

TANZANIA / JUDGMENT

spice vas tanzania vs stanbic bank ltd 2018 tzhccomd 30 23 february 2018

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT PAR ES SALAAM
COMMERCIAL CASE NO. 102 OF 2015 BETWEEN SPICE VAS TANZANIA-----
-----PLAINTIFF VERSUS STANBIC BANK TANZANIA LIMITED-----
DEFENDANT

JUDGMENT

SONGORO, J Spice Vas Tanzania, claiming that, on or about 20th March, 2012 they opened a bank account No 9120000598966 at Stanbic Bank, Tanzania Limited, the defendant. Further the plaintiff claim that, through their bank account they made several payment instructions of about shs 693,245,932.33 to the Commissioner of Large Taxpayer (TRA) to meet their tax obligation, but the payments were wrongly and improperly deviated and paid to individual bank account, contrary to the plaintiff bank instructions. In view of wrong and improper payment into individual bank account caused by the defendant bank, the plaintiff he suffered loss and is praying for Judgment and decree against the defendant bank as follows;-

- (i) A declaration that, the defendant's acts of diverting payment of funds from the Plaintiff's bank account number 9120000598966 to individual bank account were contrary to the account operating authorization instructions and/or the specified payment instructions constitute acts of breach of contractual obligation and duty of care owed by the defendant bank to the plaintiff in handling the Plaintiff's bank account and funds therein; Page 1 of 20
- (ii) An order for payment of shs. 761,682,768.31 being total sum of funds paid from the Plaintiff's bank account number 9120000598966 maintained at the defendant bank to the bank account number 9120000599253 which is in the name of Mr. Anthony Dawson Mallya contrary to the Plaintiff's instructions for payment of the said funds and in breach of the New Business Online Agreement; (iii) An order for payment of shs. 83,518,399.39 being penalty interest imposed upon the plaintiff by the Tanzania Revenue authority (the "TRA") on account of the defendant diverting the funds of the Plaintiff which were payable to the TRA. (iv) Interests on the said sums of shs. 761,682,768.31 and shs. 83,518,399.39 at commercial rate of 32% per annum from 28th March 2015 to the date of Judgment;

- (v) An order for payment of shs. 700,000,000.00 being damages on account of the defendant's acts of diverting funds from the plaintiff's bank account thereby tarnishing the name and repute of the plaintiff and subjecting the plaintiff to economic and business hardship without justification; (vi) Interest on decretal amount at Court rate from date of Judgment to the date of the satisfaction of the decree in full; (vii) An order for costs of this suit; (viii) Any such order or orders as the honourable Court may deem fit and just to grant in the circumstances of this case. On their part, Stanbic Bank Tanzania Limited, the defendant filed a written statement of defence and denied each and every allegation contained in the plaint. In addition the defendant bank maintained that, it is the plaintiff who designated persons, , including Anthony Dawson Mallya who was his employee to initiate payments and determined beneficiary of payment. The defendant bank therefore prayed that, the plaintiff claims has no basis and be dismissed with costs. In the view of the plaintiff claims and defendant's denials the court in consultation with the parties framed four issues for determination being; Page 2 o f 20
1. What were the terms of the New Business Online (NBOL) Agreement entered between the plaintiff and defendant
 2. Whether the defendant's bank is in breach of its obligations under the NBOL Agreement.
 3. Whether the defendant's bank is in breach of its duty of care owed to the plaintiff in the handling of the plaintiff's bank account No. 9120000598966.
 4. Whether it was the plaintiffs or the defendants staff members who were primarily responsible for initiating, authorizing and processing the alleged payments from the responsible bank account.
 5. Whether the defendant bank is liable to the plaintiff for alleged loss arising from the perpetration of the alleged fraud, misappropriation of funds or incorrect payment.
 6. To what reliefs are the parties entitled. It follows therefore the plaintiff suit was heard and decided on the basis of the above mentioned agreed issues. During the hearing of the suit the plaintiff was being represented by Mr. Wellwel Learned Advocate while Defendants were being represented by Mr. Dilip Kesaria, Learned Advocate In pursuing his claim the plaintiff called Mr. Arun Nagar who testified as PW1 and tendered several exhibits. In his testimony PW1 told the court that, is the Chief Executive Officer and the Managing Director of the plaintiff company since June 2009. He further explained to the court that, on the 20th March 2012, his company opened bank accounts, including Account No 91200000598966. PW1 then said between 26th August 2013 and 5th September, 2014 the plaintiff was utilising the defendant's online bank services and they electronically instructed several payments through their bank account Number 91200000598966 in favour of the Commissioner for Large Taxpayer (TRA) to meet its various tax liabilities including Value Added Tax and Withholding Tax. It was part of PW1 testimony that, it was Mr. Antony Dawson Mayalla their employee who initiated alleged tax payments. PW1 then maintained in his testimony that, contrary to their financial banking instructions the defendant bank did not

pay the funds to the Commissioner for Large Tax Payers (TRA) Instead, transactions of shs 693,245,932 .33 alleged to have been sent to the Commissioner of Large Taxpayers for payment of taxes, were unlawful and illegally transferred into individual bank account of Mr. Antony Dawson. PW1 claims that, diversion of funds was committed by the defendant bank, contrary and in violation of the plaintiff's bank instructions and that, amount to failure to maintain a duty of care on the part of the bank. The witness claim that, over 20 online banking transactions involving statutory remittance of VAT and withholding tax were not remitted to TRA as per plaintiff payment instruction. PW1 further explained that, unlawful and authorised payments were made to the personal account of Mr. Anthony Dawson Mallya held in the same defendant bank. As a result of failure on the part defendant's bank to remit government taxes, PW1 said the plaintiff was issued two agency notices for non-payment of VAT and Income Tax, attaching their bank accounts held in Baroda Bank . The witness also explained that, the defendant bank was negligent and timely failed to make feed back to the plaintiff on correctness of financial transaction made on automated online electronic system. Due to diversion of funds from the plaintiff's bank account into personal bank account of Anthony Dawson Mallya continued for a long period of time. PW1 blamed the defendant bank that, it acted contrary to the Business Online , Agreement, which resulted into negligence in mishandling of the plaintiff bank account and occasioned huge financial loss to the plaintiff. To support the plaintiff claims that, the defendant bank was negligent PW1 tendered several exhibits including a Board Resolutions dated 8th January, 2012 and that, of 11th July 2014 authorising the use of New Business Online Banking System which were Page 4 o f 20 admitted as Exhibit Pl(a)(b) and (c), Summary of different payment which was admitted as Exhibit P2, Payment transaction report which was admitted as Exhibit P3, Summary of Transaction Exhibit P4 Payment transaction report which was admitted Exhibit P5. Other Exhibits which were admitted are TRA Agency Notice dated 24/3/2015 admitted as Exhibit P6 and TRA VAT Agency Note was admitted as Exhibit P7, A document with title Instruction Pending Authorisation was admitted as Exhibit P8 , a letter to Commissioner General dated 30th March, 2015 which was admitted as Exhibit P9 , Reports of Bank Transactions were admitted as to Exhibit P10 and 11, Extract of Bank Transaction was admitted as Exhibit P13 and a letter from the plaintiff to the defendant was admitted as Exhibit P14. While being cross examined by Mr. Kesaria, PW1 replied that, their company became the customer of the bank in 2009 and he admitted that, Anthony Dawson Mallya was their employee and was unqualified Accountant, Further, PW1 agreed that, he and Mr. Kumar resides in Johannesburg and Mr. Anthony Malya who was their employee is based in Dar es Salaam and was one of authorised signatory of his company, and the company was using his email and telephone number in its official business. The witness also admitted that, funds diverted were initiated by Anthony Dawson Malya but beneficiary was supposed to be Commissioner of Large Taxpayer. PW1 further during cross examination explained that, they lodged criminal complaint with the police against Anthony Dawson Malya, who was their accountant and currently is facing criminal charge and the case is still going on. All in all PW1 prayed to the court grant a judgment , in favour of the plaintiff and prayer contained in the plaint. After that, PW1 closed his

testimony and plaintiff case was also closed. On his part the defendant, he called Willmot William Ishengoma who testified as DW1 and explained that, is the head of risk assessment of Stanbic Bank Tanzania Limited. DW1 then explained that, the dispute between the plaintiff and defendant arises from Page 5 of 20 New Business Online (NBOL) is facility which was availed by the defendant bank to plaintiff. He then explained that, in NBOL electronic online agreement availed to the plaintiff is governed by terms of the agreement. He further explained that, according to clauses 4.2.2, 4.2.6, and 4.2.7, the plaintiff is under contractual obligation to maintain overall responsibility for the operation of the services within his organisation and manage services including taking care of internal risks. Also, DW1 explained that, the online electronic banking system also requires the plaintiff to take responsibility for all successful acceptance of bank transactions including payments, collection and transfers of monies. Also, DW1 stated in his witness statement that, in the NBOL Agreement the plaintiff furnished the defendant bank with names of designated plaintiff officials who are authorised to use online system, and who are contact persons. In that, regard the name of Mr. Anthony Dawson was furnished to the defendant bank including his email and telephone mobile No 0787-429394. DW1 further explained that, other designated plaintiff officers for the use of online electronic banking systems were Mr Arun Nagar, Nitin Kumar, Mr. Ram Kumar, Mr Vijay Jadhav who their address and telephone numbers were of South Africa. The witness explained that, in the online electronic banking payment system each client has his unique code number and Tanzania Revenue Authority i code Number is "TARATZTZ" and there is password for users including initiator of payment and, authoriser payment in each bank financial transaction. He then clarified that, in electronic online payment system "initiator" alone may not process payment alone even the "authoriser", alone may not process payment alone. DW1 then maintained in his testimony that, the electronic payment system may not process any initiated payment made by Anthony Dawson without authorisation of by both Mr. Nitin Kumar and Mr. Ram Kumar or Mr. Nitin Kumar and Mr Vijay Jadhav and authoriser of a single authoriser will not suffice to process payment transaction. Page 6 of 20 It was the testimony of DW1 that, on payment transactions which were made, the NBOL Electronic online payment system correctly made payments to bank account, and swift code specified by "the plaintiff's "initiator" and authorises" including Mr. Ram Kumar, Nitin Kumar and Nitin Kumar and Vijay Jadhav. So DW1 maintained that, payments made were done correctly pursuant to destination account and swift code given by the plaintiff's officials through online instruction and all payments were visible on plaintiff's computer screens. On allegations that, payment were made to the Commissioner of Large Tax payer, DW1 stated that, it is the plaintiff's officials who were changing account number and swift code deliberately, and such fraud was perpetrated by the plaintiff's officials as shown in the TRA Letter dated 30th March 2015 to the Commissioner General. DW1 emphasized in his testimony that, there is no human involvement in online electronic bank payment system which may allow bank officials to interfere the transaction and collude. On the part of Anthony Dawson, DW1 stated that, he, was introduced to the defendant bank by the plaintiff's company as designated person of the plaintiff's company together with his the

address which shows is residing at Dar es Salaam. Other designated plaintiff officials introduced to the plaintiff were Mr. Arun Nagar, Mr. Nitin Kumar and Mr. Ram Kumar, and Mr Vijay Jadhav their address shows were residing in , Johannesburg. In respect three payments made in Annexure SVTL 2, SVTL 3 and SVTL 7 of the plaint which are subject of complaint, DW1 clarified that, their history shows payments were initiated by Anthony Dawson and approved by the Mr Nitin Kumar Mr. Ram Kumar Page 7 o f 20 and Vijay Jadhav and there was no reasons why online electronic payment system should decline to process payments instructions. So the bank online electronic payment system acted correctly in obeying and carrying payment instructions made Anthony Dawson, Mr Nitin Kumar Mr. Ram Kumar, and Vijay Jadhav who all were the plaintiff's officials. DW1 the insisted in his testimony that, Clauses 4.2.2 and 4.2.6 of NBOL online facility agreement protects the bank from any wrongdoing or fraud perpetrated by the plaintiff and his officials who are his customers. Finally DW1 explained and concluded that, if there any loss or fraud which was committed that, was perpetrated by the plaintiff officials who have not been sued in this suit To substantiate the defendant defence that, the bank is not liable, DW1 tendered New Business online agreement which was admitted as Exhibit DW1. A document with title "Stanbic Bank New Business Online Customer Designed Person" which was admitted as Exhibit D2, Payment Instruction detailed report, Exhibit D3, Payment instruction details which was admitted as Exhibit D4, After DW1 testified was cross examined by Mr Daniel Wellwel, and the witness maintained that, alleged payments made by the plaintiff paid to TRA went to Anthony Dawson and then close his testimony. Following the closure of the testimony of DW1 the defence case was closed and that, was the end of the plaintiff and defendant's case. Then the both counsel with the leave of the court filed their closing submissions. To start with Mr. Wellwel, explained that, the plaintiff his claim emanates from illegal diversion of funds which was in bank account Number 91200000598966 contrary to the account operating instructions of the plaintiff to the bank. The counsel then argued that, was a breach of contractual terms and violation of duty of care owed by the defendant bank in handling plaintiff bank accounts. The counsel then submitted that, Page 8 o f 20 from presented evidence a total of shs 761,682,768.31 were diverted into individual bank account. It was the argument of the plaintiff's counsel that, the plaintiff claim is based on banker customer relationship where defendant's bank is under duty to exercise reasonable skills and care in managing accounts of customers as envisaged in the case of Joachimson Versus Swiss Bank Corporation T19211 3 KB 110 . The plaintiff then submitted that, the plaintiff being a customer was not under the duty and position to prevent forgery which took place in the defendant bank, nor to conduct periodic checks in his bank statements to identify unauthorised payments. It was the argument of Mr. Wellwel that, Plaintiff issued instruction of payment to Commissioner for Large Taxpayers (TRA), instead the defendant's bank unlawfully and without authorisation illegally diverted funds and paid into the account of No 91200000599253 which belong to Anthony Dawson Malya. He argued that, payments made to Anthony Malya were contrary to the plaintiff's instruction for payment and contravened the bank duty of care and banking practise. The counsel explained that, going the testimony of PW1 in total 20 transactions of shs 693,245,932.33 whose beneficiary was

Commissioner for Large Taxpayer, TRA were illegally diverted without being detected by the plaintiff's bank. In addressing the 1st issue agreed issue of what were the terms of New Business online Agreement the counsel submitted that, online system was a bank product and plaintiff . has no control on it. He then insisted that, it is the defendant's bank which was taking control of it and banking practices requires a bank to exercise a duty of care on its customers including the plaintiff. But no duty of care was accorded to the plaintiff's bank account. Page 9 o f 20 Moving to the second agreed issue whether or not the defendant bank breach its obligations under the NBOL Agreement the plaintiff counsel explained that, as set out by Section 37 of the Law of Contract Act parties are bound by their contract but payments done by the defendant's bank were not made to the Commissioner of Large Taxpayer who was beneficiary and the defendant bank system was supposed to reject the said payments, instead of processing all transactions. The plaintiff claim in such circumstances the defendant bank would have "detected the fraud which was committed. Submitting on 3rd agreed issue of whether defendant bank breached its obligation under the NBOL Agreement, plaintiff's counsel insisted that, parties are bound by their contract and since the plaintiff's instruction to pay Commissioner of Large Taxpayer was not complied with that, amount to negligence on the part of the bank. So the defendant's bank breached its duty of care it owed to the plaintiff in handling the plaintiff bank account No 91200000598966. Submitting on the 4th issue of whether it was the plaintiff or the defendant staff who were primarily responsible for initiating , authorising and processing payments the plaintiff counsel pointed that, it was the plaintiff employees responsibility to initiate and approve payments and further insisted the responsibility of making correct approval and payments remain with the defendant bank Therefore there is likelihood that, defendant's employee were responsible for the "intimating" correct approvers Turning to the last point of whether or not the defendant is liable for alleged loss arising from alleged fraud ,and misappropriation of funds and incorrect payment, the counsel , submitted that, the evidence shows that, funds were transferred from the plaintiff's bank account without authority and paid to Mr. Malya instead of TRA and that, was breach of the NBOA, account operating instructions, ant failure to exercise duty of care owed to the plaintiff and that, lead to erroneous payment of shs 761,682,768.31 which was wrongly paid. The counsel insisted that, the defendant should not have processed the Page 10 o f 20 above mentioned transactions. So the plaintiff prayed that, the judgment and decree be entered in favour of the plaintiff. On his part Mr. Kesaria for the defendant submitted that, it is the plaintiff who entered into New Business Online Agreement (NBOL) with the defendant bank. Then relying on the testimony of DW1 he told the court that, online electronic banking facility is availed to bank customers. The counsel then indicated that, the plaintiff claims that, there was fraud and unauthorised payment from his bank account, but the evidence of PW1 shows that, the fraud was initiated by the plaintiff employee one Mr. Anthony Dawson. On the plaintiff exhibits which were admitted in court the defendant counsel submitted that, the law requires payment of fee on each exhibits. But there is no proof is court fees were paid on each exhibits as it is required by law. The counsel then prayed to the court to disregard all plaintiff's Exhibits which were admitted. While on this point the defendant's counsel drew

the attention of the court to a decision in the case of High Court Civil Case No 220 of 2012 between Betam Communications Tanzania Limited Versus China International Telecommunication Corporation and Another where exhibits which no fees were paid were disregarded. So relying on the cited decision, Mr. Kesaria applied to the court not to act on the plaintiff Exhibits. Submitting on the first issue of what were the terms of the New Business Online (NBOL) Agreement entered by the plaintiff and defendant bank, Mr. Kesaria submitted that, , even the plaintiff has a contractual role of maintaining overall responsibility of operation of online electronic banking system. Also he added that, the plaintiff has a contractual duty of putting in place internal controls which will oversee and eliminate possible risks including forgeries. Also, the counsel highlighted that, under clause 4.2.6 of the Agreement the plaintiff was required take responsibility of ensuring that, there are successful bank transactions including correct payments, collection and transfers of Page 11 o f 20 monies. In view of what was agreed in the agreement the defendant's counsel finally submitted that, online banking system granted the plaintiff full control in making online electronic payments without involving defendant bank officials and that, is what happened in the alleged financial transactions In respect of the second issue of whether or not the defendant is in breach of its obligation, defendant counsel submitted that, the defendant has fully complied with his obligation under NBOL Agreement of providing of electronic banking facility to the plaintiff including providing of password and codes to the plaintiff officials. So he fully complied with the terms of the agreement and the law. He also pointed out that, there is no evidence which shows any of the defendant employee breached the terms of the agreement or was involved in allege financial transactions which were carried by the plaintiff's officials. On the issue whether or not the defendant was on breach of its duty of care the defendant's counsel submitted that, under NBOAL Online Agreement, the defendant banking system has on obligation of processing instructions received from the plaintiff's official including payments, collection and transfers of monies. Mr. Kesaria then indicated that, based on what testified by DW1 in the electronic payment, the one who is in the driver seat is the " payer" who were Mr. Anthony Dawson Malya as "initiator" and "authorises" who were Mr. Ram Kumar or Mr. Nitin Kumar or Mr Vijay Jadhav there no human involvement from the bank officials. . The counsel relying on testimony of DW1 emphasized that, in online electronic banking system, the procedure is completely different from that, where a customer using a cheque drawn for payment, where bank officials are involved in scrutinising transactions. But in on online banking system there is no human involvement on part of bank officials except the customer himself. The counsel then argued that, since defendant's employee were not involved in any of the transactions alleged to have been made online, the defendant bank is not liable. Page 12 o f 20 Moving on what reliefs are parties entitled to the defence counsel prayed for the dismissal of the plaintiff claims with costs in favour of the defendant. The court has carefully considered the plaintiff's ' s claims and find is based on allegations that, the defendant's bank breach a duty of care, and was negligent in handling and processing 20 online transaction of shs 693,245,932.33 whose beneficiary was Commissioner for Large Taxpayer, TRA but were illegally diverted into unauthorised personal bank account of Anthony Malya thus causing huge loss to the

plaintiff. In the light of allegations raised by the plaintiff, I find under Section 110 (1) and

- (2) of the Evidence Act Cap 8 TR.E 20021 a burden of proof is on plaintiffs to prove each and every allegations. Indeed Section 110 (1) of the Evidence Act Cap 6 established that; Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that, those facts exist. So as stated in Section 110 of the Evidence Act Cap 6 the burden is on the plaintiff to prove each and the level of proof is that, of balance of probability. Now before going into the merit of the plaintiff's claims, I find it is ideal to consider objection and plea raised by Mr. Kesaria that, plaintiff's Exhibits should not be relied upon by the court because there no proof, if court fees were paid on each exhibit before being admitted I have considered the objection raised and find it was raised in closing submission of the defence counsel, and the plaintiff and his counsel did not have an opportunity to comment upon. That, being the position, the court responses on the said objection on the plaintiff exhibits is that, Courts of Laws in several decisions, including a decision in the case of Frank M. Marealle versus Paul Kvauka Niau f 19821 T.L.R No 32 have frequently stated that, in making their decisions, it is prudent for to confine themselves into legal issues which were framed in the pleadings. In other words a court should Page 13 of 20 entertain fresh legal issues which was not part of agreed framed issues. Honestly, I find such rule is still good law in our jurisdiction. Turning to the defendant's objection on the plaintiff exhibits, it is crystal clear that, was not one of framed agreed issues of determination during the final pre-trial conference or in subsequent stage of the trial. It was raised and argued after both the plaintiff and defendant cases were closed. More the defendant did not have a chance to comment upon it. Quite frankly I find on the basis of what was decided in cited case of Frank M. Marealle versus Paul Kvauka Niau TSupral it will be improper for the court to make any decision on issue which was not framed as issue for determination. Also, I would like to remind the parties that, Order 1 Rule 13 of the Civil Procedure Code Cap 33 TR.E 20021 requires objections on points of law be raised at the earliest possible time. Since objection on payment of court fees to the plaintiff exhibits was not raised at the earliest possible time, the proper assumption is that, such objection was deemed to have been waived and it may not be raised after the closure of the plaintiff and defendant case. For reason explained above, I hereby dismissed defendant objection based on item 18 of the 1st Schedule of Court Fees Rule GN 187 of 2015 on ground that, for not being raised at the appropriate time. So it was waived and it fails. With the above mentioned court finding, I now straight proceed to address the 1st agreed issue of what were the terms of the New Business Online (NBOL) Agreement entered . between the plaintiff and defendant. In addressing the above I perused a copy of the New Business Online Agreement, which was admitted as Exhibit P 1 (C) and find it has about 20 agreed terms. My further perusal shows that, the most relevant terms for the purpose of this disputes are term No 4 which stipulates rights and obligation of each party in the agreement, term No. 7 which requires both parties to obtain, maintain and take full responsibility for functioning and security of all hard ware and software of online electronic banking system, Further term No 8 which provides for use of Passwords and Codes for plaintiff officials as conditions in

operating online banking system. So to conclude on the 1st issue the court find the New Business online Agreement has several terms of agreement as explained above, which put overall responsibility for the operating online banking service to plaintiff as well to defendant. Also under the agreed terms both the plaintiff and defendant had contractual obligation to secure the system from possible risks, by maintaining internal controls from time to time. In other words even the plaintiff has contractual obligation of overseeing the online system in his area of works. Turning to the 2nd agreed issue of Whether the Defendants bank breach its obligations under the NBOL Agreement, honestly I find in allegations of "breach of contract" the key issue for determination is whether or not the defendant did not perform part of his contractual obligation or performed differently. In addressing the above, the court find the presented evidence of both PW1 and DW1 shows that, the plaintiff had some offices and office at Sandton Johannesburg, South Africa, and one of his officers was based in Dar es Salaam, Tanzania. Then from testimony of PW1 and DW1 it's further established that, the plaintiff was operating online electronic banking system in the defendant bank Account No 91200000598966. Then DW1 said under its terms the plaintiff who was the "bank's customer" was allowed access and enter electronically into his bank account and make electronic transfer of monies and pay his business associates including the Commissioners of Large Taxpayers. Also the court find copies of computer generated reports Exhibits P3 and 11 and D4 shows through that, a sum of shs 693,245,953.33 Page 15 of 20 were transferred on anticipation that, were being paid into bank account of Commissioner of Large Taxpayer TR A , but were paid into the bank account of Anthony Dawson Malya who was the plaintiff employee. The plaintiff and PW1 now claim that, was a breach of contract on the part of the defendant bank while the defendant and DW1 maintained the bank committed nothing wrong and there is no breach because all financial transactions were done by the plaintiff's employees pursuant to their own instruction on the online banking system. The court have carefully examined and assessed allegations on allegation of breach of terms of New Business Online Agreement raised by the plaintiff against the defendant bank, and find from computer generated copies which were admitted in court as Exhibits P3 , 11 and D4 tend to establish payment processed were authorized by Nitin Kumar, and Ram Kumar who are plaintiff employees. The payment was in favour of Commissioner of Large Taxpayer, but ultimately payment were made in favour of Anthony Dawson the Plaintiff country accountant, who's Bank Account was No 9120000599253. The court fully analyzed payment instructions appearing on computer generated copies admitted Exhibits P3 and 11 and D4 , any reading payment instructions issued by Nitin Kumar and Ram Kumar who were authorizing payments from South Africa, may be tempted to believe that, intended that, payment were firstly made to the beneficiary Ad-hoc who was Anthony Dawson, and is the one who will ultimately make payment from his bank account to the Commissioner of Large Taxpayers- TRA . So in my close examination of computer generated copies Exhibits P3 and 11 and D4 I only realized and found that, it is the plaintiff employees who were involved in processing payment by guiding online electron payment system in paying alleged taxes. The above mentioned exhibits also established none from the defendant bank officials were involved in initiation,

processing or authorizing payments the alleged payment which went into the wrong hands. Page 16 of 20 A fact that, TRA payment were processed by online electronic system by defendant's officials is proved by Computer-Generated copies Exhibits P2 and P4. Also a fact that, the plaintiff was defrauded by his own employee was also expressed in plaintiff letter addressed to TRA, and signed by Arun Nagar the CEO and Managing Director of the plaintiff's company in Exhibit P9. In the said Exhibit PW1 openly stated that;- "Upon further investigation, we have realized that, our company as well as Tanzania Revenue Authority have been defrauded by one of our employees in collusion with certain staff of Stanbic Bank'. So as stated paragraph of Exhibit P9, Mr. Arun did not mention the defendant's bank staff alleged to have colluded with the plaintiff employee to divert funds. So in view of the above the court finding in Exhibit P2, P4 and P9, it is clear that, none of defendant bank official committed any act which amount to breach of the terms of NBOL Agreement. It seems from the exhibits which were tendered that, it is plaintiff and his employees who process all electronic payment transactions which are disputed. In the absence of any evidence implicating the defendant bank officials tempering with the system or colluding with plaintiff official on financial transactions which were wrongly paid to Anthony Malya, the court find a claim breach of duty of care or of breach of terms of agreement may not stand and it fails. On the allegations that, the defendant bank did not discharge its duty of care according to the banking practice, the court find it has been emphasized by courts in several decision including decisions in the case of Tai Hina Cotton Mill Ltd Versus Liu China Hina Bank Ltd and others r 19851 2 All ER, and National Bank of Commerce versus Ally Yakut *

- (1989) TLR 119 at page 121, Silavo v CRDB (1996) Ltd r20021 1 EA 288 (CAT) Luaakinaira J.A (as then was). Intercom Services Ltd and others v Standard Chartered Bank Ltd [2002] 2 EA 391 (HCK) that, banks owe a duty of care to their customers. So it follows that, the defendant bank has obligation of exercising a duty of care in handling the plaintiff account. Page 17 of 20 However in the present dispute the plaintiff's allegations that, the defendant bank breached a duty of care is not supported by any tangible evidence. All presented exhibits shows that, plaintiff and his employees were solely responsible for processing payments which were directed to Commissioner for Large Tax payer but ended into the bank account of their fellow employee Mr. Anthony Malya. Mr. Wellwel Learned Advocate of the plaintiff strongly reminded and emphasized to the court that, defendant bank was under duty to exercise reasonable skills and care in managing accounts of the plaintiff as envisaged in the case of Joachimson Versus Swiss Bank Corporation r 19211 3 KB 110. The court has no quarrel with that, legal proposition. However the decision in the cited case of Joachimson Versus Swiss Bank Corporation T19211 3 kb 110 appears to be only relevant where there is tangible evidence that, defendant bank committed an act of negligence on the plaintiff bank account, or failed to observe banking standard and practice. But facts and evidence of the plaintiff himself strongly suggests that, it is the plaintiff and his officials who were making online business transactions in their own bank account while using the defendant bank website. As explained by DW1 the online electronic payment system was just obeying commands which were being made by Nitin

Kumar, Ram Kumar, Anthony Dawson and other plaintiff's officials. So a mere factor that, funds were diverted and paid to the unauthorized bank account • or to unauthorized person by using defendant online electronic bank system which was availed to the plaintiff and his employee is not sufficient evidence to prove negligence or breach of duty of care on the part of the defendant bank. The plaintiff would have come with the evidence which explaining negligent act committed or done by the bank or its officials in processing transferring of alleged payments. Page 18 o f 20 So in the absence of any evidence which shows the defendant acts of breaching of duty of care, or negligence, the plaintiff's claim on breach of care or terms of contract has remained unsubstantiated and they all fail. In other words allegations were not proved on the balance of probability. Turning to the 4th agreed issue of whether defendant bank is liable the court has reviewed the presented evidence from both sides as explained above, and finds nothing implicated the defendant bank or its employees. The court is aware that, when there is a contract or agreement or banker customer relationship a tortious or civil liability arises only when there is a breach of the terms of agreement, or failure to exercise due care on a party alleged to have committed such breach. As pointed above under Clause 4.2.2 of New Business Online Agreement Exhibit D1 the plaintiff as the user of the system was also under contractual obligation to take overall responsibility for the operation of the services, by setting up internal controls which would have detected all risks in his financial transactions, including risk of detecting forgery or theft at his sphere of online banking. Without repeating too much I would emphasis in absence of evidence of breach of terms of the agreement on the part of the defendant or a proof failure to exercise a duty of care, I find the defendant bank is not liable for any wrong which was committed under the watch of the plaintiff and his officials. For that, reason, I find and decide that, the defendant bank is not liable for alleged online financial transfer of monies processed by plaintiff alone and his officials Moving on what reliefs are parties entitled the court find since the plaintiff did not prove claims of breach of terms of contract and breach of duty of care against the defendant bank the court find all plaintiff claims from paragraph 21 (i) to (viii) of the plaint were not proved as explained above. Consequently, I hereby dismissed the plaintiff suit with costs in favour of the defendant bank. Page 19 o f 20 r The Right of Appeal is fully explained to the parties. Dated and Delivered at Dar es Salaam this 23rd February, 2018. H.T SONGORO JUDGE Judgment was delivered in the presence o f Mr. Peter Lucio, Learned Advocate of the plaintiff, and Zakaria Daudi, Learned Advocate o f the defendant. Page 20 o f 20

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