REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CORAM: A.K NDUNG'U J

CIVIL APPEAL NO. 19 OF 2017

NIC BANK LIMITED.....APPELLANT

VERSUS

BIG ED ELECTRONICS LIMITED.....RESPONDENT

(Being an appeal from the entire Judgment and Decree of Hon. G.A Mmasi (Mrs.) SPM

dated and delivered on 13th January 2017 in CMCC No. 3453 of 2014)

JUDGEMENT

INTRODUCTION

1. The appellant instituted CMCC No. 3453 of 2014 against the respondent claiming the following reliefs;

a. **Kshs. 4,626,109.24/= as stated in paragraph 9 herein above;**

b. **Interest thereon at the rate of 30% from 4th April 2014 until payment in full;**

c. **Costs of this suit.**

2. In its amended plaint, the appellant claimed that at all material times, the respondent was its customer, having opened a current account which was to be operated in accordance with its Account Opening General Terms and Conditions.

3. On 18th January 2013 and on 25th January 2013 the respondent deposited cheques for USD 3,631 and USD 38,150 (being Kshs. 310, 087.40/= and Kshs. 3,280,000/=) into its account. The appellant averred that it sent the cheques to its corresponding bank in New York, Deutsche Bank Trust Company Americas which credited its accounts on 31st January 2013 and 6th February 2013 respectively and the proceeds were in turn credited into the respondent's account.

4. On 26th March 2013, the appellant averred that the corresponding bank dishonoured the cheques on the ground that they were forged. The respondent was notified of the developments but failed to regularize his account hence the suit.

5. In its statement of defence and counter claim, the respondent acceded that it was the appellant's customer and that it had deposited the two impugned cheques in its account. The respondent stated that it was notified that cheque number 643777 for USD 38,150 and cheque number 091000019 for USD 3,631 had cleared upon which it proceeded to utilize the funds. It was only notified of the insufficiency of funds in its account on 26th March 2013 after which the appellant had proceeded to withdraw funds from its account.

6. The respondent averred that the withdrawal of funds from its account by the appellant amounted to a breach of its contractual duty. It claimed that it had relied on the appellant's financial advice to utilize the funds by purchasing and delivering to its customers laptops and other appliances and had as a result of the appellant's negligent misstatement lost a sum of Kshs. 3,676,728/=. The respondent therefore counterclaimed for;

a. Special damages of Kshs. 3,676,728/= (41,781 USD);

b. General damages;

c. Interest on (a) and (b) at the rate of 30% p.a. from April 2013; and

d. Costs of this suit.

7. When the matter came up for hearing before the trial court, Kelvin Mbaabu (PW1) testified for the appellant. He stated that he had been the appellant's legal officer for 5 years and his duties included debt recovery. He testified that the respondent had opened a current account with the appellant bank by executing an Account Opening Form and General Terms and Conditions on 4th July 2011.

8. According to clause 1 of the terms and conditions, the bank was required to honour any instructions for payments from its customers. Clause 5 gave the bank the onus to debit the customer's account and levy interest in the event of an overdrawn account at the prevailing interest rate which was 30%. Clauses 8 and 9 provided that when the bank received any cheque payable to the customer, it allowed them to credit the cheque at the customer's risk and debit the account if the cheque was unpaid. Clause 10 thereof stated that the bank was not liable for any dishonoured bill, including cheques while clause 11 indicated that the bank had a right to demand overdrawn account monies with interest. PW 1 also pointed out that clause 12 of the conditions stipulated that the bank was not liable for cheques honoured but later found out to be forged and that the penalty was to reverse the transaction and debit the customer account.

9. PW 1 testified that on 18th January 2013 they received a cheque for USD 3,632/= and on 25th January 2013, they received another cheque for USD 38,150 from the respondent. He told the court that the general bank practice was that when they received a cheque from a third party they would allow 21 days for the cheque to clear before crediting the amount in their customer's account using the prevailing exchange rate. In this case, the correspondent bank was Deutsche Bank in New York.

10. Once the appellant received the cheques, they sent an email to the correspondent bank for them to do what was necessary. The cheques were credited to the appellant bank on 31st January 2013 for the cheque of USD 3,631 and on 6th February 2013 for the cheque of USD 38,150 and the sums of Kshs. 310,087.40/= and Kshs. 3,280,900/= was credited to the respondent's account and captured in its statement of account.

11. PW 1 stated that by the time they received credit in their account no issues had been raised by the correspondent bank. However on 26th March 2013 they were informed through SWIFT that the cheque was not good for payment. When the cheque for USD 3,631 remained unpaid the appellant bank made inquires through SWIFT on 28th March 2013 and sent a reminder on 17th April 2013 asking for reasons why their account had not been credited. The correspondent bank responded on 6th May 2013 stating that there was a forged endorsement claim. A letter dated 26th March 2013 informed the appellant that the cheque had been altered and there was an affidavit by the drawer affirming this.

12. The reversal for USD 38,150 was done on 26th March 2013 for Kshs. 3,281,760/= and the reversal for the second cheque was done on 27th March 2013 for Kshs. 310,087.04/=. PW 1 testified that they notified the respondent about the reversal and sent a letter dated 3rd March 2014 demanding for the amount debited plus accrued interest. The respondent wrote back complaining about the reversals on 5th April 2013. A subsequent demand letter dated 7th April 2014 was sent to the respondent demanding a sum of Kshs. 4,626,109.22/= at the prevailing rate together with interest.

13. PW 1 told the court that it was a regulation of the bank not to conduct due diligence when they received a cheque. They did not concern themselves with ascertaining who issued the cheque into the customer's account and that the correspondent bank was to work on the "nitty gritty." He stated that their claim was for refund of the monies credited and subsequently debited from the respondent's account.

14. When cross examined, PW 1 clarified that the respondent's account was not an overdraft account and also admitted that they had not sued the respondent for forgery. He stated that the bank could give credit immediately a customer deposited the cheque but in this case they had waited for clearance of the cheque for 21 days. On 27th March 2013, a normal deposit of Kshs. 50,000/= was made. It was added to actual balance but the funds were not available to the customer as the cheque bounced. PW 1 stated that for international cheques they credited the account immediately awaiting the funds and if the money was not forthcoming, they reversed the funds.

15. He testified that they had sent a remittance to the bank but it was quiet for 21 days. He stated that it was the onus of the paying bank, J P Morgan Chase, to carry out due diligence of issuance of the cheque and confirm the credit. He also stated that they had sued the respondent rather than Deutsche Bank because it had enjoyed the cheques yet they were not genuine cheques and also stated that it was the customer's duty to follow up forgery claims. PW 1 reiterated that they had invoked clause 9 (a) of the terms and conditions to reverse credit in this scenario and that there was no limit in reversing the credit which could be done even after a year or 2 years.

16. For the respondent, Edward Ngaruiya (DW 1), a part owner of the respondent company, admitted that he had deposited the two cheques into the respondent's account after receiving them from customers for the sale of electronics. He contacted the appellant bank and asked them if he could deposit the cheques as he doubted them. He did not get the funds immediately upon depositing the cheque and had to wait for 21 days. After 21 days the funds were cleared into DW 1's account. He deposited a cheque from a firm of advocates for Kshs. 50,000/= on 22nd March 2013 but the funds were not made available to him as the cheque was returned due to insufficient funds.

17. DW 1 testified that as a company, they did not stock goods which they sold. When they received an order, they would send it to their supplier and on receipt of funds they would pay out. He recalled that they had received an order from a company in Uganda which forwarded them a cheque. DW 1 told his customer that he would send the goods after the cheque cleared and the funds became available. Upon receiving a phone call from the bank telling him that the funds had cleared and were available for his use he purchased laptops from Telcom Ltd and sent them to the customer in Uganda and the customer sent a letter confirming receipt of the laptops.

18. On 26th March 2013, the bank sent DW 1 an email saying that the cheques had been dishonoured. They told him that since the cheques had been dishonoured, he should sign the same into a loan and he declined as he did not require a loan. DW 1 complained that he was blacklisted from getting any loan facilities anywhere. He testified that he had filed a counter claim because the respondent company had been defamed and could not enjoy credit facilities any more.

19. During cross examination, DW 1 testified that he had read and understood the terms and conditions of the Bank and had signed as he had understood them. He stated that before he received the cheques he had never contracted in such huge sums. He told the court that he did not know those who had drawn the cheques and admitted that when he received the foreign cheques, he had doubts and he assumed the risk when he took the cheques as provided in the terms and conditions.

20. He testified that 21 days after presenting the cheque for USD 38,134, he utilized the money. One John Sserugo Bosco ordered for laptops which he bought from Matrix. He spent a total of 2.4 million shillings for the purchase and refunded Kshs. 735,723/= to John Sserugo Bosco as it was an overpayment having gotten a profit of Kshs. 610,000/=.

21. DW 1 testified that on 26th March 2013, he was informed by the bank that the cheque was dishonoured. He stated that he had pursued the person who had sent the dishonoured cheque but he was in the States so he did not take action. He also told the court that he had filed his counterclaim for compensation as he had been listed as a defaulter with a CRB and he could not enjoy the credit facilities from suppliers who were not willing to work with him.

PARTIES' SUBMISSIONS

22. The parties took directions to canvass the appeal by way of written submissions.

23. The appellant's counsel in his written submissions argued that the respondent had voluntarily executed the Account Opening General Terms and Conditions which stipulated that the appellant would accept all cheques presented for payment at the respondent's risk. Since the respondent had admitted the existence of a banker/customer relationship the appellant argued that this relationship was at all times governed by the Bank's General Terms and Conditions and that the trial court had erred by overruling its terms.

24. It was submitted that though the appellant bank owed a duty of care to its customers, it was bound by the General Terms and Conditions and condition no. 5 thereof gave the bank the authority to debit the customer's account and levy interest in the event of an overdrawn account. The trial court was faulted for failing to consider that as a result of the dishonour of the foreign cheques, the respondent's account became overdrawn and the respondent was under a contractual obligation to regularize its account as expressed in clause 9 of the terms and conditions.

25. The appellant submitted that the respondent was attempting to escape from a bad bargain it had entered into with its clients. The appellant argued that it was only fair for the bank to credit the respondent's account once it learned of the forgeries since it would be illegal to let the respondent gain from a forged document. The case of ***Consolidated Bank of Kenya Ltd v Julius Kulundu Asiba [2012]eKLR*** was relied on for the proposition that a forged document is null and void and cannot confer any rights on the holder or the drawer.

26. The appellant also argued that the trial court had failed to consider that the appellant was merely a receiving bank and as such only credited the respondent's account with the value of the cheques based on the strength of the credits received from its correspondent bank in New York, Deutsche Bank Trust Company Americas. It relied on **section 3 (2)** of the **Cheques Act (CAP 35)** which provides;

> (2) Where a banker, in good faith and without negligence and in the ordinary course of business-
>
> (a) receives payment for a customer of a prescribed instrument to which the customer has no title or has a defective title; or
>
> (b) having credited the customer's account with the amount of a prescribed instrument to which the customer has no title or a defective title, receives payment of the instrument for himself, the banker does not incur any liability to the true owner of the instrument by reason only of his having received payment of it; and a banker is not to be treated for the purposes of this subsection as having been negligent by reason only that he has failed to concern himself with the absence of, or irregularity in, endorsement of a prescribed instrument of which the customer in question appears to be the payee.

27. As the collecting bank, the appellant argues that it had no reason to believe that the cheques would turn out to be a forgery. It was argued that the appellant's duty was merely to credit or debit the accounts once it got confirmation from the corresponding bank which it had no reason to doubt. The appellant insists that it exercised due diligence by informing the respondent about the dishonour of the cheques and asking him to regularize his account promptly. This, in its opinion, negated any negligence on its part.

28. The appellant cited the case of ***Standard Chartered Bank Kenya Ltd v Intercom Services Ltd & 4 others [2004]eKLR*** where the court held;

> *"Depending on the circumstances of each case the collecting banker may find it prudent and in accordance with practice of bankers to undertake those investigations to avoid liability in negligence to the true owner of the cheque...*
>
> *The standard of care is that derived from the practice of bankers, although the court is free to examine such banking practice and form its own opinion as to whether it conforms to a standard of care which a prudent banker should adopt, the court should be hesitant in condemning as negligent a practice generally accepted by those engaged in the banking business."*

29. The trial court was accused of failing to comprehend conventional bank practices and procedures. In particular, the appellant submitted that PW 1 who was well conversant with banking procedures had explained that an overdraft in an account meant an overdrawn position in the customer's account which could be done in a number of ways as outlined in the terms and conditions. In this case, the bank exercised condition no. 5 in debiting the customer's account and levying interest on the overdrawn account.

30. The appellant restated the words of Visram J. in the case of ***Intercom Services ltd & 4 others v Standard Chartered Bank [2002]eKLR*** where he stated that;

> *"It makes no difference who the drawer of the cheque is. It makes no difference for what purpose it was drawn. The concern of any banker when collecting a cheque for its customer is limited to ensuring that the customer is in fact entitled to it. To ensure that it shall not expose itself to liability to the true owner of the said cheque. It is not for the banker to assume the role of an investigator of its customer's affairs or to turn itself into the policeman of this nation."*

31. The appellant submitted that the trial court's decision had the effect of allowing the respondent to gain from a forged cheque which was a nullity.

32. The appellant also argued that the counterclaim was baseless and that the trial court had erred in allowing it, DW 1 having admitted that the proceeds of the cheques had been utilized. The respondent's claim was also assailed on the ground that its claim was in the nature of a claim for breach of contract and therefore general damages were not available to it. The appellant also argued that the claim for damages for defamation was not pleaded and therefore not available to the respondent.

33. In support of the trial court's decision, the respondent adopted its full written submissions before the trial court and further argued that the appellant had breached the banker/customer contract by taking out funds from its account after express representation that the cheques had been cleared for payment.

34. The respondent was of the view that the appellant bank bore it a duty of care since it is a recognized principle that banks bear the risk associated with the business of banking. To support this position, the respondent cited the case of ***Dyer and Blair Investment Bank Limited v Equity Bank Limited & another[2015]eKLR***. The cases of ***Ecobank Kenya Limited v Instarect Limited [2017]eKLR, Equity Bank Limited & Another v Robert Chesang[2016]eKLR, Fidelity Commercial Bank Limited v Italian Market Limited [2017]eKLR*** were also cited in support of the foregoing argument.

35. The respondent emphasized that the law recognizes that the customer does not owe a duty of care *"to take reasonable precautions in the management of his business with the bank to prevent forged cheques being presented to it."* It was argued that the respondent placed full reliance on the appellant bank to exercise its duty and any terms and conditions of the appellant could not oust clear provision of banking law and practice. The appellant bank was accused of failing to apply its skill, expertise and employ the requisite safeguards and thus fell short of its duty of care to the respondent.

36. The respondent also argued that the appellant is estopped from claiming against the respondent based on the representations it had made to the respondent. When DW 1 presented the cheques to the appellant, the appellant's representative informed the respondent that the funds had cleared, a statement that the respondent relied upon entirely in the utilization of the funds. This was after the 21 days required for book keeping operations as captured under clause 9 (b) of the terms and conditions.

37. The respondent submitted that there was no reason for the appellant bank to release to it the funds when it had not received a response from the corresponding bank when it sent a query on the foreign cheques. The respondent argues that this was a case of the appellant bank being negligent in paying out monies that had not been cleared for payment. The respondent relied on the seminal case of ***Hedly Byrne & Co. Ltd v Heller & Partners Ltd [1964] AC 465 at 466***, where the court held;

> *"A negligent, though honest, misrepresentation, spoken or written, may give rise to an action for damages for financial loss, caused thereby, apart from any contract or fiduciary relationship, since the law will imply a duty of care when a party seeking information from a party possessed of a special skill trusts him to exercise due care, and that party knew or ought to have known that reliance was being placed on his skill and judgment."*

38. The respondent further argued that the right party to the claim was the correspondent bank or the paying bank that authorized the payment. The respondent argues that the appellant as the collecting bank was acting as an agent of the customer and therefore has no claim against its customer and the rightful party should have been the correspondent or paying bank which had no authority to authorize the payment of the forged cheques.

39. The respondent submitted that according to **Ross Cranston** in **Principles of Banking Law (Oxford University Press, 2nd ed. 2002)** at **pp. 263-264**, *"if a collecting bank acts on the representation [of a paying bank] and suffers loss of the amount advanced to the customer, it will be able to claim from that paying bank*."

40. It was argued that the appellant's reversal of the cheque deposits, which sent the respondent's account into arrears and the issuance of a letter of bad credit to a Credit Reference Bureau, were detrimental to the respondent's business and a breach of the banker/customer relationship. That the respondent was therefore rightly entitled to general damages which in this case was measured by the sum of the two foreign cheques as held by the court in the case of ***Otieno–Omuga & Ouma Advocates v CFC Standbic Bank Limited [2015]eKLR***.

ANALYSIS AND DETERMINATION

41. Having considered the parties' submissions, the record of appeal and having also re-evaluated the evidence before the trial court as

expected of a first appellate court, I come to the following verdict of the issues which are;

a. Whether the appellant failed to exercise the requisite skill and expertise in crediting the respondent's account with funds based on cheques number 091000019 and cheque number 643777 and subsequently debiting its account; and

b. Whether the appellant was estopped by its representation from making a claim against the respondent;

42. From the pleadings and evidence adduced it is not in doubt that the appellant and the respondent herein were in a banker/customer relationship at the material time. It is also common ground that the respondent made cheque deposits to its account for USD 3,631 vide cheque number 091000019 and USD 38,150 vide cheque number 643777 on 18th January 2013 and on 25th January 2013 respectively.

43. The cheques were sent to the appellant's corresponding bank, Deutsche Bank Trust Company Americas, in New York, who credited the appellant's account but later on reversed the transaction on the grounds that the cheques were forged / altered. The appellant who had credited the respondent's account similarly debited the account and demanded that the respondent regularize its overdrawn account.

44. In its decision, the trial court found that there was no proof that the respondent or its representatives had drawn the cheques and that the Bank owed a duty of care to its customers, to protect them from forgeries. The question that arises from this and the parties' submissions is whether the appellant bank failed to discharge its duty of care to the respondent when it debited its account following the dishonour of the cheques by the corresponding bank.

45. Case law emphasizes the duty of bank to exercise reasonable care and skill towards its customer in carrying out its operations. Regarding the duties of a paying banker, the court in the case ***Dyer and Blair Investment Bank Limited v Equity Bank Limited & another Civil Suit No. 26 of 2009 [2015]eKLR*** quoted an excerpt from the Halsbury's Law of England 4th Edition Volume 3(1) at page 142, where the authors stated as follows;

> *"A banker must not continue to pay cheques without inquiry if a reasonable and honest banker with knowledge of the relevant facts would have considered that there was a serious or real possibility, albeit not amounting to a probability, that the customer was being defrauded or that money was being misappropriated. Failure to inquire would not be excused merely because of a conviction that the answer would be false."*
>
> *The common aphorism that a banker is under a duty to know his customer's signature is in fact incorrect, even as between the banker and his customer; the principle is simply that a banker may not debit his customer's account on the basis of a forged signature, since he has in the event no mandate from the customer for doing so."*

46. Simply put, where a paying bank advances funds based on a forged or altered cheque it does not act on the instructions of its client and such a transaction will be void *ab initio*.

47. Having analyzed the cases ***Dyer and Blair Investment Bank Limited v Equity Bank Limited & another, Ecobank Kenya Limited v Instarect Limited [2017]eKLR, Equity Bank Limited & Another v Robert Chesang[2016]eKLR*** and ***Fidelity Commercial Bank Limited v Italian Market Limited [2017]eKLR*** which were cited by the respondent, I found that they were distinguishable from the present case as they relate to the duties of a paying bank towards its customer yet the appellant bank in this case was the collecting bank which received the cheques and forwarded them to the paying bank for payment.

48. Ross Cranston in the excerpt cited by the respondent from the **Principles of Banking Law (Oxford University Press, 2nd ed. 2002)** at **pp. 263-264**, defined the duties of a collecting bank thus;

> *"In collecting a cheque, the collecting bank will act as agent for its customer. This means that it must act with reasonable care and diligence: for example, it must collect the cheque promptly. It also means that once the cheque is collected, the collecting bank comes under an obligation to credit the customer's account with the amount. Once it has done this it must not reverse a credit to the customer in the event that it has repaid the paying bank, but that bank does not have a valid claim." [Emphasis added]*

49. In the present case, the paying bank had a valid reason to dishonour the cheques and debit the appellant's account. In turn, the appellant bank debited the respondent's account in accordance with its terms in its Account Opening General Terms and Conditions. The respondent did not deny the appellant's claim that the two foreign cheques were forged. In fact, DW 1 testified that he was doubtful when he received the cheques.

50. In the case of ***Julius Kulundu Asiba v Consolidated Bank of Kenya Civil Appeal No. 57 of 2012 [2015]eKLR*** which falls on all fours with the present case, the Court of Appeal held;

> *"Also produced by the respondent were various telex – communications between the respondent and Citibank showing that communication was sent to the latter as collecting bank; clearance of the cheque was confirmed but later reversed and a charge imposed against the respondent by the said Citibank being handling charges for the cheque that turned out to be a forgery. The respondent showed in evidence that it allowed the appellant to draw the sum claimed in the plaint which sum it was entitled to a return once the dollar cheque ended up being a forgery. The learned judge found that once the dollar cheque was found to have been a forgery it became a nullity and the appellant was not entitled to any proceeds because there were none. There is no merit in this appeal and we accordingly dismiss it with costs to the respondent."*

51. It was also the respondent's claim that when it relied on the appellant's vast expertise and skill to its detriment, the appellant was

estopped by its representation from making a claim against it. DW 1 testified that he presented his cheques and waited for the standard 21 days for the funds to clear. It was only after he got a positive confirmation from the appellant bank that he utilized the funds only for it to debit his account and have him listed as a defaulter with a Credit Reference Bureau.

52. An analysis of the appellant's actions is necessary to determine whether it was estopped by its representations to the respondent from making a claim against it.

53. Upon receiving the initial cheque for USD 3,631 on 18th January 2013, the appellant sent a remittance to its corresponding bank on 24th January 2013 (Exh. 4(a). The subsequent cheque for USD 38,150 was deposited by the respondent on 25th January 2013 and a remittance sent to the corresponding bank on 29th January 2013 (Exh 4(b). PW 1 testified that the cheque for USD 3,631 was credited into the appellant's account by the corresponding bank on 31st January 2013 and the cheque for USD 38,150 was credited into its account on 6th February 2013. The respondent's statement of accounts shows that its account was credited with the sums on 19th February 2013.

54. On 7th March 2013, the appellant asked the corresponding bank to confirm the validity the cheque for USD 38,150 and assure it that the cheque would not be reclaimed in the future. (P. Exh. 6) The corresponding bank responded on 26th March 2013 indicating that it had dishonoured the cheque. DW 1 testified that he was called on the same day and informed that the cheque had been dishonoured.

55. On 26th March 2013, the corresponding bank debited the appellant's account for USD 3,631. The appellant asked the corresponding bank to explain their actions through SWIFT on 28th March 2013 and sent a reminder on 17th April, 2013. (P. Exh. 8 (a) & (b). They received a letter dated 26th March 2013 on 6th May 2013 explaining that the cheque for USD 3,631 had a forged endorsement claim. Before the appellant debited the respondent's account on 26th March 2013, the only available balance in his account was Kshs. 241,886.57/=.

56. PW 1 testified that they sent the respondent a demand letter for the sum of Kshs. 4,486,412.90 being a total sum of the amount debited from its account together with interest at the prevailing rate of 30% in accordance with Clause 9 (a) of the Account Opening General Terms and Conditions which stipulated;

> *(a) All cheque or other orders for payment of whatsoever nature are accepted for deposit or collection at the risk of the customer. Where any cheque or order is unpaid for any reason whatsoever (including but not limited to physical loss), the bank may debit the customer with the amount previously credited (taking into account any exchange fluctuation where relevant) in respect of that cheque or order, together with interest since the date of crediting if the account thereby is withdrawn."*

57. This sequence of events shows that the appellant administered its duty to the respondent diligently and was keen enough to follow up on the transactions to ensure that there was no liability on its part. The appellant, as a collecting bank acted in its capacity as an agent for the respondent in receiving the cheques which it forwarded to the corresponding bank for onward transmission to the paying bank. When the cheques were subsequently dishonoured, the appellant promptly informed the respondent. It's actions do not depict a party bent on inducing the other to act to its detriment and I find that the respondent did not prove the particulars of negligence pleaded against the appellant.

58. In the end, I find that the appellant is entitled to Kshs. 4,626,109.24 which is the sum of the amount it had credited to the respondent's account based on the forged/altered cheques together with interest.

59. The appellant also sought interest on the sum of Kshs. 4,626,109.24/= at the rate of 30% from 4th April 2014 until payment in full.

60. An award of interest is in the discretion of the court which discretion must be exercised judiciously. See ***Kenindia Assurance Co Ltd V Alpha Knits Ltd & Another, (2003) 2 EA 512***. For special damages, a claimant is entitled to interest on that claim from the date of filing suit until payment in full. I therefore allow interest at court rates from the date of filing suit, which is 17th June 2014, to the date of payment in full.

61. The upshot is that this appeal is allowed. The judgement of the trial court is set aside and substituted thereof with a judgement entered for the appellant for Kshs. 4,626,109.24 with interest at court rates from 17th June 2014 until payment in full. The appellant shall have costs both at the trial court and on this appeal.

Dated, signed and **delivered** at **Nairobi** this **27th** day of **February, 2020.**

A. K. NDUNG'U

JUDGE