IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

COMMERCIAL CASE No. 104 OF 2017

BETWEEN

THE M & FIVE B HOTELS AND TOURS LIMITED.....PLAINTIFF

Versus

EXIM BANK TANZANIA LIMITED .....DEFENDANT

JUDGMENT

MRUMA, J.:

The Plaintiff, The M and Five B Hotels and Tours Limited (hereinafter to be referred to as the Plaintiff) commenced this action vide a Plaint dated 21st June, 2017 and presented for filing on 22nd June 2017 against the Defendant (Exim Bank Tanzania Limited or the Defendant). The Plaintiff seeks Judgment and Orders in the following terms:-

a) For an order that forensic audit be conducted in the Plaintiff's current and loan accounts held and operated at the Defendant's bank, Arusha branch and in the Defendant's affairs in the operations of Plaintiff's current and loan accounts in order to determine the actual amounts of fraudulent withdrawals made in the Plaintiff's loan and current accounts and determine the Defendant's role played in the fraudulent transactions and upon findings of the audit;

(i) The Plaintiffs be allowed to offset the amounts fraudulently withdrawn and the amount of unauthorized withdrawals from its current and loan accounts and pay only the sum or such sums as will be determined as being properly disbursed drawn and utilized by the Plaintiff as per the Plaintiff's proper authorizations and mandates;

(ii) The Defendant be ordered to reactivate the Plaintiff's current and loan accounts and disburse to the Plaintiff the balance amount of the Term Loan Facility after deducting the amount of the unauthorized withdrawals;

(iii) The Defendant be ordered to waive interest, fees, charges and any other banking charges charged on the Authorized Loan Amount, and to restructure the repayment of the Term Loan Facility by granting the Plaintiff reasonable time to repay the authorized loan amounts without accrued interests, fees and other charges charged thereon

b) For payment of damages for conversion and payment of entire sum of unauthorized withdrawals and the entire proceeds fraudulently and negligently withdrawn and drawn down from the Plaintiff's

current and loan accounts held and operated at the Defendant's bank Arusha Branch and wrongly and fraudulently converted or alternatively for payment of the entire sum of amounts of unauthorized withdrawals as money had and received by the Defendant to the Plaintiff's use;

c) For payment by the Defendant to the Plaintiff of the sum of the United States Dollars Twelve Million (US$ 12,000,000.00) being special damages suffered by the Plaintiff as pleaded in paragraph 25 of the Plaint caused by the Defendant's negligence, fraudulent conversion and breach of contract as particularized in paragraphs 19,20,21,22,23 and 24 of the plaint;

d) For payment by the Defendant to the Plaintiffs of the sum of United States Dollars Fifteen Million (US$ 15,000,000.00), being general and punitive damages for negligence, fraudulent conversion and breach of contract caused by the Defendant's negligent and fraudulent actions and omissions complained of in this plaint including costs for the following up the recovery of the whole sum wrongfully converted due to the Defendant's fraudulent and negligent actions and omissions;

e) For payment of interest on the sum itemized in prayers items (a), (b), (b), (c) and (d) above at the rate of 21% per annum computed from the date of fraudulent withdrawals and fraudulent conversion to the date of full payment;

f) For payment of interest at the rate of 12% per annum on the decretal sum in respect of prayers items (a), (b), (c) (d) and (e) above computed from the date of judgment till full satisfaction of the entire decretal sum and;

g) For an order releasing the guarantors and discharging the guarantees and the securities created by the Plaintiffs and Guarantors in favour of the Defendant as security for the grant of the term loan facility listed in paragraph 7 of this plaint;

h) For payment of all costs and expenses incurred by the Plaintiff in bringing this suit and the traditional prayer of;

i) Any other relief(s) as the court may deem fit and just to grant.

The Plaintiff's case is that she is the customer of the Defendant's bank at its Arusha branch holding and operating a current account number **0792854006** and two loan accounts numbers **0036026542** and **0036027857.** In the year 2011 the Plaintiff commenced construction of a

five star hotel project in its landed property on Plot No. 47 Block EE Ngarenaro, Arusha Municipality.

When the construction was at an advanced stage and given the pace and speed under which it was taking it became apparent that equity financing and finance generated from third party related companies funds could not copy with construction speed and it was therefore resolved that the company seek bank financing by way of loan from the Defendant's Bank.

The Plaintiff states further that on 2nd May, 2012 she made an application for credit facilities (Exhibits P1 and P2) in which she applied for a term loan of United States Dollars Three Million (USD 3,000,000.00) from the Defendant's bank. During that time construction was at advanced stages. The application was duly granted and on 4th June 2012 the Plaintiff accepted the terms and conditions contained in the facility letter (Exhibits P3 and P4).

Apart from that loan the Plaintiff had another loan (an overdraft facility) with the Defendant's bank which the Defendant had agreed to review.

It is the Plaintiff statement that in the facility letter (Exhibit P5), there was no specific terms and conditions agreed between the parties regarding how disbursements could be made and accordingly disbursements were effected

in the traditional banking practice by submitting a letter written by or on behalf of the Plaintiff accompanied by supporting documents such as:

1. Supplier's invoice;
2. Application for transfer or any other withdrawal in the form provided by the Defendant and:
3. Cheques or other negotiable instruments dully signed by Mr. Mathias Manga (PW1), who was sole signatory of the Plaintiff's Current and Loan Accounts.

It is further statement of the Plaintiff that in August 2015 she made a request for disbursement of monies but to her astonishment she was informed by the Defendant's bank that the entire sum of the Term Loan Facility (to wit USD 3,000,000.00) had been fully utilized. The Plaintiff was shocked by this news and she sought some explanations from the Defendant through her letter (Exhibit P6), regarding the status of disbursements of the said Term Long Facility. In particular the Plaintiff requested for the following documents from the Defendant:

i. Original copies of letters from the Plaintiff requesting disbursements;

ii. The manner in which each disbursement request was effected;

iii. Original copies of the applications for Telegraphic Transfers used to draw the amounts purportedly requested in the disbursements requests;

iv. Original cheque leaves used and which are duly signed by PW1 as the sole signatory to the Plaintiff's Loan and Current Accounts and;

v. Original invoices from the payees or any other document supporting the payment request to third party payees.

It is the Plaintiff case that by its letter dated 28th August 2015 (Exhibit P7), the Defendant's bank responded to her letter and informed her that the entire Term Loan Facility of US$ 3,000,000.00 was disbursed in five installments as follows:

i. US$ 550,760.00 were disbursed on 4th February, 2013;

ii. US$ 1,045,979.72 were disbursed on 26th February, 2013;

iii. US$ 644,094.00 were disbursed on 20th august 2013;

iv. US$ 255,266.00 were disbursed on 6th March 2014 and;

v. US$ 503,899.63 was disbursed on 4th December, 2014.

The Plaintiff states that having scrutinized documents purporting to support disbursements as supplied to her by the Defendant's bank she realized that there were several anomalies and irregularities pertaining the purported

disbursements including transactions which she didn't authorize, payments made to persons and entities which are unknown to her, and a number of irregular transactions in which payments were made to unknown third parties without Plaintiff's proper mandates and/or authorization.

The plaintiff states that she initiated internal investigations and later on she reported the matter to the office of the Regional Crimes Officer (RCO) of Arusha whereby criminal investigations were commenced.

According to the Plaintiff, criminal investigations revealed that the Defendant's eleven (11)officers namely Praveen Mehra who was the Defendant's head of Credit and a signatory to the Offer Letter, Allan Moshi, Humphrey Rupiah, Domitila Macha, Magreth Edson Mkisi, Hilda Kabate, Bonigne Karekezi, Dolorosa Komba, Shida Thomas Aeron, Lugano Angyelile Kapologwe and Beatrice Mtani together with the Plaintiff's Officer one Hillary Lagara Pawegi also known as Larry Lagara colluded to fraudulently withdraw and steal the moneys held in the Plaintiff's Current and Loan Accounts.

It is further statement of the Plaintiff that forensic examination of handwriting and signatures conducted by the Police Forensic Bureau at Arusha, revealed that documents (A1-19) bearing disputed signatures and documents (B1-B36) bearing specimen signatures and handwriting of Mathias

Erasto Manga, sole signatory of the Plaintiff were different and therefore were signed by different persons.

The Plaintiff states that all monies which she is complaining of were drawn and payments fraudulently made to strangers without making usual confirmation with Mr. Mathias Erasto Manga (PW1), the sole signatory of her accounts a thing which is contrary to Defendant's bank usual practice, banking prudence and requirements.

The Plaintiff states that before, during and after the investigations over the matter was initiated the Defendant refused to corporate with her and that even when they were specifically requested so by the police, they refused to provide any support to the police in their investigations over the matter.

The plaintiff states that the Defendant blatantly and deliberately failed to make sufficient inquire and to use reasonable skill, care diligence and to take appropriate steps and measures in managing the operations of the Plaintiff's accounts thereby allowing unauthorized and improper withdrawals and drawdowns to be made against the said accounts and thus occasioning loss and financial damages which the Plaintiff is now claiming.

The Defendant's Defence is comprised in its Written Statement of Defence of26th July, 2017. In a four pages pleadings the Defendant denied each and

every allegations and put the Plaintiff to a strict proof thereof and she averred that the Plaintiff didn't suffer any loss because all transactions were authorized by her (i.e. the Plaintiff) and that the Defendant didn't commit any wrong. It further states that the Defendant extended to the Plaintiff two Credit facilities namely:

1. Overdraft Facility of T.shs 900,000,000.00 dated 27th May, 2011 which was to be paid up to 1.9.2012 and;
2. Term Loan Facility of US$ 3000,000.00 dated 11th July, 2012 which was to be paid in 36 months.

It further states that on 6th February, 2014 the Plaintiff wrote a letter to the Defendant requesting for 12 months extension of the grace period in the loan account. In that letter the Plaintiff (Exhibit D5), the Plaintiff stated reasons for requesting extension but none of the reasons touched the Term Loan of US$ 3,000,000.00.

The Defendant denies the Plaintiff's allegations of negligence, fraud, conversion and mishandling of the accounts and asserts that delays in completion of the construction of the hotel was caused by reasons purely on matters emanated from the Plaintiff's changes effected in the structure of the building. It stated that the Plaintiff through a letter dated 4th December, 2014

clearly admitted that the entire term loan of US$ 3,000,000.00 was disbursed as requested by the Plaintiff and the same was used in the project and nowhere did she complain of any fraud or any portion of the said term loan.

The Defendant states further that the Plaintiff admitted to have received and used the money disbursed in accordance with the credit facility with regard to the term loan and that by 4th December, 2014 when the final installment, which means the 5th installment was disbursed to make the total of US$ 3,000,000.00

Furthermore, the Defendant states that on 11th May, 2016 its Risk Management and Compliance Offices in Dar Es Salaam via one John Orauya sent to the Forensic Bureau of Criminal Investigations Department of Police Headquarters in Dar Es- Salaam, a number of documents under cover letter with reference number EB/CO/320/16 signed by Head of Risk and Compliance Exim Bank Dar es Salaam one David Lusala for forensic handwriting and signatures examinations .The documents were examined by E. 9955 Detective Sgt. Faustine Emanuel Mashauri who was required to find out whether signatures appearing in the documents which were marked collectively as "Y" purported to be written and signed by Mathias Erasto Manga in his normal cause of business (therefore not disputed)were similar

to specimen signatures which were disputed signatures and which were marked collectively as "X". After examinations, the Police opined that there were similarities between the disputed signatures and specimen signatures which were not disputed. He then prepared a report showing the above results.

The Defendant states that the chronology of events surrounding utilization of the facilities in question shows clearly that the Plaintiff is to be blamed for her failure to repay the loan and that the allegations on fraud and unrecognized transactions are unfounded and they are geared towards evading her obligations to repay the outstanding amount under the term loan in question. Those are Pleadings of the Parties in this matter.

This suit was first before Hon Lady Justice Sehel J, (as she then was) but following her elevation to the Court of Appeal and it being cause listed in a cleanup session which was conducted in March, 2019 hearing commenced before me on 6th March 2019.However, I could not complete it within the time fixed for that cleanup session and it fell on Ms. Justice Fikirini J (as she then was as partly heard matter. Hon. Ms. Justice Fikirini J was appointed to the Court of Appeal before she could finish it and the matter reverted back to me in yet another cleanup session held between 3rd and 28th May 2021.

At the hearing the Plaintiff called five (5) witnesses while the Defendant called three (3). On 3rd May 2019, the Plaintiff and the Defendant herein agreed on a list of six issues. The issues for resolution are abridged as follows:-

1. Whether or not the Defendant wrongfully and negligently allowed withdrawal from the Plaintiff's Current and Loan Accounts of over US$ 1,435, 757.25;
2. If the answer to the first issue is in the affirmative, whether the negligent and wrongful withdrawals were done fraudulently;
3. Whether or not the Defendant converted the Plaintiff's money as the money had and received by the Plaintiff for her use by the Defendant;
4. Whether the Defendant breached the Banker-Customer contractual relationship;
5. Whether or not there was contributory negligence and fraud on the part of the Plaintiff and;
6. To what reliefs are the parties entitled.

But before I can address the issues above, I begin by attending to a matter raised rather late by the Defendant. In its closing submissions the Defendant

argued that the Plaint was badly drafted as it does not specify the amount claimed and it does not describe the alleged role played by the Defendant in the fraudulent transactions. She didn't however make any specific prayer in respect of this observation.

In my view, the point having not been taken up in pleadings, it cannot be available as a defence. Under Rule 2 of Order VII of the same Code, the law says:

> "*Where the Plaintiff seeks the recovery of money, the Plaint shall state the precise amount claimed:*
>
> *Provided that where he sues for mesne profits or for an amount which will be found due to him on taking unsettled accounts between him and the Defendant, the plaint shall state approximately the amount sued for.*"

Thus, whereas it correct to assert that the law requires the Plaintiff to be precise on the amount she claims, but where the same has not been ascertained, she may state the approximated amount. On the other hand Order VIII Rule 2 of the Civil Procedure Code [Cap 33 R.E. 2019] provides that;

> "*The Defendant must raise by his pleadings all matters which show the suit not be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if no raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, or*

instance, fraud, limitation, release, payment, performance or facts showing illegality"

In her plaint the Plaintiff stated in paragraph 3.1 that the Defendant did wrongfully, negligently and fraudulently withdrew from her Current and Loan Accounts unknown amounts but exceeding US$ 1, 435,575.25. Under clause (a) of the prayers clause, the Plaintiff is calling for an order that a forensic audit be conducted in her accounts in order to determine actual amount of fraudulent withdrawals made in those accounts. This, in my view is in line with the requirements of the proviso to the Rule 2 of Order VII which is to the effect that where the Plaintiff sues for an amount which will be found due to him on taking unsettled accounts between him and the Defendant it will suffice for the plaint to state the approximated amount.

In the case at hand the fact that the Plaintiff is seeking for a forensic audit to be conducted is a proof that the Plaintiff was suing on unsettled account, thus she was right to state approximately the amount he was suing for.

Regarding the Defendant's pleadings, suffice to say that it didn't raise by its pleadings all or any matter which show that the suit was not maintainable in law as required by Rule 2 of Order VIII of the Civil Procedure Code, therefore that defence cannot be raised by way of written submissions because written submissions does not form part of a party's pleading.

Turning to another matter; during the pendency of this litigation, a criminal case was instituted against employees of the Defendant and the Plaintiff relating to the alleged unauthorized withdrawals herein as well as other fraudulent transactions. During the hearing of this suit parties didn't say much about the said pending proceedings. Thus, the status of the said criminal proceedings is not known to this court up till the time of composing this judgment. However, since there is a possibility of there being a confusion on what will the impact of this decision or decision in those pending proceedings, I think it appropriate to discuss albeit briefly on the consequences of judgment in a matter which may be related to this case.

Sections 42 of the Evidence Act [Cap 6 R.E. 2019] provide as follows as regards judgments in other proceedings:-

> "42. The existence of any judgment, order or decree which by law prevents any court from taking cognizance of a suit or holding a trial is a relevant fact when the question whether such court ought to take cognizance of such suit or to hold such trial
>
> Under Section 43Athe law says that:
>
> > "*A final Judgment of a court in any criminal proceedings shall after the expiry of the time limit for an appeal against that judgment or after the date of the decision of an appeal in*

those proceedings, whichever is the later, be taken as conclusive evidence that the person convicted or acquitted was guilty or innocent of the offence to which the judgment relates;

Section 44 of the same Act provides:

"Judgments, orders or decrees other than those mentioned in section 43 are relevant if they relate to the matters of public nature relevant to the inquiry, but such judgments, orders or decrees are not conclusive proof of that which they state.

It is trite law that ordinarily a judgment binds only the parties to it. This is known as Judgment ***in personam***. A judgment may also be conclusive not only against the parties to it but also against the whole world. This is known as a judgment ***in rem***. It is a judgment which declares, defines or otherwise determines the status of a person or of a thing i.e. the jural relation of the person or thing to the world generally.

As stated hereinbefore, in the case at hand parties didn't state the status of the said pending Criminal Proceedings. But that notwithstanding whatever will be the decision or order in those cases, they will be judgment in *personam* and in terms of section 44 of the Evidence Act they will not be conclusive proof of what will be stated therein which may have bearing to this suit. Moreover, it should be borne in mind that the standard of proof in

criminal matters is beyond reasonable doubt whereas in civil suit the standard of proof is on the balance of probability. Thus, the two cases have different standards of proof and whatever will be a result here will not necessarily be binding upon the case which is said to be pending in another court.

Now back to the issues the first issue is **whether or not the Defendant wrongfully and negligently allowed the withdrawals from the Plaintiff's Current and Loan Accounts.** I have no doubt that the answer to this issue will definitely give the bearing of the entire case. Before I can decided whether the Defendant did wrongfully and negligently allow unauthorized withdrawals from the Plaintiff's Accounts, we have to know what does the terms wrongfully and negligently mean in law and for chronological purposes I will start with the term negligence.

In law, negligence can be defined as conduct that fall below the standard of behavior established by law for the protection of others against unreasonable risk of harm (See **Commercial case No. 115 of 2014 Between Sharaf Shipping Agency Tanzania Limited Versus Barclays Bank Tanzania Ltd & Another; [**Unreported]). A person is said to be negligent if he or she has departed from the conduct expected of a reasonably prudent person

acting under similar circumstances. On the other hand, the term wrongfully acts, conducts or omission entails error, conducts or omissions arising out of the person's negligent acts.

From the evidence presented, the Defendant does not seriously dispute the contention that and actually there is evidence that Mathias Erasto Manga (PW1) was the sole signatory of the two accounts which were opened and operated by the Plaintiff at its Arusha branch. Thus, allowing any other person to authorize payments in the accounts of the Plaintiff constitutes negligence on the part of the Defendant.

In his evidence PW1 Manga testified that having been notified that the loan amount of USD 3,000,000.00 is said to have been fully utilized he wrote a letter to the Defendant dated 30th September, 2015 (Exhibit P6), requesting her to avail him with documents indicating how the transactions were initiated, authorized and how the payments were made and effected. He said that it took the defendant five (5) months to respond to that letter through her letter to the plaintiff dated 25th February, 2016 (Exhibit P7). According to this witness no explanation was been given to justify this delay in responding to a serious concern of the bank's client over the affairs of its

accounts. The Plaintiff contends that all documents purporting to show that PW1 authorized payments were forged.

On the part of the Defendant it is the evidence of Ms. Felister Simba (DW1), that according to the Statement of Account (which, however was not tendered in evidence) the entire amounts in of the loan facility were disbursed as follows:-

1. 4th February, 2013 USD 550,760.65 were disbursed
2. 26th February,2013 USD 1,045,979.72 were disbursed;
3. 21st August 2013 USD 644,094.00 were disbursed;
4. 6th March 2014 USD 255,266.00 were disbursed;
5. 4th December, 2014 USD 503,899.63 were disbursed;

It was further evidence of DW1 that all disbursements were made in accordance with the terms and conditions of the facility agreement (Exhibit P5) and that the Plaintiff through PW1's correspondences made with the Defendant's Bank acknowledged that the project was proceeding well and it expressed its appreciation for the loan disbursed for that purpose. It is therefore the witness's evidence that had it been true that the money didn't reach the Plaintiff, it would not have appreciated.

When she was cross-examined DW1 told the court that as she was working in the Bank's Headquarters in Dar Es Salaam and the Plaintiff's accounts were opened and operated in Arusha she did not attend PW1 or any other officer of the Plaintiff in relation to the two accounts. She added that although she had no documents to show how disbursement were made but she said that she believes that all disbursements were made following the Plaintiff's requests followed by Telegraphic Money Transfers commonly known as TT. She conceded that according to bank practices upon verifying the request documents bank officials must confirm withdrawals or payments by calling the client's signatory. She said that because she was not working in the confirmation department she cannot confirm whether confirmations were made before the withdrawals were allowed. It was further evidence of DW1 that before confirming payments the bank would ordinarily call a signatory via his or her telephone number. She said that PW1 was not the sole signatory to the Plaintiff's two accounts the subject of this case as he was alongside with Belinda Mathias Manga. She said that before opening the account bank client is required to fill in two documents namely Mandate File and Specimen Signature Card. Both documents are kept by the bank. Customarily these two documents contain basic information and particulars of

the client including his or her telephone numbers. To make all payments which are now disputed in this court it was the requirement that the Defendant verifies the signature thereon as per mandate of the Plaintiff and confirm by calling via telephone numbers provided in Specimen Signature Card or Mandate file either PW1 or Belinda Mathias Manga (assuming that Belinda Mathias was also a signatory as claimed by DWI). When she was shown documents (Exhibit P14) containing disputed signatures of PW1, DW1 reiterated her earlier statement that she didn't see PW1 or any other officer of the Plaintiff signing the said documents and that why the bank sent the said documents for forensic handwriting and signatures examinations. She was unable to tell the court the bank officer who attended PW1 during the transactions and to say the least no bank official from its branch in Arusha where all these frauds are alleged to have occurred was called to testify in this case.

In his submissions on this issue the Plaintiff's counsel contended that on the evidence of PW1 and PW4 and through documents supplied to the Plaintiff by the defendant (Exhibit P6) and the contents of Exhibit P10, it has been proved that there were a number of anomalies which resulted into unauthorized transactions, unauthorized payments made to unknown third

parties and payments made to non-existing persons and payments that were made to persons the Plaintiff never had any business with. These, according to the counsel for the Plaintiff, constitute negligence.

The defence submissions merely reiterated the evidence of DW1 DW2 and DW3 regarding what transpired both in Arusha where the accounts are operated and in Dar Es salaam where some investigations regarding PW1's complaint was carried out and further contended that from the Plaintiff's own evidence in exhibits P10 and P17 the total amount of alleged unrecognized transactions is USD 1,125,861.12 which does not tally with the amount claimed in the plaint. Thus, it is the Defendant's contention that on the evidence on record negligence has not been established.

Apart from the oral evidence which is suggesting to demonstrates what took place in the two accounts, two separate forensic examinations were conducted.

The first forensic examination was conducted by the Police in the course of investigations following reports made to it by the Plaintiff in Arusha. The second forensic examination was conducted at the Forensic Bureau Headquarters in Dar Es Salaam following the request by the Defendant's Bank who submitted some documents which they wanted to be examined.

Both bureaus produced their respective reports. Parties' are challenging the authenticity of each other's report.

The question to be determined by this court at this stage is which between the two reports might be authentic, credible and reliable in the circumstances of this case? I will start with the Arusha report (Exhibit P15).

According to Sebastian Germanus Sebastian (PW4), the Plaintiff's Group Financial Controller, their internal investigations revealed that there were anomalies, irregularities and unauthorized payments in the Plaintiff's current and loan accounts. Having so realized they reported the matter to the Police. Police commenced criminal investigations and in the process they took specimen signatures and handwritings of Mathias Erasto Manga (PW1), who according to PW4 was sole signatory of the Plaintiff's Account. He said that after police investigations it was established that PW1's signatures and handwriting were forged as a result of which eleven (11) officers of the Defendant and one officer of the Plaintiff were charged with criminal offences in the Resident Magistrate's Court of Arusha relating to forgery and fraud.

PW4's evidence was continued by that of Detective Sergeant Mustafa (PW2), who stated that during investigation she took specimen handwriting and signatures of PW1 (Exhibit P14) on 12. 7. 2016. The specimens were

examined by D. Constable Fikiri Temaunji (PW3). According to PW3 on 8th September, 2017 at the Forensic Bureau Arusha, he received a sealed parcel from F.3626 D/CPL Abdallah Mwiko purporting to be sent by the office of the Regional Crimes Officer of Arusha. In documents which were marked as exhibits A1-A19 were six letters containing dispute signatures and handwriting, documents marked as Exhibits B1-B36 which were thirty four sheets of paper, Exim Bank Mandate File of Account No. 0792854006 and one Mining Agreement all bearing specimen signatures and handwriting of Mathias Erasto Manga (PW1), after being requested by Police Officer and in his normal course of business. Documents marked as Exhibits C1-C16, being fifteen sheets of paper and one Iron Ore Business Proposal dated 8th November 2011 all bearing specimen handwriting purporting to be written by Abdallah Hussein after being requested by police officer and in his normal course of business. Documents marked as D1-D29 which were twenty seven sheets of paper, CRDB Mandate File of Account No 0150300952000 and one NIC Bank Mandate File of Account No. 2000115641 all bearing specimen handwriting purporting to be written by Larry Pawegi Lagara after being requested by Police Officer and in his normal course of business, and finally, documents marked as exhibits E1-E7 being four sheets of paper and

three delivery notice bearing specimen signatures purporting to be signed by Good luck Pallangyo after being requested by Police Officer and in his normal course of business. PW3 examined the documents and serve for documents which were marked as exhibits A5-A14, his opinions were that all documents were written by different persons. In short PW3 gave opinion that he documents which were used to withdraw monies from the Plaintiff's accounts were not signed by PW1 as alleged by the Defendants. He tendered his report as which was received as Exhibit P15.

Regarding the second set of forensic examination report which was conducted at the instance of the Defendant, Detective Sergeant Faustine Mashauri (DW3) of Forensic Bureau in Dar Es Salaam, gave evidence to the effect that on 11th May, 2016 while at his office at the Forensic Bureau of Criminal Investigations in Dar Es Salaam, he received sealed parcel from John Orauya who said he was sent by the Office of Head of Risk and Compliance of Exim Bank Limited, Dar Es Salaam. The documents were marked as Exhibit A1-A4 and they were; Telegraphic Transfer applications form for Exim Bank (T) Limited, Arusha branch all dated 19.2.2013; Exhibits A5 & A6 being Telegraphic Transfer Forms for Exim Bank Tanzania Limited Arusha branch dated 12.8.2013; Exhibit A7 being Telegraphic Transfer

Application dated 14.8.2013; Exhibits A8-A11 being Telegraphic Transfer Application Forms for Exim Bank (T) Ltd Arusha Branch all dated 5. 2. 2014; Exhibits A12 was a Telegraphic Transfer Application Form for Exim Bank (T) Limited Arusha Branch dated 25. 10. 2014.

He also received specimen B1-B3 and B7-B15 which were course of business Telegraphic Transfer Application Forms for Exim Bank (T) Ltd Arusha Branch all dated 25.10. 2014; specimen B4-B6 and B16 – B18 were various application letters and documents written to the Bank by the client in the normal course of business. According to this witness, the documents were arranged in two groups namely, A1-A12 which were marked collectively as "X", and documents B1-B15 and B16-B18 which were marked collectively as "Y". He was requested to find out whether signatures appearing in documents marked collectively as "X" (which were disputed signatures) were similar to specimen signatures in documents marked collectively as "Y" which were written and signed by One Mathias Erasto Manga i.e. PW1, and which were not disputed in views of the Bank.

In his report he opined that he discovered similar characteristics of letters and strokes formation between signatures in documents marked collectively as "X"A1- A12 which constituted disputed signatures and signatures in

documents which were marked collectively as "Y" constituted in B1-B18 were similar and were written by the same person that is Mathias Manga (i.e. PW1). The Plaintiff is challenging the credibility of the forensic report produced by the Defendant. It has been submitted that the whole process was marred with irregularities as it didn't involve proper investigative machineries particularly the criminal investigations department. I do agree with this observation of the Plaintiff's counsel.

From the evidence on record, it is clear that the way the Defendant obtained its report is susceptible to criticism. For instance, testifying on how he received the specimen signatures and hand writings which he examined Detective Sergeant Fuastine Mashauri (DW2) of Forensic Bureau Headquarters in Dar Es Salaam stated simply that:

> *"I recall that on 11th May, 2016 at the Forensic Bureau of Criminal Investigations Department, in Dar Es Salaam, I received a sealed parcel from John Orauya who said he was sent by the office of Head of Risk and Compliance of Exim Bank Limited, Dar Es Salaam. The said parcel contained a number of documents undercover of a letter with Ref. No. EB/CO/320/16 dated 11th May, 2016 signed by Head of Risk and Compliance, Exim Bank Limited, Dar Es Salaam one David Lusala"*

From the excerpt above, one can correctly conclude that the letter from the Bank went directly to Detective Sergeant Mashauri (DW2). That is not the process of communication between one office and another. **In the case of Urafiki Trading Agencies Limited and Smart Rental Car Limited Versus Abassali Aunali Kassam and Savings and Finance Commercial Bank Limited, Commercial Case No. 59 of 2010,** Unreported, this court (Mwambegele J, as he then was stated thus:

> *"The whole process was initiated without involvement of the proper investigative authorities particularly the criminal investigators.....this in my view was contrary to the required procedures in establishing the culprits of the offence of forgery and the crime of forgery itself".*

In the present case, it is clear from the defence evidence that there is no interconnection of evidence of the person(s) who witnessed the specimen signatures of PW1 being taken in Arusha, the person (s) who conveyed them to the Bank's headquarters in Dar Es Salaam and the one who took them to the handwriting expert and finally the handwriting expert himself. It would seem as if the entire exercise was a private arrangement between the Police Forensic Bureau in the Headquarters and Defendant's bank. When DW2 was cross-examined on how forensic investigations on handwriting and signatures are initiated, he said that any person can submit his documents for

examination by the bureau. He said that Exim Bank like any other person has the right to submit her documents to the bureau and the bureau has the duty to examine them and give its result and reports to its client. I think this version is not correct especially when the report is intended to be used in a court of law. In **Urafiki's case** (Supra) this court had this to say on the private initiated forensic report:

> *"Investigation of crimes is not a primary role of a lawyer.....the fact that the specimen were procured by the Plaintiff at the behest of their advocates denied the handwriting expert a basis for objective examination of the same and as such his conclusion regardless of the technology and experience employed....is far from being fair, accurate end objective"*

When investigating a matter which might end up in court, Handwriting Experts like any other Experts, become Expert Witnesses. Expert Witness's overriding duty is to the Court and not to the party who engage them. They are expected to provide independent assistance to court by way of objective unbiased opinion in relation to matters within their expertise. They should never act as advocates for any party. In the case of the **National Justice**

Compania Naviera SA Versus Prudential Assurance CO Ltd (The Ikarian Reefer) Queens Bench Division (Commercial Court) [1993]2 Lloyd's Rep 68, the Queens' Bench Division of Commercial Court of England, Cress Well J, (at P8), expressed what he considered to be some of the duties and responsibilities of expert witnesses in civil cases. The learned Judge stated:

1. Expert evidence presented to court should be seen to be the independent product of the expert an influenced as to form or content by the exigencies of litigation;
2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his experience ....an expert witness in the High Court should never assume the role of advocate.

I do agree with these observations and I am convinced that those should be the position with regards to responsibilities and duties of expert witness in our jurisdiction too. Allowing an expert witness to give patronage evidence taints its expertise nature and will not assist courts to reach just solution of matters before them.

Although there is no specific provision of the law which prescribes how handwriting and signatures for purposes of civil litigations should be initiated and investigated forensically, **Section 59(1) of the Criminal Procedure Act [Cap 20 R.E. 2019],** throws some light on how independence is important in investigations on finger prints, signatures and handwritings. The said law provides that:

> *"Any Police Office in charge of a Police Station or any police officer investigating any offence may take or cause to be taken.....samples of the handwriting of any person who is charged with an offence....."*
>
> *Under sub-section (2) of the same section the law provides:*
>
> *"Any Police Officer or any police officer investigating an offence may take or cause to be taken measurements, prints.....photographs of or samples of the handwriting, of any person who is not charged with any crime where such measurements are .....reasonably believed to be necessary for facilitating the investigation of any crime"*

There are similar provisions under **Section 36(1) and (2) of the Police Force and Auxiliary Services i.e. Act [Cap 322 R.E. 2019** which prescribes how forensic examinations could be carried out among others. Although these provisions are geared toward criminal ~~trials,~~ but there is no

doubt that the law emphasizes on the need of the examination to be conducted by a credible third party.

In the case at hand, Detective Sergeant Faustine Mashauri (DW2) was neither a Police Officer in Charge of a Police Station nor was he a Police Officer investigating any reported offence as required by the law. As stated by DW2 himself in his evidence he received and examined the examined documents direct from one John Orauya who told him that he was sent by Exim Bank Limited. The said John Orauya was not called to testify in this case. This means that because DW2 was not investigating any reported criminal case, he did the examination at the request of the Defendant's bank therefore he was solely answerable and responsible to the bank.

The question that follows is whether in this circumstance his report can be independent, objective and contain unbiased opinion! In my view, it cannot. A credible forensic investigation must be initiated by a party who has no interest in the result of the matter pending in court or pending investigations by other state organs, for instance the police upon a report made to it by a complainant and in the course of investigations. In civil litigations, it may be appropriate if such investigation is initiated by a court order, upon application by either party to the litigation. In absence of a court ordered forensic

handwriting and signature examination report, police report obtained in the course of investigations of a criminal case may also be a credible report

Under normal and ordinary procedural operations of the police, the incident ought to have been reported first to the Police at a police counter in a police station. That is what the Plaintiff did in this case. But the Defendant, for reasons not disclosed submitted the documents of her own choice to a police officer at the Police Bureau in its Headquarters. The forensic examination report obtained in such circumstances is likely to be not only patronage, but also tied to a party therefore incorrect and self-defeating. Similarly, the credibility and genuineness of the documents that were submitted to the Police Forensic Bureau in the Headquarters are questionable. The report itself suffers the same problems. As a result the patronage nature of the report can simply be traced in the evidence of the expert (DW2). For instance, after referring generally to the methods he used to examine the documents, Detective Sergeant Faustine Mashauri (DW2), concluded that:

> *"That through the use of modern scientific equipment especially (VSC 6000), I discovered similar characteristics of letters strokes formation between signatures in the in document marked collectively as X A1-A12 (disputed signatures), and signatures in documents marked collectively*

as "Y"(B1-B18) were similar and were written by the same person that is Mathias Erasto Manga in his normal course of business and were not disputed"

[emphasize is mine]

This, in my view is a conclusion indicating patronage behaviour. It confirms an old adage which says; 'he who blows the flute chooses the song' (Mpiga zumari ndiye huchagua wimbo). An expert witness who was expected to be an independent ought not to have given such a conclusion or even mention names. In the case of **Salum V. Republic (1964) E.A. 127,** which was cited with approval in Criminal Appeal No. 40 of 1994 (supra), SPRY, J, observed that:

"I think the true answer was given by Bishop of Lincoln case, that 'it is not possible to say definitely that anybody wrote a particular thing'. I think an expert can properly say, in an appropriate case, that he does not believe a particular writing was by a particular person. On the positive side, however, the most he could ever say is that the two writings are so similar as to be indistinguishable and he could, of course, comment on unusual features which make similarity the more remarkable. But that falls far short of saying that they were written by the same hand"

In the present case, DW2 whose report was at the instance of the Defendant concluded that the documents he examined were written by Mathias Erasto Manga (PW1). This was wrong and as stated hereinbefore, it reflects patronage nature of the evidence of DW2, the Handwriting Expert. The witness ought to have remarked that the two writings were so similar as to be indistinguishable and end there.

As discussed in the course of this judgment the forensic examination which was conducted in Arusha (Exhibit P15). This by the Police Forensic Bureau in Arusha was conducted in the course of investigations of a criminal case reported to the Police. . In his evidence PW1 stated how having realized that there were anomalies and possible fraud in withdrawals done in the Plaintiff's account he reported the matter to the police in Arusha. Police commenced investigations of the matter. Detective CPL Abdallah Mwiko was assigned to investigate the case. In the course of his investigations he took specimen signatures and handwriting of PW1 (Undisputed signatures) and sent them to DC Temaunji (PW3) a handwriting expert who examined them against handwritings and signatures which were used in withdrawing money from the Plaintiff's accounts. These signatures and handwritings were disputed by the Plaintiff. In his report PW1 opined that the disputed handwriting on exhibit

A5-A14 and specimen handwriting on exhibit B5-B34 and B36 were written by different persons. I find this evidence to be credible. The forensic examination was initiated by the police (whom I find to be a neutral party), in the course of investigating crimes which were reported to it. The net result the of police investigations is that some officials of the Defendant's bank and one officer of the Plaintiff's company were arrested and charged in Arusha Resident Magistrates' Court criminal case No 242 of 2016 which was still pending at the time of the hearing of this case. That being the case, I accept the evidence of PW1 Erasto Mathias Manga, PW2 Sergeant Mustafa and that of Detective Constable Temaunji (PW3) and find and hold that the documents (Exhibit P15) which were used to disburse and therefore withdraw monies from the Current and Loan Accounts of the Plaintiff were not signed by Erasto Mathias Manga, the sole signatory to those accounts.

Since there is no dispute that some monies were drawn from the Plaintiff's accounts and since on the evidence as analyzed above the Plaintiff didn't authorize the said withdrawals, it is my conclusion that the Defendant's bank was negligent to allow the said withdrawals.

There is evidence to the effect that even after the matter was reported to the Police in Arusha, the Defendant's bank didn't show any remorse and

cooperate with the Plaintiff and the police to nab the fraudsters. For instance it is the evidence of PW1, and PW2 to the effect that the Defendant's bank did not fully corporate with either the Plaintiff or the Police in the investigations of the alleged frauds. This evidence is corroborated by the fact that despite the fact that the fraud transactions were alleged to have been committed in Arusha where the accounts were opened and operated the Defendant's submitted its documents for forensic examinations to the Police in Dar Es Salaam, instead of Arusha where the fraud was being investigated. There is also evidence to the effect that even when the court ordered her to surrender some documents to the police in Arusha for investigations, the Defendant resisted and using the same advocate with the accused persons, it lodged a notice appeal against that order!. This, I my view, demonstrated the negligence conduct of the Defendant throughout the conduct of this matter. It is my finding therefore that the Defendant's bank were negligent. The consequence of the Defendant's negligence is that more than USD 1,435,757.25 was wrongfully withdrawn from the Plaintiff's Current **No. 0792854006** and two Loan **Accounts, i.e. Account No.0036026542** and Account **No.0036027857**. This finding answers the first issue in the affirmative, that is to say the Defendant negligently and wrongfully allowed

withdrawals of more than USD 1,435,757.25 from the Plaintiff's current and loan accounts.

The second issue is whether the negligent and wrongfully withdrawals were done fraudulently. **Black's Law Dictionary 9th Edition by Bryan A. Garner** defines the term fraud as:

> *"A knowing misrepresentation of the truth or concealment of material fact to induce another to act to his or her detriment"*

From the above definition and circumstances of this case, the logical question that would follow is whether negligence in the circumstance of this case was aimed at achieving fraud?.It is trite law that fraud must be specifically pleaded and that the particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent has to be set out and then it must be stated that the acts were done fraudulently. This was done. The Plaintiff pleaded in paragraph 22 of the Plaint that the Defendant did fraudulently allow her current and loan accounts kept and operated at its Arusha Branch to be drawn without proper instructions and mandate. The fraudulent acts were particularized under paragraphs 22:1, 22:2, 22:3 and 22:4 and also in paragraphs 23 and 24 of the plaint.

Similarly it is trite law of practice and procedure that fraudulent conducts must be distinctly alleged and distinctly proved.

Regarding proof, I have already found as a matter of fact that the Defendant was negligent in not confirming the payments with the mandatory signatory (or signatories) of the Plaintiff before allowing payments. I have held that if bank officials had acted prudently it was expected that the officer who authorized payments would have called on telephone numbers provided in the Specimen Card and spoke to the signatory before allowing such a huge withdrawals or payments. Apparently that was not done and the bank didn't call the officer who allowed the complained withdrawals nor any officer from its Arusha branch where all these transactions were done to testify in this matter. Similarly it did not produce for inspection by the court or even by the police the Mandate File and/or Specimen Signature Card and when they were ordered to deliver the same to the police they showed their grievances against court order by lodging a notice of appeal against that order. The two documents would have assisted the court to know who had the mandate to sign on the accounts. Actually, it is as if the defendant did not want the alleged fraud to be investigated and this is confirmed by their act of refraining from calling any witness from its branch in Arusha where the accounts were being maintained. This omission leaves the testimony of PW1 that he was sole signatory unchallenged. There are also uncontested

testimonies of PW1, PW2, PW4 and PW5 to the effect that the Plaintiff submitted all documents containing transactions which led to the unauthorized withdrawals for forensic signatures and handwriting examinations. The documents were examined and the result (Exhibit P15) showed that they were not signed and/or written by PW1.Where evidence of party is not controverted such proof is higher than a mere balance of probability. In the case of **R.G. Patel vs Lai Makanji [1957] E.A 314,**which was cited with approval by this court in the Case of **The Registered Trustee of Alli Mberesero Foundation Versus Kapesa Benedict Mberesero (Commercial Case No. 176 of 2017),** it was held that allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, but something more than a mere balance of probabilities.

Because it is not disputed that the Plaintiff's monies were drawn as alleged, and because it has been proved that PW1 didn't authorize the disputed withdrawals, I find and hold that the Plaintiff has been able to prove that monies from her accounts were withdrawn fraudulently and without her authority. I find that this proof of fraud is as per standard laid down. To say the least in terms evidence the Defendant opted not strictly counter the

Plaintiff's evidence. For instance despite the fact that the incident occurred at its Arusha branch where the accounts and the project are being operated, no witness was called from Arusha. Both bank officials who testified for the Defendant DWI Felister Simba and DW3 David Lusala stated that they were stationed at the Bank's headquarters in Dar Es Salaam. They admitted in cross-examination that they had never dealt with the Plaintiff's accounts in Arusha and therefore they know nothing about them. It follows therefore that what they testified in relation to the accounts is what they heard from other people, therefore hearsay evidence. Section 62 (1) (a) and (b) of the Evidence Act provides that:-

1. Oral evidence must, in all cases whatever, be direct that is to say-
   (a) If it refers to a fact which could be seen it must be the evidence of a witness who says he saw it;
   (b) If it refers to a fact which could be heard it must be the evidence of a witness who say he heard it.

None of the three witnesses Felister Simba (DW1), D. E 9955 Detective Sergeant Faustine Emanuel Mashauri (DW2) and David Lusala (DW3), claimed to have attended or seen PW1 in his normal course of business therefore be acquainted with his handwriting or signatures. For undisclosed

reasons no witness who attended PW1 and the Plaintiff's accounts was called to testify in this case no explanation was offered. In the case of **Hemedi Said Versus Mohammed Mbilu [1984] TLR** 113, this court held that:

> *"Where for undisclosed reasons a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witness were called they would have given evidence to the party's interest"*

In the present case, officers who dealt with the opening and supervising the accounts in Defendant's bank at Arusha were crucial, but for undisclosed reasons they were not called. It my finding and holding that this was done designedly for reasons best known to the Defendant itself.

The next issue is whether the Defendant converted the Plaintiff's money as money had and received by the Plaintiff for the use by the Defendant. Conversion can simply be defined as taking another person's property without cause or permission. **Black's Law Dictionary 9th Edition by Bryan A. Garner** defines conversion as the act of appropriating the property of another to one's own benefit or to the benefit of another. It is not necessary that that other person is disclosed. Conversion is a common law remedy for the unlawful interference with the goods of property of another.

On how conversion is committed Winfield and Jolowicz on Tort 15th Ed, at page 588 says that:

> *"Conversion may be committed by wrongfully taking of goods, by wrongfully disposing them, by wrongfully destroying them or simply refusing to give them up when demanded".*

For purposes of civil litigations, to constitute conversion, there must be positive wrongful act by the Defendant in dealing with the property of the Plaintiff (and in this case money) in a manner inconsistent with the owner's (i.e. Plaintiff's) right and in the process of so doing deny the owner's right or to assert a right inconsistent with them. **Halsbury's Laws of England, 4th Edition at page 355**, the author states that:

> *"There need not be any knowledge on the part of the person sued that the goods belong to some ne else.....liability in conversion is strict and fraud or other dishonesty is not necessary ingredient in the action"*

In the case at hand on the evidence of PW1 and PW4, which is to the effect that when the Plaintiff requested for disbursements she was informed that all loan amounts had already been disbursed, and having found that the alleged disbursements were without the Plaintiff's authorization it therefore my finding that, the said disbursements and withdrawals were wrongful and amounted to conversion. I accordingly, answer the third issue in the

affirmative, that is to say the Defendant converted the Plaintiff's money as the money had and received by the Plaintiff for Defendant's use.

The fourth issue is about the breach of Banker-Customer relationship. I have found that there is credible evidence to support the assertions that there were unauthorized withdrawals from the Plaintiff's accounts. As revealed in the evidence of PW1, PW4, PW2 and PW3, the Plaintiff's didn't sign some of the documents which were used to allow payments. The Defendant was negligent. Her officials were grossly negligent in allowing huge payments before confirming them by calling signatories of the Plaintiff's accounts. The mandates were as reflected in the specimen card, namely to allow payment upon verification of the signatures of the signatories and call them to confirm through telephone numbers provided in the specimen card and the Mandate file. What the foregoing means is that the Defendant's duty to the Plaintiff on the basis of the customer's instruction was that the bank had to ensure that transactions on the Plaintiff's accounts were properly authorized by the authorized signatories and to direct all inquiries and correspondences to the numbers given by the customer. Apart from comparing the signatures on the instructions presented against the specimens held at the bank, the bank had an implied duty arising from the contract and particularly so in the

contemporary world where even distant physical communication is possible through video calls via smart phones, mobile devices, webcam etc., which transmit and receive both audio and video. It is inconceivable to me and to this court to be told that a big and modern bank like Exim Bank authorized such huge payments without calling any signatory of the Plaintiff to confirm if actually they had authorized the same. Confirming payments by telephone call and where the officer is doubtful of the voice of the person he is speaking to, then by video call, is such an important implied duty that no prudent bank officer authorizing payment can dare to ignore. This duty calls upon the banker to exercise skill, prudence and available technologies while dealing with transactions on the customer's account. In the case of **Lipkin Gorman Versus Karpnale Ltd (1992) 4 ALL ER 409**, it was held that:

> *".....cases dealing with the question of breach of duty of care by a paying banker to his customer when carrying out the customer's mandate must be approached with caution as they are no more decisions of fact i.e. of the application of the law to an endless variety of circumstances"*

This observation is intended to warn courts that in cases like this before holding the bank liable there must be evidence to prove that the bank was negligent. This burden lies with the Plaintiff. What the bank is required to

prove is that it paid in good faith and in the ordinary course of business. In the present case, and as discussed hereinbefore, the plaintiff has been able to prove negligence on the part of the Defendant's bank. The Defendant has failed to prove that it acted reasonably and with due care and that all withdrawals and payments were made in good faith.

Regarding the nature and extent of the contractual duty of care owed by a paying bank, (i.e. the Defendant), when called to honour instructions given by the customer and in particular, in the case of a corporate customer which has given the usual mandate to its bank, it was observed in a Kenyan case of **Karak Brothers Company Ltd Versus Burden (1972) ALL.ER** that:

> *"A bank has a duty under its contract with its customers to exercise reasonable care and skill in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all relevant facts which can vary almost infinitely"*

As stated in this judgment, applying the above test, the Defendant was negligent in allowing some unauthorized payments from the Plaintiff's accounts. Bank officials didn't use reasonable care and skill before allowing monies to be drawn from the two accounts in that they didn't verify the

signatures and confirm with the Plaintiff's signatories. In my considered opinion, the circumstances surrounding the first two withdrawals and payments from the Plaintiff's accounts were sufficient alert to require the Defendant's bank officials to exercise reasonable skill and care by making a more extensive inquiry beyond the minimum verification of signatures by way of comparing them with signatures in specimen card (of which there is no evidence that it was done), and make a call to the signatory whose number was provided in the specimen signature card. By not exercising reasonable care and skill the Defendant allowed the withdrawals and payments in quick succession, of fairly large sums. I find in the balance of probability that the Defendant's bank was negligent in the manner in which it handled and approved not only the first two payments but also the subsequent withdrawals.

The fifth issue is whether or not there was contributory negligence and fraud on the part of the Plaintiff. This issue will not detain me much. In tort contributory negligence occurs when the Plaintiff fails to exercise reasonable care for his or her safety. On the same vein, contributory fraud refers a situation where a Plaintiff is part of the fraud scam. In law contributory negligence and contributory fraud can bar or reduce the amount for

compensation a plaintiff receives if her action increased the likelihood that an incident occurred. It was almost impossible for the Plaintiff to know the collusion between its officer(s) and bank officials unless she is alerted on the withdrawals. There was no such alert.

In the case at hand no evidence was led to suggest any failure by the Plaintiff which led to unauthorized withdrawals from her two accounts. There is no basis upon which contributory negligence can be found against the Plaintiff. I accordingly answer the fifth in the negative. That is to say no contributory negligence has been proved.

The last issue is about reliefs. The plaintiff is praying for:

(a) An order that forensic audit be conducted in her current and loan accounts held and operated at the Defendant's Bank Arusha branch.

The term forensic audit entails examining and evaluating the company's financial records to derive evidence to be used in a court of law or legal proceedings. In the case at hand court was made aware of two other pending proceedings which are related to the Plaintiff's two accounts. The first matter is Resident Magistrates' Court Criminal Case No. 242 of 2016 which during the trial of this case was pending before the Resident Magistrates Court of Arusha. The second matter is Commercial Case No.

109 of 2016 which is pending before this very court. In Commercial Case No. 109, the present Defendant has sued the present Plaintiff for the recovery of monies loaned under loan facility the subject of this suit. It is my considered view that, in the present the court is called to determine the Banker-Customer relationship and whether there is any breach of the express and implied terms of such relationship and remedies available for a party suffered by such breach. Making an order for forensic audit of the two accounts may be outside the scope of this case and have prejudice effect on the two pending cases. In other words the judgment in this case may affect the way the two pending cases will be decided. That being the case this court do hereby denies to grant orders sought in prayer (a) in the Plaint.

In prayer a (i), the Plaintiff is asking for an order that she be allowed to offset the amount fraudulently withdrawn and of the amounts of the unauthorized withdrawals from her current and loan accounts and that she be allowed only to pay only the sums as will be determined and as being properly disbursed, drawn and utilized by the Plaintiff. Again this is another tricky prayer in view of Commercial Case No. 109 of 2016 which is pending before this very court. In that case the Defendant herein is suing the Plaintiff herein for recovery of loan amount under the loan facility which is also the

subject of this case. However, in my view in the present case this court is called to determine whether the Defendant is negligent and therefore in breach of the loan agreement and what are the remedies thereof. This court is not called to determine what is outstanding (if any) in the loan facility. It is my view and holding that the proper forum to determine the payable amounts (if any) under the said loan facility is in Commercial Case No. 109 of 2016 and not this case. Similarly prayers undersub-paragraphs (a) (ii), (iii) and (g) are not grantable in this litigation which is basically on the tortious liabilities resulting from negligence and fraud.

In paragraph (c) of the prayers clause the Plaintiff is praying for payments of USSD 12,000,000.00 being special damages suffered by her as a result of Defendant's negligence, breach of contract and fraudulently conversion of her money. This is within the scope of this matter.

It is trite law that special damages must not only be specifically pleaded, but they must also be strictly proved. There are myriads of authorities including **Borham – Carter V. Hyde Park Hotel [1948]64 TLR, and Musoke David v. Departed Asians Property Custodian Board (1990-1994) E.A. 219**.

In the instant case the Plaintiff called Mr. David Leo Tuhoye PW5, Chief Executive Officer of a company called Corporate Business Advisory Company Limited, a registered company dealing with among others, the provision of corporate and business advisory services who was engaged by the Plaintiff to update its project write up in respect of its hotel which was under construction. According to his business plan (Exhibit P27), given the executed and completed construction work as of 22nd July, 2018 there will be cost overrun of T.shs. 4,740,129,915.00 equivalent to USD 10,859,530.00. He said that due to delay in construction and completion of the Hotel had caused an increase of construction costs from USD 10,405,266.00 projected at the time of planning of the project in 2013 to an estimated USD 13,264,797.00 partly due to escalation in costs of the materials and services due to foreign exchange and thus, loss suffered by the Plaintiff amounting to USD, 2,804,744.00.

It is further evidence of this witness that the delay in construction and completion of the hotel caused further loss of profit of USD 8,161,488.00 computed since the date anticipated completion in the year, 2015 to the date of preparing the plan. The witness stated further that the Plaintiff is expecting to lose his benefit derived from the project amounting to USD

39,915,078 in loss of profit by the year 2029. This report is supported by the assertion of PW4 who stated in his witness statement that the project requires an estimated amount of USD 4,000,000.00 to be completed and needs a period of thirteen months from the date of availability of finances to the date of completion. There is also evidence of Erasto Mathias Manga PW1, to the effect that the Plaintiff has suffered loss of business goodwill and that its directors and officers credit worthiness has been lowered within the financial markets and their financial credibility and bankability within the banking business is now questionable.

I have perused the business plan (Exhibit P12), and I find that it provides a contemporaneous record as well as estimated business of the Plaintiff. The report shows the amount that would have been earned had the hotel been completed as planned. The Defendant didn't lead any cogent evidence to challenge the report (Exhibit P27) which I find to be credible.

As regards to the quantum, the Plaintiff is claiming USD 12,000,000.00. On the evidence on record, I am unable to appreciate how this figure was reached. I have seen and I will allow overrun costs of USD 2,859,530.00 because they are not cogently challenged, I also allow loss of estimated profit of USD 8, 161, 488.00 for the period of anticipated completion of the project

in the year 2015 to 2018. In total the Plaintiff is awarded special damages of USD 11,021,018.00 (Say Eleven Million One Hundred and Sixty One Thousand Four Hundreds and Eight Eight United States of America Dollars).

As regards to general and punitive damages, whereas general damages are awardable where there is no proof of actual loss, punitive damages are awardable where the Defendant is guilty of committing a wrong or offence. In the present case I have already awarded special damages basing on the proof of actual loss. Accordingly, general damages cannot be awarded. The prayer for the award of general damages is rejected.

As regards punitive damages which are also called exemplary damages, these are sums awardable apart from any compensatory or nominal damages. Dan **B. Dobbs, Handbook** on the Law of Remedies (1973) page204 states that:

> *"Punitive damages, also called exemplary damages are sums awardee apart from any compensatory or nominal damages, usually because of particularly aggravated misconduct on the part of the Defendant"*

In the present case, I have found the Defendant guilty of negligence and civil fraud. It has been proved that following the defendant's breach, negligence and fraud which was conducted through its officials, the Plaintiff money were wrongfully withdrawn and converted. The converted monies were intended

to finance a five star hotel construction. A project operates within certain constraints of time money, quality and functionality. It needs to have a clear beginning and a definite end. By granting a project loan, impliedly the Defendant's bank assumed the role of being a co-owner and beneficiary of the project. Project loan is provided to corporate borrowers for purposes of capital expenditure and it is a loan structure that relies primarily on the project's cash flow for repayment with the project's assets, rights and interests held as secondary collaterals. It is for this reason among others that before committing and extending credit to a project, lenders reviews on the credit worthiness of the borrowers, credit risk appraisals, seeks to ascertain the risks associated with the extension of the credit facility. By doing all this, the lender is showing her great financial interest and actually is a partner in the success of the project. Committing and/or condoning gross negligence and fraud on the credit in the hope that her interests are protected by the securities and collaterals cannot be acceptable and should be deterred. Thus, given the size and experience of the Defendant's bank, I asses and award the Plaintiff punitive damages at the tune of USD 1,000,000.00 (Say One Million United States Dollars).

The Defendant is claiming interest at the rate of 21% on the decretal sum form the date of fraudulently withdrawals to the date of judgment and at the rate of 12% per annum from the date of judgment till payment in full. Interest is a payment from the judgment debtor an amount above the decreed sum. It is intended to cover a profit that one would have accrued had he put his monies in business circulation. Section 29 of the Civil Procedure Code [Cap 33 R.E. 2019], gives discretion powers to make rules prescribing the rate of interest which should be carried by the judgment debts. However, those powers are without prejudice to the power of the court to order interest to be paid upon to the date of judgment at the rate to be decided by the court. I am not aware of any rules made by the Chief Justice prescribing rate of interest chargeable on the judgment debt.

In the case at hand the currency involved is United States of America Dollars, which is among the strongest currency in the world. Claiming an interest at the rate of 21% per annum or anything near that is being unrealistic. Instead of 21% prayed I will order an interest of 10% per annum (which is equivalent to the rate chargeable under the loan facility, the subject of this suit), from the date of institution of the suit to the date of this judgment and

further interest at the rate of 7% per annum from the date of judgment till payment in full. The Plaintiff will have her costs of the case.

A.R. Mruma,

Judge

Dated this 5th Day of July, 2021.