ACRITICAL ANALYSIS OF THE DUTIES OF BANKS TOWARDS CUSTOMERS IN UGANDA

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DECLARATION

I **Namuganza Claire** declare that I am the sole author of this thesis report and that during the time of this study, it has not been registered for other academic award or qualifications, this thesis report is a result of my own research work and where reference was made to other people works. The same has been duly acknowledged.

Signature:.....

Date:29/05/2019

APPROVAL

"I certify that I have supervised and read this study and that in my opinion .it conforms to acceptable standards of scholarly presentation and is fully adequate in scope and quality as a dissertation in partial fulfillment for the award of Degree of Bachelor of Law of Kampala International University"

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DEDICATION

iis thesis is dedication to my family Mr & Mrs. Muganza Simon Peter, for their patience, durance and understanding.

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ABSTRACT

This is a study of ''Bank's duties towards their customers''. The law and practice was carried out in different banks with in Uganda, with specific aim of establishing the extent of compliance with these duties by banks and the legal issues put in to consideration to enforce and exercise these duties. Examining too on how banks have failed in their duties by investigating on the loop holes there in as we identify possible interventions to control the failures in banks. This study will also constitute literature review from various scholars on their say on specific duties as well as different laws from different countries that govern different relationships. This study was based on qualitative methods of data collection and this analysis was done through conducting library and internet research.

The study findings indicated that the different duties that include; the duty of care, good faith, honouring of cheques and also factors that lead to the breach or failure in their duties as banks to customers for example Misleading advice, undue influence, fraud, misrepresentation and failure in conduct of due diligence and the possible defences that exclude liability from banks.

The study recommended that being that laws are present but there is need for them to be enforced and other recommendations include the need to conduct with respect to be exercised towards customers, and being observant when conducting duties towards customers.

ACRITICAL ANALYSIS OF THE DUTIES OF BANKS TOWARDS THEIR CUSTOMERS IN UGANDA.

CHAPTER ONE

1.1 INTRODUCTION

The banks have played a significant role in the financial sector which has created a bond between the customers and the banks leaving no room for dissatisfaction of customers this has been done through acceptance of deposits of money from the public[1] repayable on demand[2], and payment of cheques[3]. This is being conducted by banks like bank of Uganda, central bank and standbic bank, these banks are then recognized for their great effort in acting as savior for the public hence this leading to a prosperous economy due to more investments , more jobs, and taxes extracted for the state ,quick transactions in terms of money exchange.

1.2 BACKGROUND OF THE STUDY

Banking began as a first protype bank which was exercised by merchants of the world, who made grain loans to farmers and traders who carried goods between cities like Assyria, India and sumeria the ancient Greece and Roman empire lenders based in temple made loans by accepting deposits and performing the change of money. The development of banking spread from northern Italy throughout the Holy Roman Empire in the 15th century and 16th century to northern Europe .The history of banking is intertwined with the history of money, ancient types of money known as grain money and food cattle money[4]. However in Uganda diverse groups of people are keenly interested in knowing the extent of Uganda's economy of banking progress since the pre-independence era, up to date when Ugandan banking sector was liberalized from the dominated banks at the time[5].

These banks were more of foreign, they included Standard charted bank, Bank of Baroda, Grindlays and Barclays bank[6]. Due to their conservativeness in money lending policies usually

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[1] S.1(b)(i) Financial institution Act
[2] S.9(1)(a) Bill of exchange Act cap 68
[3] S.1(b)(iii) Financial institutions Act
[4] https;//en.m.wikipedia.org.wiki.History of Banking.
[5] G.P.Mukubwa, Africa Banking law And Practice ,2nd Edition.
[6] https;//en.m.wikipedia.org.wiki.banking in Uganda.

giving loans on strict commercial criteria, as a result these banks intended to lend to larger companies and finance trade all of which were controlled by foreigners. This policy of lending discriminated against Africans because the majority did not accept securities such as life insurance policies, bills of exchange etc. The African ventures were at high risk and relatively noncommercial sectors such agriculture and animal husbandry. The colonial government reacted to the perceived inadequacies of foreign owned banks by enacting in the 1950's the credit and saving bank which was intended to facilitate loans to Africans in furtherance to the agricultural, commercial and cooperative society. This was the first public sector bank in Uganda which was intended to lead most of Africans. But due to the continued facilitating of non-indigenous businesses ,the independent government intended to reform the banking sector in the 1960's and 1970;s which were to fill the financing bank gaps and influence allocations of credit directly through administrative controls .In 1965 Uganda credit and saving bank was transformed into Uganda Commercial Bank Ltd due to the rapid expansion of UCB and cooperative banks in 1970 and 80 this is because after independence it had more 290 branches of banks and shortage of professional and skilled personnel[7]. This development was coupled with weak regulatory frame work. New laws like the financial institutions Act, Bill of Exchange Act , all these were enacted to strengthen the regulatory frame work of the financial sector by addressing a number of issues. And this led to the growth of Uganda's financial system leading to substantive progress. The financial system was divided into 4Tiers; these include commercial banks regulated under the financial institutions Act as Tier 1 and institutions consisting of credit institutions as Tier 2. The banking sector falls under Tier 1. Under the financial institutions Act all financial institutions that are incorporated are compelled to apply to central bank for a banking license[8] .These banks too are granted a minimum capital requirement for various tiers of financial institutions and supervised by bank of Uganda. As seen the minimum capital requirement was revised to one million, two hundred and fifty thousand currency points [25Billion][9] .

It's often stated that banks owe an obligation to their customers. In common law for there to exist any duty that is binding there must be a relationship that exists between the parties, this relationship in common law must be one of a contract and there is need to fulfill these

[7] http://www.monitor.co.ug..prosper. Growth of banking sector,(wensday.oct.11th 2017)
[8] http://www.abccapitalbank.co.ug.the finanicial sector in Uganda.ABC Capital Bamk Uganda.
[9] S.26(5) Financial institutional Act 2004

contractual conditions there that were discussed in the case of **Kornark Investments (u) ltd v Standbic Bank Uganda Ltd**[10] . These duties can subsequently be assumed by specific agreement or from the standpoint of the customer between services which the bank habitually does though not to be bound i.e. banks drafts, letters and safe custody. But this has not been judicially determined. This point was expressly left open by **Justice staughton** that there can be existence of conflict of laws, contracts, illegal performance [11] Though it is observe that these duties that are exercised are arguably most important concept with in the legal and practical system as well as equity as seen that later these different duties in both common law and equity were later merged and used by different courts so they need to be respected.

It is an obligation of a bank to perform these duties Atkin lj whilst adhering to the notion of implied super added obligations of banks[12]. It is discussed that it is impossible to give exhaustive implied duties but rather in any given case court will concentrate on particulars in contract or tort, the proximity of the parties, reasonableness and justice on a particular fact over matters pertaining into this relationship they have between banks and customers. We have duties that are both common law and under the Act; like the duty to repay by the bank at the branch where the account is kept. This can be a duty arising out of a law or consent. Other duties are legal ones arising out of contract not merely moral ones so duty of secrecy is legal not moral like duty of care[13], hence such a breach gives raise to damages.

Different exceptions to the duties of a bank are legal and common law obligation arising out of the contract and relationship of trust and confidence between the banks and customers to morally and legally exercise them. When there are duties imposed on a bank, legislation will expect a strict compliance as compared to tortious common law. It has been stated that a bank and a customer must not have a disputable situation which are likely to interfere in the relationship and duties too and if such disputes occur they should setup avenues on how to resolve disputes arising out of claims[14]. However the duties must be in contemplation during their relationship[15].

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[10] Civil suit no.116 of 2010.[2012] UGCOMMC 6 (16 Feb 2012))
[11] Libyan Arab Froreign Bank v Bankers Trust.Co.1986.
[12] Joachimson v Swiss Bank corporation (1921)3 kb 110
[13] Tournier v National provincial &union Bank of England(1924)1KB
[14] The insurance ombudsman Bureau, Annual Report.(O.B,1982)

The banks must when be conducting these duties exercise "a level higher than that trodden by the crowd''. In Uganda, the laws governing the different duties of a bank in banking systems have not systematically been observed and pursued.

So in this situation where the personal duties of the customers are infringed upon we see that the laws come as liberators. Such duties can be investigated to determine which exceptions are rightly granted to banks. When banks tend to breach them without the express knowledge and consent of the customers which is one of the reasons why the law of banking has come up to solve and put up some implementations of different remedies. It is upon this study that seeks to answer the questions whether the duties of banks to customers are truly exercised and how the legal frame work too is being exercised and how to improve and expand on the maintenance and exercise of these duties by banks in Uganda.

1.3 STATEMENT OF THE PROBLEM

During the 1960 and early 1970 the primary objectives of the reform of the banking sector were to fill the financing gaps and influence allocation of credit directly through administrative controls. A number of commercial bank branches and services contracted significantly where Uganda had 290 commercial bank branches in 1970[16]. By 1987, there were only 81 of which 58 branches were operated by government owned banks. Banks have carried out their duties to ensure the smooth running of the banking business, despite the fact that there has been a breach of these duties as a result of weak laws that have failed in their implementation in the protection of the relationship that exists between the bank and customers. So the purpose of this study is intended to examine the effectiveness of the law and public in the keeping intact of the relationship between customers and banks.

1.4 OBJECTIVE OF THE STUDY

1.4.1 GENERAL OBJECTIVES

To analyze the obligation of the bank towards customers, this will be done by conducting a critical analysis of the law and factual situations on ground.

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[15] Professional Programme, Banking law and Practice 2018.
[16] Ibid 7.

1.4.2 SPECIFICIFIC OBJECTIVES

1. To examine the extent of compliance of banks with their duties towards their customers.
2. To evaluate the legal and regulatory framework on law protecting customers in a bank and customer relationship.
3. To analyze the defenses of the banks towards the failure to exercise their duties towards customers.
4. To determine the possible recommendations to overcome the gap between bank and customer relationship.

1.5 RESEARCH QUESTIONS

1. To what extent have banks complied with their duties towards their customers?
2. How does the law protect customers in a bank and customer relationship?
3. What are the possible defenses towards Banks?
4. How have banks failed in conducting their duties towards customers?
5. What are the possible solutions to the gap in the protection of the customer in a bank customer relationship?

1.6 THE SCOPE OF THE STUDY

The study will be carried out in Uganda and it is centered in Kampala district on the duties of the banks towards customers. The study will take a period of 3 months from May to July so this study was conducted considering legal procedures, common law and case law while deciding on the possible adverse law on the nature of duties considering the coming into their existence which also helps in the deciding on the possible factors that have led to their breach as duties. So the scope is there to remedy on the problems by providing possible recommendations to encounter such problems.

1.7 SIGINFICANCY OF THE STUDY

The study seeks to answer the questions on the extent of compliance with their own duties towards customers in the banking sector which will be determined by a critical examination during conduct of research. The study is of great importance through contribution to both academic and practical use in the awareness of the loopholes in the law of banking sector when exercising their duties. The study too is expected to determine whether the legislative laws have

made any amendments relating to banking in exercising their and appropriate solutions towards arrangement of betterment of the customer's interest in order to create a strong relationship.

1.8 METHODOLOGY

The study is conducted by carrying out library research that will be based on common law and statutory sources of banks in Uganda. These will be considered when determining the obligations as banks, relevant primary and secondary sources will be consulted. Primary sources include; legislation, law reports. Secondary sources are books, journals, articles and internet. Under the statutory legislation there The constitution of Republic of Uganda 1995, Bill of exchange Act Cap 68, The bank of Uganda Act Cap 51, Financial institutions Act Cap 54. In common law leading cases will be used to act as precedent in the banking area. Internet surfing will be used to a limited extent, this will be used to derive us to updated views on the institutional frame work and cases therefore with respect to duties conducted by banks.

1.9 LITERATURE REVIEW OF THE STUDY.

In literature review there will be a discussion on duties of banks in Uganda and their failures there too are particularly an examination of the performance and analysis of duties of banks in Uganda. So there are different studies on banking that is to say different scholars have different views on duties of banks and the finding too.

Grace Patrick.T.Mukubwa[17], has conducted a study on the duties owned by the banker to customer largely relating to duty of care where the bank adheres strictly to their mandate imposed on them that is to say he has to act reasonably during his conduct that was seen in the case of **woods v Martin bank** ,[18] where the manager of bank advised the plaintiff to invest a substantial amount of money in shares and it was held that a bank being that he had obtained fiduciary duty so he was held being that he gave out his advice without first conducting a test of duty of care like a reasonable man would have carried out.

And he discussed too the duty of secrecy. It is an implied term that a banker enters into qualified obligation not to disclose information, concerning the customer's affairs without his or her consent to the third party. Although this duty might be altered within the law to disclosure where

[17] Grace Patrick .T. Mukubwa ,Africa Banking law and practice.
[18] (1959)1QB55.

the disclosure is in the interest of the bank requires disclosure and where there is a duty to the public to disclosure.

Mark. HapgoodQc[19], has explained that though it is impossible to give exhaustive list of the duties few will be discussed like the duty to deal with securities deposited with the bank and the bank who accepts safe custody is a bailer for reward. So for convenience of customers banks assume charge of valuables. The goods are said to be delivered to the banker for safe custody. He discussed too the duty to repay where the customer pays money into his account. The bank obtains tittle to the money and assumes a contractual liability to repay of the cheques against the money of the customer in the bank's hands because the bank owes a duty its customers a duty to honour cheques in carrying out payment instruction.

Ep .Elliger and Eva[20],states that economically a person whose calling involves confidential work has to be that one engaging himself in law, his discretion can be relied upon in certain cases in the interest of the state. He is treated as being of greater importance than a given agent's duty of confidentiality. The duty of secrecy is best explained on the effect the detailed knowledge about its customer's financial affairs. The bank acquires all these details because it is the customer's pay master and receiver of amount of him or her. Banks are required to observe strict duty of secrecy other than in exceptional causes permitted by the law for the bank to disclose information concerning the customer's account. This study therefore put into consideration the effectiveness of the need of the banks to a bind by their duty of non-disclosure. He discussed too the duty of care as one arising from the neighbor's principle, because of the fact that he can reasonably foresee as to the likely hood of injury by his action.

Andrew Laid law and Graham [21]; have observed on how a bank that owes an implied duty to its customers should not divulge information about its customers to third parties .Although this duty is eroded where there is a compulsion by the law to disclose some information where there is a duty to the public to disclosure in the bank's interest and where is consent of the customer disclosure in the banks interest and there is consent of the customer.

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[19] MarkHapgood ,Pagets law of banking 10th edition.
[20] E.p.Ellinger and Eva Lominika, Modern Banking law 5th edition.
[21] Andrew laid law and Graham Robert ;Law Relating to Banking law London 1992.

R. k.Gupta [22],states that though the primary relationship between a banker and customer is that of a debtor and creditor or vice versa the special features of this relationship , imposes the following additional duties on the banker .These include duty to honor cheques ,deposits accepted by a banker are his liabilities payable on demand. So the banker is therefore, under a statutory obligation to honor his customer's cheques in the usual course. "The drawer of the cheque having sufficient funds of the drawer in his hands, properly applicable to the payment must compensate the drawer for any loss or damage caused by such default." The account of the customer in the books of the bank records all of his financial deals with the latter depicts the true state of his financial position. If any of these facts is known to others the customer's reputation may suffer and incur losses. So the bank has utmost duty to keep secrecy. The duty to safe custody articles, so banks may obtain fixed deposits over 3 years and to take care of an eventuality that are kept in their the locker-hired for rent and charges. if the locker neither operates the locker nor pays rent then it will be taken over and taken over by some other customer.

Danny Busch and Cees Van Dam[23],In recent years more and more clients and third parties have filed claims against banks such as for mis-selling financial products ,poor financial advice ,insufficient disclosure and warning for financial risk .The scope of the duty of care seems to expand from protection of consumers against unclear risk of complicated protection of professional parties and against more obvious risk of relatively straight forward products .The duty of care of banks raises many questions both at a theoretical and practical level ,the book is principally concerned with the duty of care in the area of the provision of investment services ,advise and asset management .

1.10 CHAPTERLIZATION

Chapter 1 covers in depth introduction of the duties between bank and customers, its background and highlights the justification for the research, method to be employed in the set of objectives and scope.

Chapter 2 examines the extent of compliance of banks with their duties towards the customers.

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[22] R.K.Gupta; Banking law and practice 1oth edition.

[23] Danny Busch and Cees Van Dam;A Bank's Duty of Care.HART. OXFORD AND OREGON 2017.

Chapter 3 shall cover evaluation of the legal and regulatory framework of the law protecting customers in bank and customer relationship.

Chapter4 will analyses the defenses of banks towards the failure to exercise their duties towards customers.

Chapter 5 shall be able to determine the possible and recommendations to overcome the gap between the bank and customer relationship.

CHAPTER TWO

EXAMINATION OF THE EXTENT OF COMPLIANCE OF BANKS WITH THEIR DUTIES TOWARDS CUSTOMERS.

2.0 Introduction.

A bank is obliged by common law and statutory law to establish the identity of a potential customer by carrying out its bonafide duties failure to do this may lead to the bank being held delicately liable. However, there is recognition of delicate liability of banks to the owner as it is trite law that banks owe duties to customers these duties may include:(1) the duty of care (2) the duty of loyalty (3) the duty of good faith(4) duty of honouring cheques, and the duty of safe custody. Giblin v M'Mullen[24], provides that the law now governs the liabilities of bankers who gratuitously undertake the safe custody of goods deposited with them for that purpose was finally settle by the case.

A bank has been defined as a body of persons whether corporate or not who carry on the business of banking[25]. S.3. Financial institution is defined to include a bank, credit institution, building societies and any other institution classified as financial institution[26] .

Banking business is provided under the repealed financial institution act of no. 5 1993,to mean that a banking business means the business carried on as a principal by accepting deposits of money from the public that are repayable on demand or at the expiry of fixed after notice and presenting to another bank for payment , cheques, drafts[27] .

Financial institutions Act clearly states that only companies licensed under it can carry out banking business. It is observed under statutory instrument that a banker or bank to be licensed to carry out a banking business the person must be a company incorporated under the company's act 2012. With the perquisite paid up minimum capital for it to be called a bank and no company

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[24] Mark hapgood, Pagents Law Of Banking,10TH Edition,p. 237.
[25] S.1 of Bill of Exchange Act.Cap 68.
[26] S.3 of financial institution act.1993.
[27] G.P.Tumwine ,Essay in African Banking Law and Procedure, Page 50

shall carry on the business of banking unless it uses as part of its name word "bank" with the prohibition of the use, by anyone except a licensed company of the words indicating that the user is a bank.The common law meaning of a bank was seen in the case of **Bank of cherttinad Ltd of Colombo v IT comrs**[28]. **Colombo** defined a banker as one who carries on his principal business by accepting of deposits of money on current account or subject to withdraw of cheques by customers. Held a reputation alone cannot amount to carrying on a banking business. And in the 6th edition of pagent stated the usual characteristic of banking to include, payment of cheques plus collection of cheques from customers[29].

In Sir John pagens[30] view to constitute a customer there must be some recognized or habit of dealing in the nature of regular banking business. This definition of a customer of bank lays emphasis on the duration of the dealing between the banker and customer and is therefore called the duration of theory. According to this view point a person does not become a customer of the banker on the opening of an account he must have been accustomed to deal with the bank before he is designated as customer.

''Kerala high court observed in the case of **Central Bank of India ltd v Gopinathan Nair and others** [31] held that a customer is a person who does business as far as banking transactions are concerned he is a person whose money has been accepted on the footing that banker will honour up to the amounts standing to his credit. To constitute a customer, the following essential requisites must be fulfilled. A bank account such as saving, current or fixed deposits must be opened in his name by making necessary deposits of money. A customer of bank need not necessary be a person, he can be a firm, Joint Stock Company. Since the banker customer relationship is contractual, a bank follows that any personal account with a bank branch of his or her own choice can act as convince for entering into valid contract.

A person must fulfill the requirements of majority age and possession of sound mind though any person may open up an account like minors by opening saving account with certain restrictions.

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[28] (1948) AC 378.
[29] Mark Hapgood ,Pagent's Law of Banking ,6th Edition
[30] www.bishwobiddaloy.com/archives/1863.
[31] A.I.R 1979 Kerala.

Any person may apply for opening an account in his name but the banker reserves the right to do so in the case of one being satisfied about the identity of the customer.

In the case of **Ladbroke v Todd the bank**[32] the bank opened an account for a thief who at first transaction landed to the bank of collection a cheque which he has stolen .The court needed not decide whether the thief was customer of the bank or not .It was contended that as the banker relationship could only be established over a period of time .so the thief is not considered as a customer .In **Taxation comrs v English scottish and Austin Bank Itd**[33]. held that the duration of the relationship was not of essence .

2.1 WHEN DO DUTIES ARISE.

The nature of business of bankers is that part of merchant law and is noticed judicially by the courts. In practice, bankers may stand towards their customers in various legal relations and first to be mentioned is the ordinary one where a customer opens an account at a bank by paying in a sum of money to his credit. In this case the customer in effect lends his money to the banker, and the banker borrows it so the banker stands as a creditor[34]. In this case of **Guma v Bank of Africa (u) ltd and 2 others**[35]. It was discussed that the plaintiff sued the defendants for breached of fiduciary duty owned to the plaintiff because the defendants used money for his own benefit contrary to the essence of the power of attorney which only constituted him as an agent.

Duties arise when there are fiduciary responsibilities which are related to a party's reliance on another and take two forms as explained by John Glover.[36]

(i) On one side , where a party places trust in and relies on the other because he or she is reasonably entitled to do so in the circumstances , so the customer is said to have relied on the banks as a trustee because the Worthiness and trust is invested in the bank. Glover states that where fiduciary duty will arise between a trustee as a banker and is then in charge of trust to whom property is legally committed to him is legal,

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[32] (1914) 30 TIB.
[33] (1920) AC 683 at 687.
[34] Edward.B.Hamilton.B.A;AManual Of The Law And PRATICE o Banking In Austria And Newzeland. 1880.
[35] Civil suit no.0013 of 200.(2018,UGHCCD 28.(9TH April 2018)
[36] John Glover , Banks and fiduciary Relationships,Bond Law Review: Monash University vol.7. issue 1,Article 5. 1995. Available at http://epublications .bond.edu.au/blr/vol7/iss1/5.

then such trust is bound by equity to suppress his own interest and administer property .That shows that this relationship occurs when a bank and his or her customers enter into one valid contract. In the case of **Lubowa Gardens ltd & Ann v Equity Bank ltd**[37]The plaintiff Lubowa Gardens ltd and Mr. Tshirt companies under the directorship of Robert Byaruhanga and Assimwe Nancy .In this suit which was brought against Bank Of Uganda ltd here called defendants they were seeking declaration that the said defendant breached the contractual undertakings to the plaintiff to release the certificate of tittle to their land. In **Esso Petroleum co v Uganda commercial bank**[38],the Supreme court of Uganda held that the relationship of banker and customer is contractual.

(ii) Two sided ; where it is mutual or reciprocated ,we are concerned with the one sided case.

On the opening of an account the banker assumes the position of a debtor. He is not a depository or trustee of the customer's money because the money over the banker becomes a debt due from him to the customer. A bank does accept the depositor's money on such condition.

A bank acts as an agent to his customer for payment of cheques and performs a number of other agency functions for the convenience of his customers for example securities are kept safe on behalf of his customer's e.g. insurance premium. It also collects bill of exchange and cheques drawn on customers bank account.

Transfer and property act s.105 deals with lease, lesser .lessee in case of safe deposit locker accounts,(bank's immovable property) to clients on hire basis. Banks allow their locker account holders the right to enjoy the property for specific period against payment of rent.

[37] (Hccs No.11 of 2013).(2018) UGCOMMC.4 (26 feb.2018).
[38] CA No. 14 of 1992.

2.2 NATURE OF DUTIES OF BANKS TOWARDS CUSTOMERS.

(A) Duty of care.

The bank's duty to exercise reasonable care and skill has been adopted by most banks through a highly sophisated encryption system.[39] Every banker acts as an agent to its customers when exercising this duty of care, so these banks upon fulfilling of these required elements then extent of compliance is observed that is to say duty of the banks have to conduct reasonableness, standard of care and skill .**Kakooza v Eco Bank Uganda ltd** [40].The plaintiff brought this suit against the defendant for breach of their contract by an allegation for failure to credit deposit on her account, and breach of duty of care through failing to convert an overdraft facility into mid-term loan contrary to treating customers fairly and with transparency.

Every agent is bound to take as much care in looking after the property and money of his principle which is being kept on customers behalf as he exercises reasonable degree of diligence[41].

In **customs and excise commissioners v Barclays Bank pic**[42] The court held that the Barclays owned no duty of care to the commissioner. But the court of appeal conversely held that a duty of care was owed in tort.

For Liability of economic damage for negligence [43] the court held that there are three tests for the imposition of a duty of care; the assumption of responsibility test; the threefold test; and the incremental test. The three tests have been used in considering whether the duty of care is owed in tort by the defendant for pure economic loss. The first is whether objectively the defendant assumed responsibly for his words and conduct. The second is threefold , requires the claimant to show that the loss was reasonably foreseeable and there was relationship with the defendant of

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[39] Industral Guidance for FCA Banking Conduct of Business Source Book,January 2011,s.5.9.
[40] Civil suit No.44 of 2014.(2016)UGCOMMC 89.(1 Septemter 2016)
[41] A Digest of the law of Agency by William Bowstead;1st Edition .1896.
[42] 2006 UKHL 28.
[43] Ibid 27.

sufficient proximity and imposition would be fair ,just , and reasonable .The third is incremental test. That new categories of negligence should be developed incrementally and by analogy[44].

In conclusion to the duty of care has been complied with upon observation of these elements that should be present in order to exercise duty of care, that is the proximity test should exist and also the foreseeability test plus reasonable standard of care and this has shown that there is compliance with the duty of care towards customers.

(B) THE DUTY OF PROVISION OF ADVICE.

The banks have complied with their duties towards customers through the banks provision of advice to their customers this is either financial investment advice the effect of security, where the bank gives customers advice on their financial affairs. Then the bank and customer reactions may imply in addition to any contractual Moral rights both common law duties of care and fiduciary duties [45].In **Barclays Bank v Khaira**[46]Mrs Khaira, the surety raised the defence of undue influence and alleged that bank treated her negligently in that it failed to property explain to her the nature and effect of the legal charge over property before she signed contended that the bank owed a duty to advise her to seek independent legal advice .Held that a bank did not owe the alleged duties but if it too upon himself to explain then it was under duty to give proper advice.

According to John Glover, modern banking practices involves a highly complicated structure of credit which often trust a bank into a role an fiduciary duty upon the bank [47]. The limits of a bankers and complexities business or duty cannot be laid down as a matter of law. The nature of such a business must in each be a matter of fact it was and is within the scope of the defendant's banks business to advice on all financial matter.

In **Fennoscandia ltd v Clarke**[48]. Provides that where a bank assumes a further continuing obligation to keep the advice under review and if necessary correct it in light of supervening

[44] Abdulahs ,The Banks duty of confidentiality disclosure versus credit reference agencies ,European Journal of current legal issues volume 19 no.2013.
[45] Halsbury law of England 4th Edition
[46] (1992)1 WIR 623.
[47] Deist v Wachholz (1983)
[48] (1999)1ALLER (comm) 365 CA.

events. The customer in turn owns his bank the general duty of principal to an agent a relationship which is to issue modes in a manner that does not facilitate falsification in that way banks are able to comply with their duties through proper provision of advice which is not misleading hence protection of their customers.

(C) DUTY OF GOOD FAITH.

The banks have been able to comply with their duties through a conduct of good faith towards their customers by them observing the elements there to[49] and the Act also provides that a thing is deemed to be done in good faith where it is in fact honest[50].

This duty requires that bankers and officers not to make decisions that demonstrate a deliberate indifference to potential risk that is to say good faith is of essence and an absence of bad faith and acts that constitute to bad faith which are tortious will give rise to an independent ground of liability.[51] Whether done negligently or not and whether the payment was done in the ordinary course of business will be decided on the basis of custom of bankers[52].

However payment long after the advertised working hours will not qualify as payment in the course of business and also payment of large sum of money over the counter to person of suspicious appearance and demeanor may not be regarded as in the ordinary course of business[53]

(D) THE DUTY TO HONOUR CHEQUES.

It has been observed in different situations that banks have greatly complied with the duty to honour cheques because of the fact that deposits owned by a banker are repayable on demand that would show an obligation to honour these cheques as a duty of banker towards his customer.

The bank is therefore under as statutory duty to honour cheques in the usual course because a cheque is bill of exchange[54].

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[49] Rapheal and another v Bank of England.(1855)17 CB16.139ER1030.
[50] S.90 Bill of Exchange.
[51] HUNTER,Howard:The Duty of GoodFaith and security of performance(1993). Journal of contract law 6,(1),19-26 Research collection school of law.
[52] Arab Bank v Ross (1952)2QB 216 at p.227.
[53] Allchteroni and co. v midland Bank ltd(1928)2Kb 294.

Bill of exchange is defined as unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed determined future time a sum certain in money to a specified person. A cheque acts as the customer's mandate to his /her banker to pay a cheque as a bill of exchange is one that is drawn on a banker payable on demand.

In the bank's duty as they comply with their duties they are able to provide cheques which are unconditional. So where there is an order to pay at a particular time it is not conditional but unqualified to pay if the indication of particular fund out of which the drawee is to reimburse him on a particular account to be debited.

In the case of **Thairl wall v Great Nothern Rlyco**, a dividend warrant bore a note to the effect that it would not be honoured after three months from the date of issue unless specifically indorsed by the secretary. It was held that the bill was unconditional .

The words were merely a definition by the directors acting within their authority as it was within reasonable time the warrant had to be presented having regard to the nature of the instrument.

A cheque like all bill of exchange must be addressed by one person to another. There must be one person as drawer another as drawee as seen in the case of **Vaglino Bros v B.O.England**[55] and Payable on demand. So modern cheque words like " payable on demand " if omitted is not fatal

In the case of **Thairlwall v Great Northan Railway co** It States that a cheque containing instruction that should be presented with in a given period if it is to be paid that does not mean that it is not payable on demand. Upon the availability of adequate funds it is always the duty of the bank to pay the cheques on which the customer will be entitled to draw. This may accrue either on the basis of an actual credit balance standing to the credit of the account.

[54] S.2 of Bill of Exchange Act Cap68.
[55](1891).AC 107.

The bank's duty to honour the customer's cheques depends on the actual state of the account and the time of presentation[56] . A bank commits a breach of contract when it fails to pay a cheque when the customer's account which had an adequate balance for meeting it[57].

However compliance has been observed once the customers have been able to comply with their conditions like having sufficient funds on their accounts, and the banks to making sure that the cheques are not conditional one and payable on demand.

(E) DUTY OF SAFE CUSTODY.

Duty to safe custody has been observed in the Ugandan case as custody possession in the case of **Standbic bank Uganda ltd v Uganda crocs ltd**[58], where the court held that all documents concerning the respondents accounts were in possession and custoday of the them was to be provided by the appellant bank which only the appellant knew of and was responsible for entries [59]**Mark Hapgood** observed that to a great extent banks comply with their duties through conducting a duty of safe custody. This is when the banker deals with items deposited with it in order to determine its safety for the convenience of customers[60].

Banks assume charge over valuables. The goods are said to be delivered to the bank for safe custody when a bank there by voluntary becomes a bailee not through a wrong full conducts, like undue influence and misrepresentation. Once that is not involved then that duty flows through the right channel.

The issue of whether or not a bank could be a bailee arose in the case of **Johnson v sobaki**[61]

The defendant was counter claiming the value of some items which he had left in bank premises when he was sued to recover the amount due on an overdraft. The defendant's counsel argued that he should be compensated once the goods were proved to have been in the bank and were lost.

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[56] Joachimson v Swiss bank corporation.(1921).
[57] Marzetti v Williams (1830)1B &AD 415.
[58] (Civil Appeal No.4 of 2004)(2005)UGSC 16 (17 August 2005).
[59] Civil Appeal No.4 of 2004.2005 UGSC16 (17TH August 2005)
[60] Pagent's Law Of Banking 12th edition P.139.
[61] (1968)3ALR comm 241.

The plaintiff council argued that goods were not found in the bank .The plaintiff could not be made responsible for them.

Held that a bank is liable as bailee for safe custody. In a way where banks have defaulted and able to determine their purpose of safe custody there by making them liable to baile upon proof.

There are two types of bailees that is bailee for reward and gratuitous as discussed in **swettenham authority**[62].

In the advice of privy council in any event, a bailee for reward is one which offers its customers in the ordinary course of business. The services of looking after goods deposited with it can hardly be described as gratuitous bailee.

The different types of bailees where expressly discussed in the case when the bank must raise it would probably loss the customers who would have no difficulty in finding another bank to the customer. So a banker who receives goods for custody at his bank is not justified in removing them for safe keeping and would be liable if he caused any loss[63] .

In practice Where bailed goods are lost from the bailee whether gratuitous or reward to prove that the loss was not caused by his failure to exercise the care, then the law would be required.

However, for the avoidance of the claim of negligence and conversion banks have been able to conduct the duty properly in that compliance will to be conducted.

(F) DUTY OF CONFIDENTIALITY

To a great extent we able to observe that banks have complied with their duties through the conduct of the respecting the relationship they enter into as being that it's one that has an implied term of the contract between a bank and customer that the banker will not divulge to the third parties, without the express or implied consent of the customer. So disclosure would constitute to a breach[64] .In the case of **Sudhir Rupaleria**[65] Judge weinfeid held that to compel a client to

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[62] (2963) 2Q 716.
[63] Halsburys law of England 4th Edition page 2o8.
[64] ibid 240.
[65] Misc.Application No.1063 of 2017.UGCOMMC 152.(21 December 2017)

show the actual confidential matters previously entrusted to the bank would tear aside the protective cloak drawn about in the fiduciary relationship.

To appreciate the confidential nature of the contract of a banker and customer, the general rule is that a bank as an agent owes a duty of confidentiality to his principle. The leading case that defined bank's duty of secrecy is in the case of **Tournier v National provincial and union bank of England**[66].

The plaintiff whose account with the defendant bank was heavily overdrawn failed to meet the repayment demands made. The branch manager in the course of the conversation disclosed that the plaintiff's account was overdrawn and that he has dealing with book markers as a result of this conversation, the plaintiff contract was not renewed by the employer upon its expiration.

Held that the bank was guilty of breach of the duty of secrecy and award of damage there to. The court of appeal was further of view that there was need to recognize certain exceptions to the banks duty of secrecy they include; where disclosure is under compulsion of law, where there is duty to public disclosure.

However as seen the bank shall not publish or disclose any information regarding the affairs of customers unless with their consent, this obligation prohibits the banker from disclosure to third parties[67] .

2.2 CONCLUSION

The banker is responsible for assessing of its clients that is to say it's a bankers to exercise its obligation comply with its duties and it has been determine that to a great extent they have complied with because of the less cases that have risen against the banks for breach and the relationship between a bank and its customers as observed above depends upon the contract they enter into. That is why in most cases there has to be an element of consent before anything is disclosed to another person and in the above discussions it has been observed that compliance with the duties towards customers was more applicable and prioritized by the banks hence observance of all those duties.

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[66] (1924)1kB 461.

[67] G.Tumwine Mukubwa, Essays in African Banking Law And practice, 2nd edition , P. 74

2.3 HOW HAVE BANKS FAILED TO FULFILL THEIR DUTIES TOWARDS THEIR CUSTOMERS

INTRODUCTION.

At different occasions many banks have realized the need to offer customers with appropriate conduct when exercising their duties. But often, this is just on paper. The actual services or the quality of service at most times are not presented as promised. This often leads to customer's dissatisfaction meaning customer's service interactions can often be frustrating, and client requests can frequently appear demanding. There may be barriers in your organization that might make reasonable consumer requests seem excessive.

Banks therefore need to understand their barriers or failures towards satisfaction their duties that should be put into consideration in order to satisfy their customers. The failures range from; management, environment, communication and systems

(A) THE BANK HAS FAILED IN CONDUCTING ENQUIRES.

Before opening an account, the banker should obtain references from respectable parties about the proposed customers integrity and responsibility. By allowing a person to open an account without satisfactory references the banker could be inviting unpleasant consequences.

First place by obtaining possession of a cheque book a dishonest person may use it for nefarious purposes. Secondly the person may happen to be undercharged of bankruptcy in which case the banker would be facing consequences. Thirdly the banker may inadvertently allow an overdraft which can be released only if the customer is solvent. Fourthly omission to make enquiries regarding a customer before opening an account in the person's name is likely to make banker guilty of negligence. **Equity Bank Uganda v Musolo.**[68]It was discussed that Magistrate grade1 had erred in fact when he held that the appellant bank did no conduct inquires on the information relating respondents account statement there by reaching a wrong decision, this was observed when Uganda microfinance limited was brought by equity bank its customers and loans transferred to equity and the only change was then account codes and numbers.

[68] (HCT-01-CV-CA-0019 OF 2016)[2017]UGHCCD132(31 October 2017).

In connection, the observations made by Justice Baihanche in **LADBROKE V TODD**[69], is a consideration of impotence. According to the observations the bank acted negligently, for they did not make enquires which the ordinary reasonable people should make when opening an account.

(B) BANK'S NEGLIGENCE

Being general that the bank is to owe duty of care to its customers there are different circumstances when banks fail hence breach in their duties, more claims have been filled against banks for the poor financial advice that is conducted that later leads to the customers financial loss.[70]

A bank will be held liable for the acts committed by the bank staff or agent if the master is under duty of care he cannot get rid of his responsibility by delegating his duty to another. **Makau Nairubi Mabel v Crane Bank Itd**[71] The plantiff sued the bank for recovery of a sum shs. 57,000000 which is alleged to have been negligently debited from her account, held by the defendant bank at iganga branch on the basis of forged signature. And in the case of bailee for reward the burden is on him to show that the loss or damage occurred without any negligent or default or misconduct of himself to whom he delegated his duty. In the case of **Mr Morris v C. W Matin and Sons Itd**[72]. At **Lioyds v Grace Smith and Co**[73] held that responsibility for the wrongful acts of bank can be said to be within the scope of servants authority.

Baclays bank of Kenya v janday[74] **justice nyumu** held that the bank may have been negligent to its customer by exercising insufficient care prior to accepting the forged instruction.

And where there has been conversion, conversion for loss of destruction of goods which a bailee in conversion has allowed to happen in breach of his duty to his bailer that is to say that the bailee will not give a defence of contributory negligence in proceedings founded on conversion.

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[69] (1914)30 TLR 433.
[70] Ibidi 23.
[71] Civil suit No.380 of 2009)[2012]UGCOMMC 23 (12 APRIL 2012)
[72] 1966 QB 716.
[73] 1912 AC 710 1T 742
[74] (2004)1 EA 8.

Conversion was defined in terms approved by scrutton L J in **Oaley v lyster**[75]. That it's dealing with goods in a manner inconsistent with the right of true owner. Provided that it is also established that there is also an intention on the parts of the defendant in doing to deny the owner's right which is inconsistent with the owner's rights

(C) BANK'S FAILURER IN CARRRYING OUT DUE DELLIGANCE.

Where banks fail in terms of carrying out due diligence in opening up accounts and also lending it is recommended that a bank should act under duty of care towards their customer in order to avoid future conflicts, it is recommended for him to first of all determine the basis of good lending in lending sector, legal capacity to borrow, determine the purpose of advance, source of repayment, the profitability of the transaction and the security offered if any.

Lending is one of the principle businesses of a banker though lending is risky and speculative and it depends to a large extent on the relative chance of a banker being repaid beyond the mere undertaking by borrower to do so. From the earliest time bankers have had to seek for security other than the loan its self.

Therefore, as the banker satisfies himself as to sources of payment of loans, the security and then appropriate one also requires a careful decision on the part of banker. This is seen in that securities themselves have different characteristics and quality of assurance. The actual realization of securities depends a lot on the nature, location and attributes of any particulars security in account. Whole facts such as valuation, fluctuation and demand in forced sale and amount to be recovered from any class of security, so banks have failed to comply with the above duty that they have been recommended to entertain.

(D) WRONGFULL DISHONOR OF CHEQUES

Banks fail in their duties through the wrongful dishonour of cheques. The banker is bound to pay cheques drawn on him by a customer in legal form provided there is a bank account at the time and sufficient -valuable funds standing to credit customers available for the purpose of provide the cheques without the limits of an overdraft.

[75] 1931 1KB,148.

John Kawanga,Remmy Kasule v Stanbic Bank Uganda Ltd[76] .The plaintiff sued the defendant for breach of contract upon the defendant failure to honour his cheque. This is when the plaintiff drew two cheques on the National Union of clerical commercial profession and Technical Employees union on 3rdApril 2002.The plaintiff obtained a statement that the defendant had debt the account upon the payee representing of cheque but the defendant returned them unpaid with endorsement. "Drawer's conformation required" In Halsburys law of England, it is discussed that if there were funds on customers account a bank would only be justified for refusing to pay a cheque if it is ambiguous in from . But if it raises the banker's mind reasonable suspension that the third party might be endeavoring to misappropriate the customers money then he has a right to dishonour that cheque.**Idechemits ltd v National Bank of Nigeria Ltd**[77] .

So the bank who without justification dishonours his customs' cheques is liable to the customer in danger for injury to his commercial credit. Generally, a contract has been breached and the plaintiff cannot prove actual damage, the general rule is that he is entitled to nominal damages. So where the cheques is wrong fully dishonoured the damages are supposed to depend on whether the person is a trader or a non-trader in **Gibbons v Westminster Bank Ltd O.P.Itd**[78]. A drawer is entitled to recover substantial damage for the wrong full dishonor of his cheques substantial damage for the wrong dishonour of his cheques without pleading and proving actual damage.

(E) BANKS ACTS FRAUDENT

The general rule is that a banks are not liable to compensate customers who have been the victim if fraud where there was consent of the customer, However it's seen too that banks are liable to customers where payment was made without authority from the customer[79]. Fraud can be defined as intentionally deceiving or overriding controls in order to gain personal benefit

[76] Civil suit No.410 of 2002(2003) UGCOMMC 13.(26 JUNE 2003)
[77] 1975 1AIR COM 143
[78] Page 888.
[79] https://www.collyerbristow.com/item/1983.duty of care owed by bank to customer to prevent fraudent transactions.

while inflicting damage to other party. Personal benefit could be in form of money , information or other assets **Senkungu and other v Mukasa** [80]

A report of the Uganda bankers association indicates that albeit the good performance of financial system in supporting the economy through intermediation and operation the financial sector faces the problem of bank fraud which unfortunately is on increase. Bank frauds take various forms ranging from alteration of cheques and of counterfeit to skimming of cloning of cards[81]. According to **Andrew Bagala** , the criminal investigation directorate (CID) in the police crime annual report indicated that police was investigating more than 20 cases in which seven banks lost about shs 7b in what had been termed as fraud engineered by bank employees.[82]

BANK OF UGANDA v GODFREY MUBIRU[83] it was stated that managers in the banking business have to be practically careful than managers of most business. This because as seen under **section 15**[84] of the contract act it binds the commercial banks in their operations where by any omission in the contract between the bank and customers is entered into deceit, the aggrieved party can sue and be awarded remedies for misrepresentation in the fraud occasioned and courts have upheld this in the case of **Fredrick .j.k Zaabwe v Orient Bank ltd and 5 others.**[85] for one to claim allegations of fraud one needs to have fully and carefully inquired into when one lost his property as a matter of fraud. One must also prove any misrepresentation, details of breach of trust and knowledge of the facts

Bernard H. Kiose , discussed that can a bank be successfully sued for having assisted in the onward transfer of proceeds of fraud in its service. And he discussed that dishonest assistance amount knowing receipt are potential cause of action available to the victim where the bank assists dishonestly in transfer of , or knowingly receives funds that represent the proceeds of fraud[86].

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[80] CA. NO. 17 of 2014.
[81] Uganda Bankers Association UBA 2014.fraud protection journal of Uganda bankers association 2014.
[82] The daily moniter publication newspaper dated 8th april 2016.
[83] SCCA No.1 of 1998.
[84] Contract act 2010.
[85] SCCA NO.4 OF 2006[2007]UGSC 21.
[86] Frauduent word compendium.

What is meant by dishonesty was explained in the case of **Twinsecta limited v yardley and others.**[87] It simply means ''not acting as an honest person .would ''an objective stand standard which is assessed in light of what an alleged assister actually knew at the relevant time, as distinct from a reasonable man would take attribute to personal account.

(F) THROUGH THE CONDUCT OF ACCEPTING BRIBES.

The failure of the banks to conduct their duties normally when they act as agents, that is the bank accepts any money or property in the course of his agency by way of a bribe . he is liable to account for and pay over the amount or value thereof as money received to the use of the principal with interest from the date of its receipt and if he was induced by the bribe to depart from his duty to the principal, he is also liable jointly or severely with the person bribed to make any loss suffered in consequence of such departure from duty without taking the amount in consideration. The agent will be dismissed without notice and any agent who act in the course of his agency[88].

(G) UNDUE INFLUENCE

Banks while conducting their duties they tend to fail in terms of duties obliged on them through conduct of undue influence. In **Barclays bank v khaira** ,where Mrs. khaire raised the defence of undue influence ,courts where able to determine that where the bank failed to explain clearly to the nature of legal charge of the property signed when it took the duty upon themselves then the claimant will be able to claim undue influence upon acting on it.[89]According to **Hapmangood**[90], label, undue influence refers compendiously to circumstances in which equity supplementing the common law principle of duress will treat a person's apparent consent as having been procured by improper influence.

Where such circumstances exist, the consent thus procured is not treated as the expression of a person's free will. Where the consent takes the form of entering in to security agreement such as

[87] (2oo2)UKHL 12.
[88] Ibid 27.
[89] 1992 IWLR 623,
[90] Ibid 25

charge, the charger is not bound by the agreement entered into prior to undue influence[91]. Its right to note that just likes duress, undue influence involves the person being influenced against their will to make decision that is at the advantage of the other person. This form of conduct must have elements of threat, pressure and acts that are against a person's will.

In the case of **Royal bank of scotlandp/c v Etridge** [92],lord **nichollas** , raised two forms of unaccepted conduct . The first comprises of acts of improper pressure or coercion such as unlawful threats and also the party has sufficient propose trust and confidence in the relationships. This leads us to the fact that the threat as earlier discussed must be unlawful, the person has to be put under some form of pressure before they make a decision that will affect the relationship between the two parties and where any person acts contrary to their obligation they are to be held liable[93]

2.4 In conclusion

Banks are entitled to adopt ways on how to resolve these disputes that arise between the banks and customers due to breach of the given duties through conducts of enquiry on given complaints by the customers who may have been dissatisfied by the bank's due to the above failures in terms of exercising fraud and others.

[91] Hapmangood, Pagents law of banking, Chapter 28
[92] No.2(200) UKHL 44 2001(4 LLER) 449.
[93] Money and Banking vol.4.

CHAPTER THREE

THE LEGAL AND REGULATORY FRAME WORK .

3.0 INTRODUCTION

Banks are regulated by law, rules or guidelines through which government control the practice of banking business in Uganda. This is done through establishment of various domestic legislation, regulatory authorities engaged in the superintended banking business. These authorities reflect both the need to address particular problems and possible abuses in the protection of customer in bank and customer relationship. The chapter provides an insight into laws and institutions which govern and regulate the banking industry in Uganda. Customers and the public are paid by the bank on demand at the expiry of a fixed period or after notice and the employment of such deposits by lending.

The regulation and control of banking business is principally done by central provision by setting up a central bank which is charged with the duty to promote and maintain the stability of the value of currency in Uganda so that the customer are not affected in case of inflation or even the banking business winding up.

For the banking to be regulated, we see controls take the form of licensing, supervision, approval of the bank restriction on the range of loans and advances and the type of trade.

NO.4 OF 1993, It is prohibited for a person to transact banking business without valid license granted for that purpose.

Financial institution act provides an offence for failure to license S.2 of the act B.O.U establishes a bank as a body with the ability to sue and be sued.

3.1 BANK OF UGANDA STATUTE. (no.5 of 1993).

In the course of banking, banks act as collecting agent on behalf of their customers of financial institutions drawn upon other banks. There is need for a merchanities for clearing financial institutions drawn by different banks. **S.37(1)** of Bank of Uganda[94]enables central bank to provide facilities for clearing financial instruments on terms that are determined by the central bank. **S.37(2)** of the Bank of Uganda statue[95] provide that central bank is empowered to make regulation for participation in the clearing house and for the clearing cheques and other instruments as the rules are contained in kampala bankers clearing rules and procedures 1995.

S.41(1) of Bank of Uganda Act states that every financial institution shall furnish to this bank in manner prescribed by statutory instrument all information that may be required by this bank for the proper discharged of is functions. **S.41(2)** of Bank of Uganda provides that a bank may not publish in whole or in part information unless with consent of institution or the customer has been obtained. **S.11(1)** of Bank of Uganda states that if the financial institution is not in compliance with this regulation and as such has failed to comply with **S.27(1) of** the statue, it may determine that a bank is liable to determine that a bank is to the fine specified **S.27(5)** by the statue.

The purpose of these laws is to restrict the directors and employees of the bank because this makes them bound by the contract that they may either knowingly or un knowingly entered into.

S.16(2)(b) of Bank of uganda it is stipulated that when any person who being a director or manager of the bank makes any statement of information which he knows to be false in answering any request that bank commits an offence.

The purpose of this law is to restrict the directors during their duties to make such information that will not ruin the reputation of a bank and cause a conflict between parties. So as this being the great law that -will not be of any influence during its existence of any duties by the bank to customer.

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[94] 1933.
[95] Ibid 67

3.2 FINANICIAL INSTUTION ACT 1993.

In matters of banking there are several legislations other than the constitution which is the supreme law of the land[96]. The previous laws governing financial institutions were grossly inadequate to handle the financial sector which made it inevitable for reform in legal frame work. According to the preamble a statute to amend and consolidated the laws relating to regulating and control of financial institutions and to provide for related matters .The statute- repelled the 1969 bank act and has rectified many weakness in the Act including the Bank Of Uganda's supervisory role with the power to license new banks in that way no bank shall stand without having a valid licence which is granted by Central Bank.[97]

Under **s.27(1) of** financial institution act, a bank is under obligation to furnish information and data of its operations. This information may include periodic returns called for by central bank, the audited balance sheet and profits and loss account. **s.27(3)** of Financial institution Act, this audited balance sheet must be prepared and submitted to the central bank with in four months after the end of the bank's financial year.

However there critical comments on the financial institution bill 1999, **Michael Zander**[98], he argues that "to persons on whom the proposed legislation impinges responsibility have to be consulted and it does not matter whether they are departments, government agencies ,persons the bill provides for tighter re-entry argument into the search on the probation on deposits taking and banking business has been expanded and strengthen.

The act states that there is an imposed restriction by central Bank by notice on the different banks during their conduct of duties when there is any criminal investigation that is to say for the welfare of customers from being cheated by the banks.

Financial Institution Act of Uganda 2004. States that if there is an issue to conflict pertaining duties under **S.56(1)** a bank shall in relation to financial institutions in which he or she serves stand in fiduciary relationship and shall in addition and without derogation owe the customers

[96] A.2(1) Constitution Of Republic Of Uganda 1995.
[97] S.11 of Financial Institutions Act. 1993.
[98] Micheal Zander. The Law Making Process.7th Edition

the following duties ; a duty to act honestly and in good faith and for the purpose of subsection(a) is to emphasize the need for the banks to act honestly and in good faith.

And **S.56(b)** requires him to execute his duties with the best interest of the customers which signifies no contradictions. As the banks serve to the best interest of the customers, they are acting in breach of to whom they play of trustee whose interest also has to be protected and thus contradicting with common law especially if the injury that is likely to be caused could lead Bank losses.

S .56(c) emphasizes directors to act independently, free from undue influence of any other person. The effect is for the directors to execute their duties without fear or favor. Subsection (d) accords directors a duty to access information to enable him or her to discharge his or her responsibilities The purpose of this law is to restrict the directors from carrying out his duties before critically analyzing the necessary information related to the issues at hand.

S.57 of the financial institution act provides that a bank may be excluded from liability when he pays the bill in good faith without negligence and in the ordinary course of business when the bill is forged [99]

3.3 STAMP ACT CAP 342 (1915)

S.19 reads that any draft or order drawn up by a banker for a sum of money payable on order or demand shall when presented for payment purport to be endorsed by the person to whom the same shall not be incumbent on such banker to prove that such endorsement was made by under the direction or authority of the person to whom the said draft was made payable.

This section States that in the cases of **Charles v Blackwell**[100], the court of appeal said that the purpose seems to have been to make the banker free of all responsibility in respect either of the genuineness or validity of the endorsement, this section does not expressly require that the payment must be made in good faith but this is undoubtedly a condition of the protection. The banker could never take advantage of his own wrong.

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[99] Charles v Blackwell.(1877)2CPD 151 AT 163 CA
[100] (1877)2 CP.D.151 at 156.

3.4 CONTRACT ACT, 2010

This is an Act that codifies the law relating to contracts that can be seen in a bank and customer relationship that is seen as a contract and provides for other related matters. **S.10** of the agreement defines a contract to mean an agreement made with the free consent of parties with capacity to contract for lawful consideration and with lawful object with the intention to be legally bound. In that all transactions that a bank and customer enter into need to be legal for the bank to be legally bound in case of any breach in these duties.

Section 33 provides for obligations of parties to mean and include that where parties to contract shall perform or offer to perform their respective promises, unless the performance is dispensed without excuse. In this section we shall be able to show the duties in a contract in the banking context as discussed earlier are the duty to conduct enquiry, duty of care and duty of safe custody.

Section 15 provides for fraud to mean that one party to a contract lures another party with intent to deceive the other into a contract such acts are thus declared fraudulent and enforceable in courts of law. This will be a conduct of breach of duties in the banking system towards the customers. Therefore, this Act binds the commercial banks in their operations where by any omission in the contract between the bank and customer is entered into by deceit. The aggrieved party can sue and be awarded remedies for misrepresentation in the fraud occasion as a failure to exercise the duty to customers.

3.5 EVIDENCE (BANKER'S BOOK) ACT CAP 44.

In relation to the bank entitlement to disclosure, the evidence act provides that it's a duty of a bank to obey orders under the bankers (books evidence act). Section 7 of the banks books of evidence act cap 44 allows an applicant to apply for an order to inspect and take copies in banker's books for use in legal proceedings because the bank has liberty to that effect.

S.2 defines banker's books as including ledgers, day books cash books used in the ordinary business of the bank. The power to allow a litigant to inspect banker's books is discretional and exercised with care. **S.17** of the banker's books evidence act states that a banker has the a duty to

inspect and take copies, which only be given after the most mature careful consideration because of its interference with the liberty of that subject matter.

3.6 LIMITATION ACT 1959.

The general rule is that court will not entertain matters that are time bad, so the limitation act is therefore limited on the period upon which given matters can be brought in courts of law for determination.

S.4 (1)(a) of limitation act provides that action can be enforced against wrong full conversion and extinction of title of the owner. This occurs in cases where there has been need for safe custody on the part of the bank which converts that property. The limitation act provides that an action for an account shall not be brought in respect of any matter which arose more than 6 years before the commencement of the action. That means that customers can only be helped once they bring their grievances known to the bank. So actions in the current account do not begin to run until a customer has made a demand and such demand has not been complied with.

S.21 of the limitation act provides that if on the date when any right of action accrued for which a person was under disability, the action may be brought after the expiry of the limitation period of 6 years. This is an exemption to the general rule

3.7 INCOME TAX ACT CAP 340.

S.131(1) provides that in order to enforce a provision of this act, the commissioner may authorize in writing that in **s.131(1)(a)** he shall have all times and without any prior notice full and free access to any premises ,place and books. This comes in as an exemption of the duty of confidentiality and also instances where fraud and negligent acts have been committed by the banker in the process of conducting his obligations.

Under **s.131(1)(b)**the commissioner may make an extract or copy from any book or record or even computerized information being that he has the authority to do so. This will be done by commissioner to resolve any conflict that might have risen due to the failure in conduct of given duties.

The commissioner too under S.131(1)(c) may seize any book or record that may be material in determining the liability of person for any tax or penalty when breach is committed on the customers there too in the conduct of good faith and duty of care.

3.9 BILL OF EXCHANGE ACT 1933 (CAP 68)

This is the law that governs the issuance of cheques promisarry not and bills of exchange and their operation thereof [101].S.2 of Bill of Exchange is unconditional order in writing which is addressed by one person to another, to whom it is addressed to pay on demand or at a fixed determined future time a sum certain in money to or the order of a specific base. An instrument which does not comply with that condition does not or orders any act to be done in addition to the payment of money.

A bill is not invalid by reason that it is not dated, that it does not specify the value given therefore and that it does not specify that place where it is drawn or place where it is payable. So any banker who fails to exercise their duties like honouring cheques ,good faith, care on condition of place not dated will be held liable under the Act.

S.9(1)Bill of Exchange Act, A bill of payable on demand which is expressed to be payable on demand or at sight or at presentation and where no time for payment is expressed. S.9(2) where a bill is accepted or endorsed when it is overdue it shall as regards the accepter who accepts or any endorser who endorses it be deemed a bill on demand.

A banker and customer under s.21 of bill of exchange provides that a party to a bill of exchange that is co-existence with capacity to contract , must be one with capacity to incur liability as a drawer or customer where a bill has not been signed by them. S.29 of bill of exchange, every party where signature appeared on a bill of is prima facie deemed to have become a party to it for value. Every holder of a bill is prima facie deemed to be a holder in due course, but if an action on a bill it is admitted or proved that the acceptance, issue or bill of was subjected to fraud ,duress or force and year or illegality the burden of proof is shifted , until the holder proves that subsequent to alleged fraud ,value has in good faith been given for bill.

[101] G.p.Tumwine; Essay on African law on Banking, page 12.

s.46 of bill of exchange act dishonours a cheque by nonpayment , when it is duly present and refused by the bank under s.47 must give a notice for dishonor , failure to do this there is a breach by the bank towards customers. **S.89** defines good faith as a thing deemed to be done in good faith within the meaning where it is in fact done honestly whether it is done negligently or not so a person will be exonerated from liability when he acted in good faith during his ordinary conduct of business.[102]

3.9 CONCLUSION

The legal frame work governing banks in Uganda is seen that its enforceable is less in the way that, when addressing legal issues it does not exhaust or carter for appropriate mechanism on how these legislations are to be adequately handled being that their conducts of bribes and corruptions which makes the banking sector fail during Its operation.

So there is the need to conduct adequate research for the laws to be enforced considering the changes in society being that it is more computerized than before.

[102] S.59 of the Bill of Exchange Act.

CHAPTER FOUR

DEFENCES TO BANKS TOWARDS THE BREACH OF DUTIES OF CUSTOMERS

4.0 INTRODUCTIONS.

Although it has been seen that the banks have failed in both legal and common law when conducting their duties .It is discovered that it is not their own doing not to comply with great number of the duties discussed above in chapter 2.

The banking industry has been given an opportunity to also defend its self because of the presumption of innocent A .28(3) of the constitution. The equity of maxims of he who comes to equity must come with hands enables the banks to use it as a defence because of the different hindrances that will be discussed that deter the banks exercise these duties of the unclean hands of customers and other orders come with. Because everyone has a right to fair hearing in A.28 so that the banks are not punished for the liabilities the customers raise .

4.0 THE POSSIBLE DEFENCES OF BANKS.

4.1 GARNISHEE ORDERS.

Under civil procedure rules[103]provides that a court may upon an ex parte application of a decree holder either before or after an oral examination of the judgment debtor, supported by an affidavit stating that the decree has been issued and still unsatisfied to a stated amount and that another person with in the jurisdiction is indebted to a judgment debtor order that all debts accruing or owing from such third person known as the garnishee. Nisi is an order attaching the debt due from him to the judgment.so the service of decree nisi on a banker has the effect of binding the debt in the bankers hands . The bank should hence forth refuse to pay any cheque drawn customer.

Kensington Africa ltd v Stanbic Bank.[104] On 8/11/2012.the applicant obtained from this court an interim order staying the Garnishee proceedings execution of the decree and orders of the

[103] 0.23 r1 civil procedure rules. Cap71
[104] HCT-OO-CC-MA-284-2012)[2013]UGCOMMC 131.(11 July 2013).

decree and high court commercial Division civil suit until the disposal of the main suit, This order was served on the applicant however the respondents had refused to unblock the accounts hence this application. It was held that as soon as garnishee order nisi is served on the bank ,it binds the debt in the hands of garnishee , that is creates charge in favour of judgment creditor. It only serves freezes the sum in the hands of of the bank until the order is made absolute.

Rogers v Whiteley[105] Even though it is known that the amount of the judgment debt is less than the balance standing to the customers credit. **Choice Investments ltd v Jerommimom midland Bank ltd Ganishee.**[106]Held that garnishee orders nisi can attach funds in foreign currency on account of a judgment debtor within the jurisdiction .However a joint account like that of partnership account cannot be attached in respect of a judgment debtor of one of the partners as discussed in the case of Hischorn v Evans ,Barclays Bank ltd Garnishee [107]

In **miller v mynn**[108]Provides that an order against two or more judgment creditor can attack any bank account of any of the judgment debtors.

4.2 MONEY PAID BY MISTAKE.

There is uncertainty in the area of law as authors of pagents law of Banking , say the principle underlying the law relating to recovery of money paid by mistake have been variously stated over and the law is perhaps not clearly defined .**Dukkiva v standard Bank of South Africa ltd.**[109] Money is generally paid by mistake when the banker thinks that the signature on cheque is genuinely that of its Customer when in fact it has been forged.

Where payment is made against a cheque that has been countermanded that is to say where a cheque has been revoked or cancel. In the case of **Arim v Standbic Bank Uganda ltd**[110]The plantiff under compulsion instructed the bank to transfer money to Government of southern Sudan. The chief magistrate ordered to freeze plaintiff's account, on 13th /11/2009 the plaintiff wrote to the bank countermanding his instructions .But the magistrate ordered lifting the earlier

[105] 1898 AC 118.
[106] (1981)1All.ER.22.
[107] (1838).2 kB 801.
[108] (1859)28.L.J.QB.324.
[109] 1959 E.A 958.
[110] HCT-OO-CC-CS—0237-2010)[2013]UGCOMMC 79 (3 May 2013)

order for the transaction to be completed. So the defendant bank transferred contrary to the instructions. Held that the bank was not held liable because it transferred the money pursuant to a court order.so this acted as adefence on the side of the bank.

However the case say that if a third party pays money to an agent is personally liable under mistake of fact and the againt liable to pay it . But he or she wiil be escpe liablility if he or she has paid the demand payment was made, where money is paid voluntaerly under mistake of fact by the payer ,the money be recovered in an action for money had receive to the use of the plaintiff. However money paid with full knowledge of fact and there is no malafide of bonafide ,it canot be recovered.

4.3 FORGED SIGNATURE

It is provided that a person cannot be liable where his signature has been forged or placed on the cheque without his authority .The owner of a cheque on which the drawers or there on without authority has no right to retain the cheque he is presumed to have handled unlawfully. A banker who pays out on a customer cheque which has been forged must credit the customer's account with the amount paid if the forgeries are not due to the customers negligence.

North Bukedi co-operation Union ltd v Bank of Baroda (u) ltd[111] Plaintiff filed a suit on the ground of negligence on part of the defendant .The particulars of negligence alleged are that the money was paid out on the basis of forged instruments without duly scrutinizing the signature. Defendant denies that he acted negligently, as the signature of the plaintiff's treasure **M.John Kidimu** was forged and the plaintiff was advised to bring an hand writing expert report at trial .

During the last 25 years the courts with interesting frequency have been called upon to decide where the law ought to place the loss when a bank pays a forged checks and charges at its peril is so frequently met with. It is well settled that the failure of a depositor to notify his bank after he knows or ought to know, that it has been forged failure of the person to give notice of forgery when it comes to his knowledge that his signature has been forged and he has not given

[111] Civil suit no.688 of 2013.([2013]UGCOMMC.58.(5th April 2013)

information, then the party will be estopped from relying upon it.[112]That would then act as a defence to the bank to escape liability.

Under bill of Exchange Act [113] Subject to the Act, where a signature on a bill is forged without the authority of the person whose signature it purports to be that the signature forged is wholly inoperative. Then bank has no right to retain the bill or enforce payment. Unless this person is preclude from setting up forgery. But once it is proved that the customer of the cheque knew about the forgery then the bank will be excluded from liability.

4.4 DUTY TO DISCLOSE TO THE Public

In **Tournier v National Provisional and Union Bank of** England case[114], it was held that where there is a public duty higher than the private duty which is involved with danger to the state or public, the duty of disclosure may supersede the duty of the agent to his principal and that of confidentiality.In case of weld **Blundel v Stephens** [115] It was held that one would suspend the duty of secrecy if there is any danger to the state and disclosure is need .That would deter the bank any liability hence it acting as adefence.

In **weld Blundeel v stephens**[116] It was held that any danger to the state may supersede the duty of secrecy owed by an agent to his principal.

4.5 INFORMATION MAY BE DISCLOSED WITH THE CUSTOMERS CONSENT,

The consent maybe express or implied . Express consent should be in writing ,stating specifically the purpose for which the consent to make disclosure has been given. And may be general in the sense that the bank is permitted to disclose the general state of customers account if only such information as sanctioned by the customer as in the **case of Parsona v Barclays co ltd**[117] That answering inquires its very whole some .

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[112] Forged checks.The Duty of the Depositor to his bank. Herschel.w.Arant.The yale law journal vol.31.No.6.April.1922.pp.598.-625.
[113] S.23 of Bill of Exchange Act cap 1993.
[114] (1924) 1Kb 461.
[115] 1920 AC 965.
[116] (1920).
[117] (1910) 2 LDAB 248.

4.6 THE INTEREST OF THE BANK.

Although the bank is liable to comply with its duties to wards customers the banks as regards to the bank's own interest justifies disclosure.

According to Halsbury laws of England, in case of disclosure if for the purpose of enabling or assisting the bank to discharge its functions and in the cases of audit by the auditor of authorized institution it would act like a bank is discharging off its functions by disclosure.

And also at the time when the matter is before court when such information is needed to help court as was in the case of **Sutherland v Barclays bank ltd**[118] .

The bank had dishonored the claimant's cheque there being insufficient funds in the account to meet them, but the real reason for refusal to pay was the knowledge of the claimant that he was the cheques were drawn in respect of betting debts, when the husband intercede for her request .he was told that all the cheques were drawn in favour of bookmarkers. This disclosure it held that the wife had given an implied consent to the husband when he called him.

Hence anyone that bring a claim for breach of care cannot succeed in cases where disclosure was done in the best interest of the bank and so this is seen as a defence in any cause of action against negligence .

4.7 COMPLUSION OF LAW

A bank may be compelled by law to disclose the state of its customer account in the proceedings as decided in **Bucknell v Bucknell**[119] A bank cannot refuse to answer questions concerning its relationship with the a customer on the ground of privilege.

The **evidence act (bankers book)act cap 7**[120]provides that on the application of any party to legal preceding a court may order that such a party be at liberty to inspect and take copies of any

[118] 1938 L DAB 163.
[119] (1969) WIRL 204.
[120] S.6 of Evidence Act Cap 7.

entries in a bankers book for any of the purpose of such proceedings **ART. 27**[121]provides that no person shall be subjected to unlawful search of the person, home or other property of that person so no one will be allowed with interference of that person from privacy of that person and home.

Considering duty to secrecy towards that that duty can be violated by the bank upon compulsion by law to provide details hence this being defence to breach of duty of secrecy.

4.8. MATERIAL ALTERATION.

In the bill of exchange act.[122] provides that alterations are material where there are alterations of the date , the sum payable ,time of payment and the place of payment and where the bill has been placed without generally the acceptors consent these will amount to a defence on the part of a bank when he dishonours the cheque.

The case of **Overman and company v Rahemetulla.**[123] In its supreme court of Kenya, held that alterations are not intended to be conclusive but are to act as examples of alteration which would be considered material.

Bill of exchange[124]states that where a bill is materially altered without assent of all parties on the bill, the bill is voided except with the acceptance of the customer to alter .But where the bill has no alteration then then the payment may be enforced. **Koch v Dicks.**[125]Held that alterations in the place of drawing of a bill which changed it from an inland bill to a foreign bill were material alterations. That gives the bank an opportunity to deny liability in case of any breach of its duties towards the customers hence acting as a defence.

4.9 LEGISLATION STOPPING THE BANK.

For a variety of reasons legislations may be enacted where effect is to suspend or even sometimes terminate the contract relationship between bank and its customers .This happens in cases where the national is from an enemy country he may be prevented from accessing funds in his bank on grounds that he is an enemy. At very many occasions the credit balance of an enemy

[121]The Constuttion of Republic of Uganda of 1995.
[122] S.63(2) Bill of Exchange ACT 1933.
[123] (1930)12KIR.13.
[124] S.63 (1) Bill of Exchange Act. 1933.
[125] 172.(2933)1 kB.307.

customer maybe confiscated and such legislation will effectively terminate the banking relationship.

In the criminal enactments ,targeting the offences of corruption, embezzlement of funds ,causing financial loss and theft by agents the courts are now empowered upon application by the Deputy of public prosecution to place restrictive orders as it appears to court to be reasonably strict on the place any bank account of the accused person or any other person associated with any such offence.

S.268[126], provides that any person being employee or servant of the government, director of a company steals any money being property of his employer is taken by him to which he has access by virtue of his office commits an offence of embezzlement .This person is punishable for not less than three years and not more than fourteen years.

S. 270 of the Act provides that where a person is convicted under section;268 and 269 the court shall in addition to the punishment order such a person pay by way of compensation to the aggrieved party. After conviction of the accused person, the court may also direct that any funds standing to the credit of convicted person be applied. The bank must ensure that any court under restraining operations of the account is compiled with because failure to comply with the order is criminal[127]

In **Uganda v Lwamafa & 2 ors.**[128] Held that the provisions of Article 126(2) of the constitution and section s.7 of the Anti- corruption Act 2009 mandates court to mitigate the aggrieved through compensation .In that we see that upon bank being stopped from issuing cheques and carry out any transaction between the bank and customer the bank cannot be sued for failure to honour cheques because its presumed to be working under court instructions.

4.9 WINDING UP AND BANKRUPTCTY OF A CUSTOMER.

[126] Penal code Act cap 120.
[127] Statutory instrument no.5-3.
[128] (criminal session case 9 of 2015)[2016] UGHCACD 4 (11 November 2016)

Insolvency Act[129] provides that upon winding up of a company it ceases to have any legal existence and all the contractual relationship come to an end and this winding up may either be by court or voluntary or even subject to supervision of court. The voluntary winding up commences when the members of the company pass a resolution for the company to be windup. **S.58**[130] provides that a resolution must be advertised in the Gazette and in the newspaper in the official language.

S. 3 & 4[131] provide that where a customer has been provided with a statutory demand and he fails to pay his debt he will be declared un able to pay debts then petitions will arise this can be seen the case of **Epaineti Mubiru v Uganda credit and saving Bank**[132]. It was held that before a bank sells off a mortgaged property they must avail evidence of service of statutory notice which upon proof of none compliance then the bank can sell it off and hence the bank will not be held liable. This is because a contract then ceases to exist that is to say duties like duty of care towards the customers and where negligence might happen then one will not be held liable.

4.1O WINDING UP OF THE BANK.

Where the bank is wound up, it ceases to have a legal personality and hence its contractual relationship with its customers is terminated once the central bank revokes its licence .[133]The licence may be revoked where central bank has justified that the bank ceases to own business and has wound up and dissolved, Under **S.60** [134]provides for the effect of voluntary liquidation which provides that a bank shall cease to carry on any business and any transfer or alterations that may be made by the members of the company are said to be void .

So the customer who has credit balance is entitled to prove as creditor before the liquidator to be paid that is evidence in **S.6**[135] provides for ascertaining amount of claim and interest from the liquidator. In the case of **Official Receiver v Chande and others** [136]Held that the respondents

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[129] S.57 of insolvency Act of 2011.
[130] Insolvency Act.
[131] Ibid 121.
[132] (1978)HCB109.
[133] S.17 Finanicial instution Act .No.2.of 2004.
[134] Insolvency Act of 2011.
[135] Ibid 123.
[136] (1960)EA 581.