952, in his account No. 020803949797 maintained by the defendant bank. The said cheque was for compensation for his land acquired by the Government. The plaintiff further averred that, upon going to encash T.shs. 20,000,000 from his account, the defendant failed/refused to honor his request. As it transpired, on 7th May, 2007, the defendants' bank debited the cheque from his account to the Ministry of Lands without prior consulting him, thus rendering him suffer loss of business an inconvenience for the use of his monies, the act which is now highly questioned, disputed and complained of by the plaintiff.

The defendant denied the claim. Admitting to have debited the cheque to the drawer, it is the defence of the defendant that, returning the cheque to the drawer was not unlawful and without good cause. As bankers they had an obligation to protect the deposits of their clients and pay when they are satisfied that payments are genuine and regular. Defendant therefore prayed for dismissal of the case with costs.

The plaintiff is represented by Mpoki and Associates, Advocates while defendant is represented by MDC Law Chambers, Advocates.

At the beginning of the trial before Honorable Frederick Werema, J (as he then was), three issues were framed by the parties and agreed by the Court as being contentious.

The issues are:-

(a) Whether the defendant's debiting of the account of the plaintiff was lawful; or for good cause;

(b) Whether, if the above is in affirmative, the plaintiff suffered any damages due to defendant's action;

(c) To what relief the parties are entitled to.

The plaintiff called three witnesses, including himself, while defense side called two witnesses.

A narration of how the cheque was debited to the drawer, is found in the testimony of PW1, the plaintiff himself. It is the plaintiff's testimony that at that material time, he was the owner of a piece of land on Plot No. 248/6, at Kurasini area, Temeke Municipality in Dar Es Salaam. He used that piece of land to run his garage business by the name and style of "Kurasini Garage". Sometimes in 2007, the Government acquired a piece of land at Kurasini, including plaintiff's land for purposes of expansion and development of Dar Es Salaam Sea Port. The plaintiff was compensated for the land acquired by the Government to the tune of T.shs. 46,340,000/=. The payment was effected on 27th March, 2007 vide cheque No. 187952 drawn by the Ministry of Lands and Human settlement, which he then deposited it in his account No. 020803949797 maintained with the defendant's Kariakoo Branch. PW1 tendered in court four documents (Exh. P1- P4). They include a crossed cheque to be paid into the account of Charles Robert Magoa, Certificate of Registration of his garage business, payment voucher which showed that the cheque was payment for compensation of a house and land of the payee (Mr. Magoa) and a copy of pay in slip dated 11 April, 2011.

Narrating further, plaintiff testified that, upon the Government acquiring the land, he started the process of relocating his garage business. In the process, he was offered a plot in Temeke for a consideration of T.shs. 20,000,000. On 13th April 2007, he went to the defendant bank to withdraw some money (T.shs. 20,000,000/=) in order to pay for the plot. Upon making the request for withdrawal, he was informed by the bank teller that, the amount of money he wanted to withdraw was huge and he needed special clearance to withdraw. He was therefore advised by the bank teller to write a formal request to the bank. Alternatively, he was advised to

withdraw only T.shs. 5,000,000/= since the Manager was not in the office at that time. According to PW1, he declined to withdraw T.shs. 5,000,000/= as advised because he wanted the T.shs. 20,000,000/= lump sum in order to purchase the plot. He therefore wrote the letter as advised. The following day, he went again to the bank to follow up his request for withdrawal. On that day he managed to see the Manager.

The Manager told him to wait for three days. Having waited for three days, on 20th April 2007, he went again to the bank. PW1 testified further that, on that day, the Manager told him that, the cheque he deposited in his account belongs to the estate of an undisclosed deceased person and that it was for probate and administration matter. He was further informed that, the bank had received orders from Temeke Primary Court to close the account because the monies were proceeds of a probate and that he (PW1) was the administrator of the estate.

PW1 continued with his testimony by saying that, upon being informed so, he took up the matter with the Temeke Primary Court and found out that the objector was one Elizabeth Magoa, the widow of his deceased brother Eli Robert Magoa. PW1 proceeded to the Temeke District Court to complain about the court order. An inspection on the matter was conducted by the District Court. The inspection revealed that the issue of probate was finalized and closed and therefore the cheque at the bank has nothing to do with the probate issue as claimed by the Temeke Primary Court. PW1 was then given by the Temeke District Court a copy of a letter addressed to the defendant bank, confirming that the probate issue was finalized and ordered the defendant bank to re-open plaintiff's account. This is reflected in Exh. P3 collectively.

Plaintiff further informed the Court that, the letter was received by the bank on 5th May 2007 and the bank asked him to wait for a week. After a week, he then went back to the bank headquarters to inquire about his monies. He was referred back to Kariakoo branch where, upon inquiring, he was told that the process was still going on. When he went back to the

headquarters, he was directed to see the General Manager who told him that, his money was accidentally returned to the drawer (Ministry of Lands). When contacted, the Ministry confirmed that the cheque was returned. The copy of the returned cheque dated 10 May, 2007, was tendered in Court as Exh. P4. It is the testimony of the plaintiff that, the process of preparing another cheque took three months and he received his cheque in June, 2007. PW1 testified further that, due to the acts of the defendant he has suffered a lot since his premises were demolished, his machinery vandalized and the plot he wanted to purchase was sold to other people because he relied on the compensation money to buy another plot. Finally PW1 testified that, the defendant bank was responsible for the damages that he had suffered. If the bank had called and informed him of the mishap, they would not have returned the cheque to the Ministry of Lands. He therefore prays that the Court grants him the relief sought.

When cross examined by Mr. Morris, Learned Advocate for the defendant, PW1 reiterated that, the bank did not give him his money on time and that they had no reason to return the cheque to the drawer. shown Exh. P1 (a cheque) he maintained that it was an open cheque and there was no requirement for clearance. He further testified that, the defendant bank never informed him in writing about the cause of the delay which prompted the cheque to be returned to the drawer.

Salum Kazi Salum testified as PW2. He informed the court that he worked with PW1 as technical supervisor in panel beating for seven years. He corroborated the evidence of PW1 on the plot being acquired by the Government, on the moving of the garage after PW1 had been paid compensation, and that, he was aware that PW1 was in the process of relocating his garage business and that he had secured a plot at Temeke behind Bandari Collage. PW2 further testified that, when he made a follow up on the plot, PW1 told him that the compensation cheque had a problem and that the bank had refused to encash it.

The third and final witness on the plaintiff's side was Mr. Benezeri Alex Iddi, a taxi driver. It was his testimony that, he was one of PW1's clients, and is conversant with the claim in Court. He testified that, he was aware that PW1's garage was demolished and that he was in the process of looking for an alternative plot for the garage business. He was the one who connected PW1 with one Mr. Lyimo who had a plot near the Bandari Collage and which PW1 wanted to purchase. He further testified that PW1 was prepared to buy the Plot but said he was waiting for a compensation cheque. Since the cheque was delayed, PW1 did not buy the Plot and thus it was sold to another person. Upon being cross examined, PW3 testified that, he was present when the plaintiff and one Mr. Lyimo negotiated on the Plot and that he was to be a witness of the purchase. He further stated that, though the parties did not enter into an agreement, they agreed verbally on the purchase price.

Mr. Richard Wilbert Rweyunga who was by then a credit officer with the defendant bank, testified for the defence as DW1. His testimony was that, it is true that the plaintiff (PW1) deposited a cheque of Tshs. 46,340,000/= in his account at Akiba Commercial bank Kariakoo branch. He further testified that, on 10th April, 2007, PW1 opened a savings account at defendant's bank whereby he deposited a cheque worth T.shs 46,340,000 and that the drawer of the cheque was Ministry of Lands and Human Settlement. He also testified that, as a procedure, they sent the cheque to the clearing house at the Bank of Tanzania. DW1 further testified that, on 19th April, 2007 the defendant bank received a court order from Temeke Primary Court ordering them to close the account of PW1 because the money deposited in that account was for probate matters. The Court order was tendered and admitted as Exh. D1.

Upon informing PW1 of the said court order, DW1 testified that, they closed the account and returned the cheque to the drawer. DW1 further testified that, later on they received a letter from the Temeke District court

in a form of an inspection note. The inspection note was tendered in court and admitted as Exh. D2. Following the inspection note, DW1 further informed the court that, he later received a letter (EXh.3) from the Temeke District Court informing the defendant that, the account of PW1 be allowed to operate since they have discovered that the cheque had nothing to do with the probate issue. It is DW1's disposition that, despite the order of the Court, it was the defendant's bank position that they return the cheque. As a bank they had an obligation to protect the deposits of theirclients and to pay only when they are satisfied that payments are genuine and regular. DW1 totally denied that, in returning the cheque to the Ministry of Lands was unlawful and without a good cause. He maintained that, they returned the cheque in order to protect themselves and the interest of the Ministry of lands for a cheque which they were not sure of.

When cross examined, DW1 told this Court that, they became suspicious when they received the primary Court letter. He admitted that, they did not ask the Temeke Primary Court where to send the money, and also admitted that the cheque had a payment voucher attached to it. When shown Exhibit P1, DW1 admitted that it was a payment voucher which showed "Malipo ya fidia kwa ajili ya nyumba na ardhi ya mtajwa hapo juu: Charles Robert Magoa". Meaning, the cheque was for compensation for Mr. Charles Magoa's house and land. DW1 further admitted that, they verbally informed PW1 that they returned the cheque but did not copy the letter to him. He further admitted that, they had an obligation to issue notice to the plaintiff about the closure of his account but this did not happen. However, DW1 denies having caused any damages to PW1. All what they thought was that, the money had problems and that was the reason of sending it back to the drawer.

The second and last defence witness also testified. DW2, Juliana Swai told this Court that, she is employed by defendant bank as General

Manager of operations since 16th April, 2007. She testified that, upon receiving the order of the Court to close PW1's account, she requested the Kariakoo Manager to contact the client about the Court order. At the same time, the headquarters contacted the Ministry of Lands who were the drawer of the cheque, and informed them about the Court order which showed that the monies paid into PW1 account was meant for administration of the estate of the late brother of PW1. According to DW2, the Permanent Secretary of the Ministry of Lands asked them to return the cheque. They did so through a bankers' cheque.

DW2 further testified that, the plaintiff was a new client and therefore as bankers, they wanted to be sure of the legality/genuineness of the funds, and that she wanted the money to be safe. In a twist of events DW2 denied closing the account for a while but said the account was blocked for a while. She however admitted that, they are obliged to give a notice of one month to a depositor if it is the bank that wishes to close the account. In any eventuality, the money in the account was to be returned to the client.

On being cross examined, DW2 testified that, there was uncertainty or/unclear contradicting Courts' orders which turned out to be risky to pay PW1. She however maintained that, they returned the cheque because they were suspicious that the money was meant to be proceeds of an estate of the deceased, and therefore it was better to return the money to the rightful beneficiary. She also made reference to a circular issued by the Bank of Tanzania, circular No.8 of 2002 which was aimed at combating money laundering. This circular required bankers to know their clients' well. DW2 further confessed that, it was their own initiative to return the cheque to the Ministry and that they were not ordered by the Court. DW2 was informed by DW1 that the cheque was accompanied by a payment voucher which showed that the money was for compensation of properties of the plaintiff but then, they were confused with the order of the Court

which showed that the money was for proceeds of the estate of the plaintiff's deceased brother. She also confessed that, by the time they were returning the money, the cheque had been cleared by the clearing house at the central bank, but still, they became suspicious about the client and not the source of funds.

The advocates were granted time to file their final submissions. But before going into the merits of the submissions, I would like to address one issue. Counsel for plaintiff made a prayer to this Court for an order to amend the second issue. He prayed to substitute the word "affirmative" appearing in the recorded second issue with the word "negative". His reasons being that, if the defendants' act of debiting the plaintiff's account was unlawful or in good cause (i.e, answered in the affirmative) there shall be no point in determining any damage occasioned on the part of the plaintiff. I fully agreed with that observation and treading on O. XIV rule 5(1) of the Civil Procedure Code which provides:

"5-(1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matter in controversy between the parties shall so be made or framed.

(2) The Court may also, at any time before passing a decree, strike out any issue (s) that appears to be wrongly framed or introduced."

I hereby amend the second issue as prayed. The second issue shall now read:

"Whether if the above is in the negative, the plaintiff suffered any damages due to defendant's action".

In his final submission, Counsel for the plaintiff submitted that, the defendant bank had knowledge of the origin of the cheque and reasons for payment as the bank had the relevant cheque, payment voucher and had confirmed with the drawer of the cheque. This was uncontroverted by DW1 and DW2 in their testimonies. He also submitted that, the Court's orders relied upon by the defendant are clear and are not contradicting as claimed. If at all those orders were unclear or uncertain, the proper cause was not to debit the plaintiff's account but to seek clarification from the Courts on the aspect of the orders which defendant thought were not clear or are contradicting. He surmised that, it was highly improper and in breach of the law for the bank to return the money without the order or direction of the Court or the plaintiff. With due regard to banker/customer relationship, it is the averrement of Counsel for the plaintiff that, the defendant's arbitrary action did not consider or take into account its relation in law with plaintiff. He cited a wall of cases to substantiate his claim. He also submitted that, there was no evidence shown to suggest there was money laundering in this case thus justifying the unilateral act of debiting the plaintiff's account and pay the same to the Ministry of Lands. Therefore, on the first issue he answered in the negative in that, the act of the defendant debiting plaintiff's account was not lawful and was not done in good faith.

On the second issue, Counsel for the plaintiff submitted that, the defendants' act of holding plaintiff's cheque when he needed monies to pay for another plot, deprived the plaintiff of the same. Had the defendant released the funds earlier the plaintiff would not have suffered the damage in terms of business, equipment, documents and other properties which were destroyed. He therefore surmised that the defendant's acts led to the plaintiff's damage and thus he is entitled to T.shs. 90,000,000.00 as damages for loss of business and inconvenience, interest and costs.

Defendant's final submission was brief. He submitted that it is true the plaintiff had opened and encashed his cheque into defendant's bank. However, that account had several irregularities. First, the immediate and drastic step of the plaintiff opening an account and depositing a huge amount of money, and whose business or income flow had yet to be known or ascertained by the defendant, by itself raised eyebrows as would reasonably do in any ordinary banking transaction. Second, two days later after opening the account, the plaintiff went to the defendant bank to withdraw T.shs. 20,000,000/= at a go in total disregard of the fact that the cheque was crossed, hence payable to the drawee after clearance, plaintiff had not requested special clearance so that payment is expedited and lastly, he had not given notice to the bank to draw such a large amount of money at one time. Third, there was an unprecedented thrust from the plaintiff demanding for forthwith payment, and fourth, within the next seven days, the bank had received two Court orders from Temeke Primary Court and Temeke District Court to close and open the said account.

He therefore surmised that, the above chain of anomalous events could not be underestimated by a prudent banker such as the defendant. It was the duty of the defendant bank to see to it that suspicious transactions by prospective account holders should be taken seriously so as to iron out any vices that would otherwise corrupt the industry and the economy in general. As to whether the plaintiff suffered any damages, Counsel for the defendant submitted that plaintiff has hopelessly failed to prove to this Court his daily means, income, or expenditure. He has even failed to produce his annual tax returns of his garage to prove his income. He therefore submitted that, if at all he suffered damages, justifying evidence or testimonies would have not been difficult to mobilize. He therefore prayed for dismissal of the suit together with costs

I have considered testimonies of witnesses and concluding submissions made by learned advocates on this issue. It is not in doubt

that PW1, Mr. Charles Magoa, opened an account at the defendant's bank and deposited into that account, a cheque worth T.shs. 46,340,00/=. It is also a fact that, the defendant bank returned the plaintiff's cheque to the drawer without plaintiff's instructions.

That settled, Let me now turn to the first issue which is whether the defendant's debiting of the account of the plaintiff was lawful or for good cause. It is a fact that, upon opening an account with defendant bank, the plaintiff automatically became a customer of that bank. The term "customer" of a bank is not defined by law but so far as banking business is concerned, he is a person whose money has been accepted on the footing that the banker will honor up to the amount standing to his credit, irrespective of his connection being of short or long standing. When a banker accepts deposits of money from a customer, he is only a debtor of the customer in respect of that money, because the money ceases to be the money of the customer and therefore, becomes the absolute property of the banker. His only obligation towards the customer is to honor on presentation, cheques drawn by the customer on the bank, together with interest, if any, on demand, provided there are sufficient funds in the customer's account to meet the cheque. All in all, the primary general relationship between a banker and a customer is that of a debtor and a creditor, and their respective positions are determined by the existing state of the bank account.

In his closing submission, Learned Counsel for the defendant submitted that, the bank was forced to return the cheque to the drawer because the defendant bank did not know well the historical background of the plaintiff and that, the act of opening an account and depositing a large sum of money and two days later requesting to withdraw the same, made the defendant bank suspicious. I can understand the worries of the defendant, however their suspicion per se, cannot justify the action taken. As already intimated, by opening an account with the banker, a customer

enters into a relationship with a banker. The special feature of this relationship imposes several obligations on the banker.

One of the fundamental obligations is embedded in the concept of Know Your Customer". It is a known fact that, banks are rendering various services to their customers and the latter are undertaking many transactions/transfers of funds through the banking system. Nowadays, with the coming into use of information technology in the banking system, likelihood of fraud, money laundering and misuse of such facilities have also increased. That is why banks are now exercising due diligence in understanding their customers and the nature of their business. Being mindful of this fact, I am sure that, prior to accepting plaintiff's credit, the bank had at least the basic requisite information regarding the plaintiff. Such information include, name, occupation, full address, his signature, some form of identity and referees. This information enabled the bank to open that account. If proper due diligence was done, and plaintiff opened his account, how come defendant is now claiming that he knew little about his client. This can mean one thing: that, the defendant was negligent in securing proper information of the plaintiff at the time of opening the account. If the defendant had doubts on the character of the plaintiff, he ought to have fully ascertained the true identity of the plaintiff by all other means, instead of deciding unliterary to return the cheque to the drawer. Therefore the issue that the defendant did not know well the plaintiff, finds no purchase in me. It is also the assertion of the defendant that, the account was new and therefore, the act of the plaintiff depositing his cheque and then wanting to withdraw a large sum of money two days later, made them become suspicious. With due regard, I wish to differ on this. The reason being that, in banking business, duration is not of essence to establish a relationship between a banker and a customer. This position has been held in various decisions such as **Foley V. Hill 2 H.L.C (1848-1850)**; **Shanti Prasad V. Director of enforcement (Supreme Court of India)**; **Subramania Chettiar V. Kadiresan** and many more.

It is not essential that the account must have been operated upon for some time to merit a person to be a customer of the bank. Even a single deposit in the account will be sufficient to designate a person as customer of the banker. The kind of thinking that a customer must be accustomed to deal with the banker before he is designated as a customer, has exploded or discarded a long time ago with the duration theory. In the case of **Ladbroke V. Todd** it was held, by justice Bailhache that:

> *"The relationship of banker and customer begins as soon as the first Cheque is paid in and accepted for collection."*

Since then, duration was never an essence in the relationship between the banker and the customer and that the fact that a person had no prior banking transaction with the bank because the account was new, would not by itself exclude the possibility of his becoming a customer when he paid in the amount. Therefore, as it stands, the argument of the defendant bank that they were suspicious of the plaintiff just because he opened an account and requested to withdraw some money two days later, crumbles. The bank was duty bound to have done its due diligence of the plaintiff prior to accepting him as his customer.

The other issue was raised in the testimonies of DW1 and DW2 to the effect that, the two letters from the Temeke Primary and District Court which requested the bank to close plaintiff's account and then later on to open the same account, confused them. In my opinion, if the two orders were unclear or contradicting, then, the proper cause was for the defendant to seek clarifications from the Courts on the aspects of the orders. As a diligent bank, it had the duty to be guided by the Court which issued the order. The defendant did not do that and in the alternative, they decided to take up the matter with the Ministry of Lands, and allegedly, upon advice from the Ministry, they returned the cheque without notifying the plaintiff. No evidence was adduced by the defendant to show that indeed they were advised by the Ministry of Lands to return the cheque.

Even if there was such evidence, it could have been of little value in their defence.

It is the testimony of both DW1 and DW2 that, the cheque tendered by the plaintiff had a payment voucher which clearly stated that it was for compensation purposes and that, the said cheque was subjected to the clearing house prior to being accepted by the bank. Notwithstanding that there was that undisputed payment voucher, and in total disregard to the District Court's order, it is the testimony of DW2, that, defendant bank decided on its own (emphasis mine), first to block plaintiff's account and later to return the Cheque to the drawer without prior instructions from the plaintiff who is their customer. Legally, to me, this amounts to a fundamental breach of contract between the banker and the customer. The banker had an obligation of informing its customer of what was happening and not communicating with the drawer of the cheque who is not a privy to the contract between the banker and the customer! Both DW1 and DW2 admitted in their testimonies that, they were duty bound to inform the plaintiff on the closure of his account. That did not happen. Why then did they not do so. To me this shows bad faith/ negligence on the part of the defendant.

I should pause here and ask myself, even if defendant was right in debiting plaintiff's account in for a good cause because the opening and operation of that account was shrouded with suspicion, did the defendant act diligently/ and or took reasonable finally returning the cheque to the drawer without prior notice to the plaintiff? According to the testimony of PW1, when he went to inquire about his money at the defendant bank on 5th May, 2007, he was told to wait for one week. When he went after one week, again he was told to wait because the process was going on. Whatever process there was, but defendant has failed to show what steps they were taking as a bank when they told the plaintiff to wait. Under these circumstances, the Court has a right to infer that, there was no

process going on but the defendant, acting on its suspicion of the plaintiff had already decided to return the cheque to the drawer. In fact, going by the records, it is during that one week of waiting that the cheque was returned to the drawer without plaintiff's knowledge. The fact that the money had passed through the clearing house and the defendant being satisfied by the Court that the cheque was genuine, its source and purpose of payment known, I am satisfied that, the act of defendant bank first, of closing down PW1's account and then returning the cheque to the drawer without his prior knowledge, instructions or even consultation, was not lawful, and was not done for a good cause. Under the circumstances, I answer the first issue in the negative.

I now come to the second issue on whether if the answer to issue number one is in the negative, if the plaintiff suffered any damages due to defendant's action. In answer to this, the defendant has submitted that, plaintiff suffered no damages since he has failed to establish and prove any damages apart from generally mentioning a figure of one's preference. It is further alleged by the defendant that, plaintiff has failed to prove to this Court his daily/monthly income, expenditure or even to show his garage's annual statutory tax returns. More so, defendant submitted that, since the garage was demolished, plaintiff has failed to establish specific items and values that were vandalized not even showing a police report. It is on this account that defendant submitted that the plaintiff did not suffer any damages and therefore he deserves to be nothing.

Arguing his case, plaintiff testified that, having been paid his compensation, and having negotiated for the purchase of the alternative plot, he went to the bank to with the intention to withdraw his money in order to buy the plot. Defendant's act of holding his money and debiting the account and paying the same to the Ministry of Land, has made it impossible for him to complete the sale transaction. Even if he wanted another land, he could not have paid for it. Arguing further, plaintiff

informed this Court that, his source of funds was the money which was credited into his account and which he was not allowed to take even after several demands. Since the defendant bank knew the purpose for which he wanted to draw the money, and since the defendant knew about the money and its purpose, when they communicated with Ministry of Lands. It is the lamentation of the plaintiff that, had the defendant released the monies earlier the plaintiff would not have suffered the damage in terms of his business, equipments, documents and other properties which were all destroyed. Since the plaintiff was a trader, which was his activity which earned him profit, then the plaintiff's damage was the direct result or consequences of the defendant's act of denying and or depriving him his money.

It is trite law, and I need not cite any authority, that special damages must be specifically pleaded and proved. Plaintiff has pleaded damages of shilling ninety million for his loss of business and inconvenience. I agree with counsel for the defendant that plaintiff merely stated the figure and has failed to prove how he arrived at that figure. But this alone, does not warrant the plaintiff not to be paid damages, or any form of compensation.

I think it is now high time for our banks to take stock of how they treat their customers. Most banks forget that once they accept a deposit from a customer, they automatically enter into a banker/customer relationship which is contractual. They are required to fulfill their obligations as bankers. Banks must operate within accountable, responsible and reasonable principles of banking. One such general principle is that, once a customer has opened an account with the bank, there is an obligation on the banker to honor the customer's cheque as long as there are sufficient funds available in the account for meeting the cheque.

Having answered the first issue in the negative, that the defendant's act of debiting plaintiff's account was not lawful, it goes without saying that the defendant bank is liable to compensate plaintiff for the loss suffered by

him, even though he did not specifically prove the damage he is entitled to. The fact that the dishonoring of the cheque took place due to mistake of the bank is not an excuse to the plaintiff being paid damages. Damages are awarded in order to restore the plaintiff, as far as money can do, to a position they would have been if the wrongful conduct by the defendant could not have happened. In this case, a measure of damages as a result of the defendant bank to debit plaintiff's account is the difference in the value to the plaintiff.

The defendant had a legal duty of care to act in a reasonable and diligent manner in dealing with his customers. In this case the defendant failed to do so. In the case of Kesharichand V. Shillong Banking Corporation Limited AIR 1965 SC 1711, the Supreme Court of India stated the obvious in the following terms:-

> *"The bank is bound to use reasonable skills and diligence in presenting and securing payments of the cheque and placing the proceeds to the customers' account and in taking such other measures."*

Having established that the plaintiff is entitled to damages, it takes us to the third and final issue: to what reliefs the parties are entitled to. In determining this, I have taken into consideration the following factors: that, there existed a contractual relationship between the plaintiff and the defendant. The defendant has failed to fulfill its obligations. I am also aware that the plaintiff was entitled to make some profit out of his garage business and to that extent the plaintiff is entitled to compensation. Unfortunately, this Court has been disabled to know how the plaintiff came about the computation of damages amounting to T.shs. 90.0 Million being damages for loss of business and inconvenience. The claim is not supported by any convincing evidence. I am aware that out of his garage business, the plaintiff could have made profit and therefore, entitled to some compensation. However, since there is no evidence to support the

plaintiff's claim, I am reluctant to award compensation of T.shs. 90.0 Million as claimed. Considering that it is clear from the evidence that the plaintiff suffered loss; has failed to buy the alternative plot thus could not relocate his garage business on time; had to follow up the matter at different destinations; and had to wait for some time before the Ministry of Lands wrote him another cheque, all that entitles the plaintiff to some compensation. Now, the question which has pestered my mind is, how much compensation is he entitled. I regret to say that, unfortunately, the plaintiff has put himself into a tight corner by his laxity. Much as he indicacted the sum of T.shs. 90.0 mln as damages, he has not bothered to prove how he arrived that figure nor had he shown any other cost incurred. Although he produced as evidence his business registration license, he has never bothered to tell us how much he earned in his garage business, or how much costs he incurred. He just left it to the Court to decide for him.

Much as the assertion of the plaintiff was such that his garage was demolished, the fact remains that, a party who wishes to prove a fact has to shoulder disturbances including ransacking documents however dusty or defaced, in order to unearth supportive evidence. Here, the plaintiff was duty bound to establish how he arrived at T.shs 90.0 million as damages. I am afraid that the plaintiff did not sufficiently establish how this sum was arrived at. I have considered the claim for damages in the sum of T.shs. 90,000,000/=. I regard this to be on the high side. I sympathies with the plaintiff for he must have had suffered a lot on finding that his money which he depended upon had been returned to the drawer. I consider the amount of money involved is not a small amount of money for the class of plaintiff. In the case of **Jackson Musseti V. Blue Star Service Station (1997) TLR 114** my learned brother Mrema, J (as he then was), granted the plaintiff the 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.

In the circumstances, I will allow general damages to the tune of T.shs 10,000,000/= only being opportunity lost in the purchase of the alternative plot, together with costs incurred by the plaintiff for following up the matter. The above sum shall attract interest at the rate of 7% per annum from the date when the action arose to the date of judgment and a further payment of interest of 5% of the decretal sum from the date of judgment till full satisfaction of the decretal sum. Costs of the suit are awarded to the plaintiff.

It is accordingly ordered.

A.E BUKUKU

JUDGE

27 OCTOBER, 2011

Ruling delivered this 27th day of October, 2011 in the presence of Mr. Morris, Learned Counsel for defendant and in the presence of Mr. Charles Magoa, the Plaintiff.

A.E BUKUKU

JUDGE

27 OCTOBER, 2011

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