



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. 209 OF 2006**

**TILE AND CARPET CENTRE LIMITED.....PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED.....DEFENDANT**

**AND**

**KENYA BROADCASTING CORPORATION.....1<sup>ST</sup> THIRD PARTY**

**G4S SECURITY SERVICES (K) LIMITED.....2<sup>ND</sup> THIRD PARTY**

**JUDGMENT**

1. The Plaintiff (**T&C or the Plaintiff**) commenced this action vide a Plaint dated 12<sup>th</sup> April 2006 and filed on 20<sup>th</sup> April 2006 against the Defendant (KCB or the Defendant). The Plaintiff seeks judgment in the following terms:-

- a) Kshs. 6,021,101.00.
- b) Interest thereon at a rate of 14% p.a. from 1<sup>st</sup> December 2005 until payment in full.
- c) Penalty of Kshs. 301,055.00 and interests of Kshs. 626,796.00 as aforesaid with further interest at 14% per annum from the date hereof until payment in full.
- d) General damages.
- e) Costs of the suit.
- f) Such further or other relief as the Honourable Court may deem proper.

2. The Plaintiff's case is that on 19<sup>th</sup> July 2005, it paid for and obtained a bankers cheque from its bankers I&M Bank for Kshs. 6,021,101.00 in favour of the Commissioner of VAT for payment of value added tax for the month of June 2005, due from the Plaintiff. That on 26<sup>th</sup> July 2005 the said cheque was presented by an unknown person to the Defendant's branch in Nakuru, and on the same day the Defendant sent the cheque to I&M Bank for clearance. That I&M Bank cleared it and wrongly paid out the sum of Kshs. 6,021,101.00 to the Defendant and not the Commissioner of VAT.

3. The Plaintiff states that because of the wrong payment it had to pay the Commissioner of VAT the said sum of Kshs. 6,021,101.00 on 30<sup>th</sup> November 2005, including a penalty for late payment.

4. The Defendant's Defence is comprised in the amended pleadings of 21<sup>st</sup> June 2006. Kenya Broadcasting Corporation (KBC) is one of its customers at its branch in Nakuru. That on 19<sup>th</sup> July 2005, KBC procured a bankers cheque in its favour drawn from I&M Bank for a sum of

Kshs. 6,021,101.00 at the branch.

5. It further states that upon clearance of funds into KBC's account number 200970888, funds were disbursed on 27<sup>th</sup> and 28<sup>th</sup> July 2005 to KBC's authorized officer one Mr. Markphallen O. Were (Were) in the sums of Kshs. 3 million and Kshs. 3,010,000.00 respectively. The Defendant denies the Plaintiff's allegations of conversion and asserts that being a receiving bank, it is not liable, in the absence of negligence and having received the payment in good faith for its customer KBC. That as a collecting agent for Kenya Revenue Authority (KRA), it received commission from KRA for payment remitted to KRA by taxpayers and therefore had no reason to convert the Plaintiff's money as alleged.

6. It stated that the Plaintiff's loss was occasioned by the Plaintiff's negligence and the acts of the Plaintiff's employees, more specifically one John Kiruma (Kiruma), done in breach of trust and who stole and/or intercepted the banker's cheque intended for the Commissioner of VAT. The Defendant particularized the acts of negligence and breach which included, *inter alia*, that Kiruma failed to deposit the banker's cheque as instructed and instead surrendered the cheque to unknown persons. That Kiruma then forged VAT pay-in slips. The Defendant also accuses the Plaintiff of failing to heed a warning from Kenya Revenue Authority to remit its tax obligations by way of Electronic Funds Transfer (EFT) and not by way of cheque to avert fraud such as the one that befell it.

7. In an alternative plea, the Defendant states that the Plaintiff's loss was occasioned by or very substantially contributed to by the common carriers of bulk money and other important goods, that is Securicor Security Services Kenya Limited, who were entrusted by the Defendant's branch in Nakuru to ferry cheques and cash to the Defendant's central clearing house in Nairobi. That Securicor Security Services Kenya Limited failed in its duty of care and was negligent thereby occasioning the Plaintiff's loss notwithstanding any limitation or exclusion clauses in the contract between it and the Defendant.

8. In an alternative plea, the Defendant states that the Plaintiff's employee, Kiruma, who is the person who deposited the banker's cheque, colluded with employees of KBC causing the cheque to be deposited in its Nakuru branch and payment made to KBC's agent, Were.

9. The Defendant states that upon discovery of the fraud it lodged a complaint with the banking fraud investigations unit, following which several of its employees were arraigned in court in Criminal Case No. 1829 of 2005 (Republic vs Markphallen Otieno Were & 9 others) (the Criminal Case).

10. Upon obtaining leave of Court, the Bank joined KBC and the Securicor as third parties to the suit. On 9<sup>th</sup> December 2008 the Bank filed a Statement of Claim against the Third parties seeking a declaration that it is entitled to indemnity or contribution by the third parties and judgment for the amount of any costs that may be adjudged in favour of the Plaintiff and its own costs of defending the action and prosecuting the third party proceedings.

11. The Defendant reiterated the contents of its Defence and further stated that the crediting and eventual payment of Kshs. 6,021,101.00 was done in the ordinary course of business, in good faith and without negligence, notice of or knowledge on its part of any loss, theft, misappropriation, diversion or conversion of the cheque referred to in the Plaintiff. The Defendant set out particulars of the fraud by the agents of the 1<sup>st</sup> and 2<sup>nd</sup> Third Parties.

12. The Third Parties filed separate statements of Defence. The 2<sup>nd</sup> Third Party (G4S or 2<sup>nd</sup> Third Party) denies the contents of the statement of Claim by the Defendant. In particular, it denies that its employees fraudulently conspired, colluded, aided or abetted the 1<sup>st</sup> Third Party to transact the now notorious cheque or was in any way involved in the loss.

13. It further denies that it tampered with the Defendant's mail, or that it had any cheques of any kind that it could have substituted with the genuine cheques. It states that it received sealed mail bags from the Defendant with no knowledge of the contents. That any tampering of mail bags could only have occurred while in the Defendant's custody or possession. It states that if any substitution, presentment and diversion of the cheques took place then the same was facilitated by the Defendant's employees. It denies vicarious liability for the criminal acts, if any, of its employees.

14. It states that it delivered the mail bags in the same condition it received them and that the same had not been tampered with in any way. It further states that should the Court find that the Defendant is entitled to indemnity or to contribution by the 2<sup>nd</sup> Third Party, the same should only be to the extent delimited by clause 3 of the contract between them.

15. The 1<sup>st</sup> Third Party (KBC or the 1<sup>st</sup> Third Party) relies on its Defence dated and filed on 16<sup>th</sup> January 2008. It maintained account number 045-20097088 with the Defendant. But it makes the point that the account was exclusively an imprest account meant only for receiving salary for transferred staff and other occupational funds from the 1<sup>st</sup> Third Party's headquarters in Nairobi. The Bank would present and collect cheques in the context of imprest for and on behalf of the 1<sup>st</sup> Third Party at a fee. Further that the Defendant owed the 1<sup>st</sup> Third Party a duty of care to supervise and take all reasonable steps to maintain the account with utmost care.

16. That in the months of June and July 2005, the Defendant fraudulently and negligently aided in encasing various third party cheques other than imprest cheques drawn against the account contrary to KBC's instructions and in breach of its duty of care. KBC set out particulars of fraud and breach of duty of care by the Defendant including that it failed to call officers of KBC to confirm payment, permitting one of KBC's signatory to fraudulently appoint another without authority, paying out huge sums of money knowing that such cheques were never banked, failing to detect fraud and in fact facilitating the fraud. It also denies vicarious liability as alleged by the Defendant and that the Defendant is entitled to any indemnity or contribution as alleged.

17. The Defendant presented a Reply to the 1<sup>st</sup> Third Party Defence denying the allegations of fraud and breach of duty of care pleaded. It further reiterated the contents of its Statement of Claim.

18. The hearing of the suit commenced before Hon Justice Havelock on 13<sup>th</sup> May 2014 and it fell on me to finalize it as partly heard matter. At the hearing the Plaintiff called six witnesses while the Defendant called one witnesses. The Third Parties each called one witness. On 8<sup>th</sup> November 2012, the Plaintiff and the Defendant herein filed a list of nine agreed issues. The issues for resolution are abridged as follows:-

1. Whether the Plaintiff's employee, Kiruma, deposited the banker's cheques at National Bank?
2. Whether the Plaintiff's loss was as result of its negligence or fraud?
3. Whether the Defendant was negligent and/or fraudulent in clearing the cheque?
4. And if so, is the Defendant liable to compensate the Plaintiff the sum of Kshs. 6,021,101.00 with interest?
5. Whether the third parties had any role to play in the fraud?
6. Who is entitled to the costs of the suit?

19. But I begin by attending to a matter raised rather late by the Defendant. In its closing submissions it argued that the Plaintiff did not produce a resolution authorizing the institution of the present suit. But having not been taken up in pleadings, it cannot be available as a defence. See order 2 Rule 4 of the Civil Procedure Rules;

“4. (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality —

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading.

(2) Without prejudice to subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.

(3) In this rule “land” includes land covered with water, all things growing on land, and buildings and other things permanently affixed to land”.

20. Turning to another matter, during the pendency of this litigation, the criminal case was instituted against employees of the Plaintiff, KCB, KBC and G4S relating to the banker's cheque herein as well as other fraudulent transactions. On 25<sup>th</sup> October 2011, parties to this suit agreed to await the outcome of those proceedings before embarking on the hearing of this civil claim. Judgment in the criminal case was delivered on 11<sup>th</sup> November 2011 and parties wish to rely on the same. How should the Court treat that judgment?

21. Sections 44 and 45 of the Evidence Act provide as follows as regards judgments in other proceedings:-

“44. Judgments in rem

(1) A final judgment, order or decree of a competent court which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is admissible when the existence of any such legal character, or the title of any such person to any such thing, is admissible.

(2) Such judgment, order or decree is conclusive proof—

(a) that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;

(b) that any legal character to which it declares any such person to be entitled accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person;

(c) that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease;

(d) that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.

45. Other judgments of a public nature Judgments, orders or decrees, other than those mentioned in section 44 of this Act, are admissible if they relate to matters of a public nature relevant to the inquiry, but such judgments, orders or decrees are not conclusive proof of that which they state.”

22. The Black's Law Dictionary, 9<sup>th</sup> Edition defines a judgment *in rem* as;

**“An action in rem is one in which the judgment of the Court determines the title to the property and the rights of the parties, not merely as between themselves, but also as against all persons at any time dealing with them or with the property upon which the court had adjudicated.”**

23. Etyang J. in the case of **Japheth Nzila Muangi vs. Kenya Safari Lodges & Hotels Ltd [2008] eKLR** held as follows:

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

.....

**The plaintiff contends that Mr. Kamuyu virtually held him responsible for the false or fraudulent accounting which allegedly existed in the Accounts Department at Mombasa Beach Hotel. To demonstrate Mr Kamuyu's intentions, the three accused, who were employees in that Department, were charged with theft. But the court pronounced a final judgment about their character and found them innocent. Through the acquittal of these accused the plaintiff seeks to demonstrate that there was no false accounting or any criminal activity going on in his Department which would have justified his dismissal. I think, in the light of the above, it is correct to say, and I do so hold, that the judgment in criminal case No.3247 of 1999 was a judgment in rem is admissible.” (emphasis added)**

24. Odunga J. in *Abukar G Mohamed v Independent Electoral and Boundaries Commission [2017] eKLR* cited with approval the decision in **Pattni vs. Ali & Anor (Isle of Mann (Staff of Government Division) [2006] UKPC 51** in which reliance was sought from Jowitt's Dictionary of English Law (2<sup>nd</sup> Edition.) P. 1025-6 to the effect that:-

**“A judgment *in rem* is an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. Such an adjudication being a solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is also declared by the adjudication...So a declaration of legitimacy is in effect a judgment *in rem*.”**

25. The criminal proceedings determined, on a standard of proof beyond reasonable doubt, whether or not the Plaintiff's employee alongside employees of the Defendant as well as those of KBC and G4S were guilty or not of the charges they faced. The judgment in the criminal trial is *in rem* in so far as it determined the legal character to be ascribed to the accused persons as to their guilt or otherwise of the criminal charges they faced.

Whether the banker's cheques was deposited at National Bank?

26. It is common ground that the banker's cheques in question No. 014260 was prepared in favour of the Commissioner of VAT by I&M Bank at the Plaintiff's request. It was for payment of VAT in the sum of Kshs. 6,021,101.00 for the Plaintiff's account (P. Exh. 1 Page 1).

27. That the cheque was given to the Plaintiff's employee, Kiruma (PW 2), with instructions to deposit it is also not disputed. Kiruma gave his version of the events of 19<sup>th</sup> July 2005. That he was instructed by Jita Gandhi (PW 5) to collect the banker's cheque from I&M Bank and he did as instructed. Later on that day he deposited the cheque alongside five other cheques at National Bank, Times Tower Branch. He returned VAT pay-in slip No.717585 to the Plaintiff as evidence of payment (P. Exh. 1 Page 2).

28. He denies forging the VAT pay-in slip or having any knowledge of how the cheque supposedly left National Bank in Nairobi and found its way to KCB Nakuru branch.

29. The Defendant's witness, Aloys Okari Ombui, impugns this evidence and states that the pay-in slip was a forgery. He refers to the judgment in Criminal Case No. 1188 of 2006 where, on page 36, the trial magistrate held as follows:-

**“I have considered these evidence vis a vis the evidence by the document examiner who found that the KRA receipt dated 19.1.05 for 6,021,101/= presented by accused was not stamp with the same stamp impression of National Bank cashier No. 3 and I find indeed no money was paid to National Bank as alleged;.....”**

30. The Defendant produced a certified copy of the Judgment in its supplementary bundle of documents dated 21<sup>st</sup> February 2012. At page 20-21 of the Judgment, PW 28, Emmanuel Kenga, the document examiner is recorded as having testified as follows:-

**“That on 16.10.06 he examined document marked A which a KRA receipt dated 19.1.05 for 6,021,101/- as against documents marked B1 and B2 are stamp impression of National Bank cashier no. 3 and found that they were made by different implements and prepared a report P. Exh. 13”.**

31. Kiruma is accused No. 7 in the criminal proceedings. He was charged with 2 offences; conspiracy to defraud contrary to Section 317 of the Penal Code and stealing by servant contrary to Section 281 of the Penal Code. On theft, the allegation was that on 19<sup>th</sup> July 2005 he stole

banker's cheque no 014260 for Kshs. 6,021,101.00, the property of Tile and Carpet Ltd. Further particulars of the charge was that the theft happened between I&M Bank and Times Tower Building. In effect that the cheque never got to National Bank. As is common ground, he was acquitted of both charges.

32. As I understand it, KCB's argument is that because the Criminal Court found that the stamp impression on the pay in slip was forged, then that was cogent proof that Kiruma was involved in the forgery and stole the cheque. But I am not sure that the Bank's view is an accurate characterization of the evidence both here and at the criminal trial. The Court found that the stamp on the pay in slip was forged. But it did make a finding as to who was responsible for the forgery, least that it was Kiruma. And I cannot say that because the Court held that no money equivalent to the cheque was paid into National Bank, it is the same thing as saying that that Kiruma did not hand over the cheque to a teller at the Bank. At these proceedings, KCB asserted criminal conduct on Kiruma and indeed made specific pleadings in that respect. It was upon the Bank to provide cogent proof that it was indeed Kiruma who stole the cheque. The standard of such proof would have to be higher than on a balance of probabilities although not beyond reasonable doubt. And I must add that the task was not made any easier by the finding of the Criminal Court the Kiruma did not steal the said cheque. Kiruma stood firm in his evidence during this trial that he left the cheque with cashier No 3 at National Bank and it was the cashier who stamped the pay in slip. This was consistent with his sworn defence at the criminal session. To prove that he stole the cheque contrary evidence needed to be led by KCB, something it failed to.

33. There was no evidence as to how the cheque left the hands of teller No 3 at National Bank and found its way to KCB Nakuru Branch. What is however clear is that the cheque made its way to KCB Nakuru Branch. What is not in doubt is that the Plaintiff's loss was a result of fraud and not negligence. This begs the question who perpetrated or was involved in the fraudulent scheme.

Was the Defendant negligent and/or fraudulent in clearing the cheque?

34. The Defendant produced a cheque deposit slip (D. Exh. 1 page 1) showing that a cheque for the sum of Kshs. 6,021,101.00 was deposited on 27<sup>th</sup> July 2005 at its Nakuru Branch. It shows that the cheque was drawn by I&M Bank and was to be deposited into Account No. 200970888 belonging to Kenya Broadcasting Corporation Nakuru. The deposit slip does not bear the cheque number.

35. The Defendant also produced KBC's bank statement from 6<sup>th</sup> April 2005 to 6<sup>th</sup> September 2005 (D. Exh. 1 page 2-7). The statement shows that on 25<sup>th</sup> July 2005 a sum of Kshs. 6,021,101.00 was deposited by way of cheque (D. Exh.1 page 6). The statement further shows that the money was subsequently withdrawn on two occasions, that is on 27<sup>th</sup> July 2005 vide cheque No. 00831 a sum of Kshs. 3 million and on 28<sup>th</sup> July 2005 vide cheque No. 00832 a sum of Kshs. 3,010,000.00.

36. The Defendant in its Amended Defence of 21<sup>st</sup> June 2006 states the KBC procured the cheque on 19<sup>th</sup> July 2005 and deposited the cheque on 25<sup>th</sup> July 2005. That the funds were then disbursed to KBC's authorized officer, Were.

37. PW 6, Charles Ngovi, I&M Bank's Operations Manager told the Court that I&M Bank did NOT issue a banker's cheque for the sum of Kshs. 6,021,101.00 dated 19<sup>th</sup> July 2005 in favour of KBC.

38. PW 3, Caleb Muoki, Chief Manager Operations I&M Bank told Court that the banker's cheque in question was presented to them through the Defendant for payment. He did not know whether the Defendant was authorized to collect money for Commissioner of VAT, but the Defendant could receive the money if it had an account for Commissioner of VAT. He stated that if KCB did not have such an account, then that would be conversion of the cheque or that if the payee is changed on a cheque, that can only be an act of fraud.

39. The Defendant's witness attempts to explain the anomaly in the Plaintiff's cheque being wrongly paid to the Defendant in his statement dated 5<sup>th</sup> October 2012 wherein he states at paragraph 8 (iii) that ;-

“Having intercepted the genuine cheque and fooled the drawer by issuing the fake deposit or pay-in slip, the fraudsters would then fraudulently procure replica cheques with the same particulars like the genuine cheques in terms of the issuing bank or drawer, cheque number, signature and amount. The only difference would be that the replica cheque would be drawn in the name of the bank account through which the fraud was to be perpetrated.

(iv)The replica cheques would thus be out-rightly fraudulent though on their face would appear genuine. It is these replica cheques that would be presented to the intended receiving bank as a cheque deposit in favour of the account through which the account was to be perpetrated. Without detecting the fraudulent nature of the replica cheque, the receiving bank would in the ordinary course of business accept the same and issue the depositor with a cheque deposit slip.”

40. He further stated at paragraph 9 of his statement;-

“The cheque the subject of these proceedings was never presented to the defendant bank.”

41. He reiterated the same in cross-examination when he told the Court;-

“In transit the cheque we received which was in favour of KBC was substituted and a different cheque introduced”.

42. PW 4, Joseph Kabiru the Senior Archivist of the Judiciary appeared before court on 29<sup>th</sup> January 2019 and produced the cheque produced in Criminal Case No. 1188 of 2006 as Exhibit No.113. A certified copy of the same was produced before court. The cheque is numbered 014260, is dated 19<sup>th</sup> July 2005 drawn by I&M Bank for a sum of Kshs. 6,021,101.00 in favour of Commissioner of VAT A/C Tile & Carpet Centre Ltd. The same bears a stamp by the Defendant dated 25<sup>th</sup> July 2005 Teller No. 8, Nakuru. The cheque is crossed and bears the

words “A/C Payee Only” and “Non-Negotiable”.

43. Contrary to the Defendant’s testimony, the Defendant received the cheque as drawn and no details on the cheque were changed. The payee remained the Commissioner of VAT for ‘**A/C Tile and Carpet Centre Ltd**’ but the Defendant credited KBC’s account with the proceeds of the cheque. The crossed cheque was clear as to who was to be paid as it indicated “A/C Payee only”. The only person to whom the sums in the cheque was to be paid, unless it was otherwise endorsed, was the Commissioner of VAT.

44. There is a further accusation of fraud by KBC in its Defence dated and filed 16<sup>th</sup> January 2008. It admits that the account in question belongs to it. KBC however states that the same was exclusively an imprest account meant for receiving transferred staff salary and other occupational funds from its headquarters in Nairobi. That the terms of operating the account, it would present and collect cheques in the context of transferred imprest.

45. The Defendant filed a Reply to KBC’s Defence in which it denied the allegations.

46. KBC’s witness, Samuel Mureithi rehashed the contents of KBC’s Defence. He testified that KBC used to operate two separate accounts with the Defendant namely a collection account and an imprest account. That at its Nakuru station, all revenues, both cash and cheque, were to be deposited in the collection account held with the Defendant No. 200970871 for onward transmission to the main account at Kencom branch. That withdrawals from the collection account could only be done from the main account with the authority of the Managing Director, Finance Manager and Corporation Secretary.

47. He further told Court that the imprest account No. 045200970888 would be operated solely as an imprest account and that no third party deposits would be made therein. That the only funds transferred to the imprest account were from the main account in Kencom and the same was to cater for day to day running expenses at the branch, for instance transport, fuel, postage and other office expenses. That the amounts transferred on a monthly basis were below Kshs. 100,000.00.

48. The same had signatories who were senior officers at branch level and the Nakuru branch signatories were Were, Geoffrey W. Mwakio and David K. Barmosho.

49. He testified that in the year 2005, the bank allowed deposit of third party cheques into the imprest account contrary to procedure. He considered the same irregular and fraudulent because:-

- i. No third party deposits were to be made into the account,
- ii. The cheques deposited were not in the name of the corporation,
- iii. Only Electronic Funds Transfers (EFT) from the head office were to be allowed into the account,
- iv. The bank ought to have detected and rejected the foreign cheques,
- v. The amounts were uncharacteristically huge, and were banked and withdrawn without any reference to the head office.

50. KBC did not produce banking instructions to the Defendant for the Account number 045-20097088. However, that it was an imprest account is not disputed by the Defendant. Its witness in cross examination stated;

“This was an imprest account for KBC – we do not have the instructions on this account.”

51. One cannot speculate on the operating instructions for the imprest account without further evidence. On this no conclusive findings can be made.

52. The Defendant in paragraph 8 of the Amended Defence avers that being a receiving bank, it is not liable in the absence of negligence and having received the payment in good faith for the cheque payable. This argument is made on the footing of Section 3 (2) of the Cheques Act, Cap 35 Laws of Kenya which provides as follows:-

“(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.”

53. Makau J. in the case of Beyond Kenya Limited & another v Gulf African Bank Kenya Limited [2019] eKLR in dealing with a similar issue on cheque conversion had the following to say:-

“22. In the Court of Appeal in *Standard Chartered Bank Limited vs Intercom Services Ltd & 4 others* [2004] eKLR the court expounded on the law as follows:- ‘The onus of establishing circumstances showing absence of negligence is on the banker. It is a matter of defence, and does not give a substantive cause of action. The extent of inquiry must be measured by what in the circumstances a fair minded banker paying due regard to the exigencies of banking business in relation to the person depositing the cheque would consider it prudent to do in order to protect the interest of the true owner and each case must depend on its own circumstances. (See *London Bank of Australia Ltd vs Kendall* (1920) 28 CLR 410, 411, 417). The standard of care required is that to be derived from the ordinary practice of bankers not individuals. (See *The Commissioner of Taxation vs English, Scottish and Australian Bank Ltd* [1920] AC 683 at page 689 and *Marfani & Co. Ltd vs Mindland Bank Ltd* [1968] 2 ALL ER 573). In the latter case, Diplock LJ said in part at page 579:

"What facts ought to be known to the banker, i.e. what inquiries he should make and what facts are sufficient to cause him reasonably to suspect that the customer is not the true owner, must depend on current banking practice and change as that practice changes. Cases decided thirty years ago, when the use by the general public of banking facilities was less much widespread, may not be a reliable guide to what the duty of a careful banker, in relation to inquiries and as to facts which should give rise to suspicion is today."

23. In *Ellinger’s Modern Banking Law*, 4th Edition, at page 639, the learned authors summarize a fundamental principle in cases such as this one as follows:-

"In all cases of conversion, the bank’s duty to act without negligence is given a reasonable construction. The bank is not expected to assume the role of an amateur detective, and need not be unduly suspicious."

.....

30. In the case of *KwaMashuu Banking vs Standard Bank* (1995) (1) SA 377 (D), it was ruled that:-

"In the case of a stolen cheque the loss only occurs because of the intervention of the collecting banker. The thief is unable to gain access to the money once he steals a cheque and he is only able to convert the cheque to cash because of the conduct of the collecting bank."

31. Judge Combrinck ruled in the case of *KwaMashu Bakery Ltd vs Standard Bank of South Africa Ltd* (supra) that:-

"As a first step towards protection of the true owner of a cheque, it is expected of a reasonable banker to not only satisfy himself of the identity of a new client but also gather sufficient information regarding such client to enable him to establish whether the person is the person or entity which he, she or it purports to be."

32. The 20th edition of *Clerk & Lindsell on Torts* at paragraph 17-37, opines that:-

"Cheques, negotiable instruments and other securities are considered corporeal property. Their sole value is as choses in action, which cannot be converted. If, however, such physical documents are unlawfully dealt with, as where a cheque is stolen and paid into a bank account controlled by the thief, the person entitled to them may recover full damages based on their value as choses in action."

33. In view of the facts of this case, I find a payment of a cheque to someone who cannot verify the cheque was meant for him or who is not the true owner is not only unlawful and wrong but is an act of conversion. I therefore find the defendant is liable for the loss suffered by the plaintiffs."

54. The details and instruction on the banker’s cheque No. 014260 were clear. Even if the person who presented the cheque filled in the wrong details on the cheque deposit slip (D Exhibit 1 page 46), the Defendant had an obligation and was duty-bound to countercheck and verify that the details matched those on the banker’s cheque. That is a plainly reasonable duty expected of a receiving Bank.

55. The Defendant’s action of receiving banker’s cheque No. 014260, calling for the money from I&M Bank and then wrongly crediting KBC’s account with proceeds of banker’s cheque No. 014260 were not acts of good faith deserving the protection of Section 3 (2) of the Cheques Act. There was negligence, and perhaps fraudulent conduct, on the part of the Bank’s employees.

56. As a consequence of the unlawful and wrongful payment, the Plaintiff was forced to pay a sum of Kshs. 6,021,101.00 as Value Added Tax for a second time on 30<sup>th</sup> November 2005 (Amended Complaint, Paragraph 4). The Plaintiff produced letters exchanged between its Tax Consultant and Kenya Revenue Authority on the issue (P. Exh. 1, page 4-8) resulting in Kenya Revenue Authority waiving interest and penalties on the unpaid amount. The Plaintiff further produced an application form for payment by way of Real-time Gross settlement (RTGS) stamped by I&M Bank 30<sup>th</sup> November 2005 and its bank statement reflecting the payment of Kshs. 6,021,101.00 (P. Exh. 1, page 11 and 12).

57. This evidence stands unchallenged. The Defendant is therefore liable for the Plaintiff’s loss in the sum of Kshs. 6,021,101.00. Of the role of the Third parties?

58. A party who takes out Third Party proceedings looks up to the Third Party for indemnity or contribution. It is not any different in the matter at hand.

59. The defendant in its Claim dated 8<sup>th</sup> December 2008 and filed on 9<sup>th</sup> December 2008 absolves itself of any blame for the Plaintiff’s cheque’s loss. It instead blames agents of KBC and G4S for the conversion.

60. These claims are resisted by both third parties.

61. I start off with the more straightforward defence by the 2<sup>nd</sup> Third Party. In support of its Defence, G4S called one witness. Alvin Kagema explained that the 2<sup>nd</sup> Third party was previously known as Securicor Security Services Kenya Limited before changing its name to G4S and eventually to G4S Kenya Limited.

62. He admits that in the year 2005, G4S and the Defendant had a contract for services, whose terms were continuous and renewed annually. He produced a copy of a service contract dated 1<sup>st</sup> November 1999 (2<sup>nd</sup> Third Party Exh. Page 1-9).

63. He told the Court that the 2<sup>nd</sup> Third Party issues satchels to the various banks such as the Defendant. They are issued to the head offices of the Banks who then distribute to their branches. A satchel is a small bag, often with a shoulder or side strap. He gave a detailed outline on how G4S carried out its duties:-

i. Cheques and other documents are put together and sealed in a satchel.

ii. The serial number of the satchel is typed out and placed in a separate envelope.

iii. A Bank representative/s then puts the sealed satchel and sealed envelope in a mail bag and locks it with a padlock. A copy of the key to the padlock is at the branch and another at the clearing house.

iv. 2<sup>nd</sup> Third party sends a courier rider to collect the pre-packed mail bag. The rider confirms that the mail bag is sealed, intact and padlock in place. If the same is not intact, the courier rider has instructions not to pick up it.

v. Should the rider confirm that everything is in order, he/she raises a work order detailing the number of items picked, physical condition, weight and time of collection. The same is signed by the bank representative.

vi. The Courier rider takes the mail bag to the office where it is documented and placed in a vehicle, which is then sealed. The seal is broken upon arrival at destination. No employee sits at the back of the vehicle where the bags are kept.

vii. The recipient signs a delivery note confirming receipt of the mail bag in good order. If the same is tampered with, then it will be not received and a report made to the supervisor.

64. With respect to the claim before court, he states that all the secured cheques were delivered in the same condition they were received. That there was no report of tampering at any point.

65. The Defendant does not dispute that it made no report or complaint of tampering at any point during the transportation of the impugned banker's cheque as required by their contract (See clause 7(a) 2<sup>nd</sup> 3<sup>rd</sup> Party Exh. Page 3). On this G4S cannot be faulted.

66. Returning to the Judgment in Criminal Case No. 1188 of 2006, the court did not find any G4S employee guilty of the charges therein. The Court held:-

“From the evidence on record it is apparent that the only reason accused 10 was arrested and charged was because he used to collect the mail bag from Nakuru KCB from Securicor office for onward transmission to KCB head office. Although there is evidence that the bag was ripped on its bottom from where the cheques are supposed to have been removed and submitted; the prosecution did not lead evidence to show at what point in time and by whom the bag was torn and cheques removed. There is no evidence that accused 10 did not have any other means of livelihood and the prosecution evidence that they made various developments at home and even married a second wife after the offence was committed are non-issues and 19<sup>th</sup> and 25<sup>th</sup> counts must fail.”

67. While G4S escapes liability what is to be said of KBC? The Criminal Court found Accused 1, Were, guilty of multiple counts of stealing contrary to Section 279 of the Penal Code and convicted him accordingly. He was an employee of KCB and a signatory KBC's imprest bank account with the Defendant A/C number 045-200970888.

68. It was KBC's defence and evidence that the Defendant failed in its duty of care by perpetuating the fraudulent activities at its KBC's bank account. KBC produced several letters in its bundle dated 25<sup>th</sup> May 2010 as its evidence. It produced a letter dated 17<sup>th</sup> August 2005 from the Defendant wherein the Defendant informs it of several fraudulent cheques deposited into its account and subsequent withdrawn by KBC staff. It further produced its bank statement as evidence of the fraudulent deposits and withdrawals.

69. The Criminal Court in Criminal Case No. 1188 of 2006 at page 32 of its Judgment made the following findings:-

“As explained by the investigating officers; it is apparent that after the cheques were submitted for payment to the respective payees; some persons working at Securicor Kenya KRA; National Bank and Kenya Commercial Bank Head Office and Nakuru Branches conspired with accused 1 in a manner that enabled the drawing of parallel cheques with similar details as the original ones except for the payee which were then presented by accused for payment into the account of Kenya Broadcasting Corporation imprest account No.200970888. It is also apparent that the cheques presented for clearance were the original ones but the funds were diverted to the Kenya Broadcasting Corporation Imprest account No. 200970888 where the false cheques had been deposited. And contrary to accused 1's evidence that all monies into the Kenya Broadcasting Imprest account no.200970888 to which he was a signatory was channeled from the KBC headquarters; it is apparent that he deposited all the questioned cheques into that account. The withdrawal

cheques also confirm that accused I made withdrawal of the proceeds of those cheques. Accused's told court that the money in question was used for Kenya Broadcasting Corporation special projects. Accused did not tender any evidence to show that he had used the money for the benefit of Kenya Broadcasting Corporation

70. It is an established principle that an employer is vicariously liable for the tortious acts of its employees where they occur "in the course of employment." This principle is enshrined in the common law doctrine known as "let the master answer." (See Kenya Power & Lighting Co.Ltd v Kenneth Lugalia Imbugua [2016] eKLR). Black's Law Dictionary defines vicarious liability as:-

"Liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties."

71. The scope of the application of the doctrine of vicarious liability between a master and servant was discussed by the Court of Appeal in the case of Tabitha Nduhi Kinyua Vs Francis Mutua Mhuri & Another CA 180 OF 2009(2014) eKLR wherein it stated:-

"In Kenya Bus Service Ltd. –vs- Kawira- Civil Appeal No. 295 of 2000, this Court held that the existence of master/servant relationship gives rise to vicarious liability.

The principle of vicarious liability is an anomaly in our law because it imposes strict liability on an employer for the delict of its employee in circumstances in which the employer is not itself at fault. An employer will be held to be vicariously liable if its employee was acting within the course and scope of employment at the time the delict was committed.

.....

11.The test for establishing whether an employer is vicariously liable for his/her servant's negligence was set out in this Court's decision in Joseph Cosmas Khayigila –vs- Gigi & Co. Ltd & Another. - Civil Appeal No. 119 of 1986 as follows:-

***"In order to fix liability on the owner of a car for the negligence of the driver, it was necessary to show either that the driver was the owner's servant or that at the material time the driver was acting on the owner's behalf as his agent. To establish the existence of the agency relationship, it was necessary to show that the driver was using the car at the owner's request, express or implied or on his instructions and was doing so in performance of the task or duty thereby delegated to him by the owner."***

See also Morgans –vs- Launchbury & Others (supra). Waki, J.A in P.A Okelo & Another t/a Kaburu Okello & Partners –vs- Stella Karimi Kobi & 2 Others- Civil Appeal No. 183 of 2003, expressed himself as follows regarding the assignment of vicarious liability:

***"In assigning vicarious liability, the learned Judge appreciated, correctly, that it arises when the tortious act is done in the scope or during the course of his employment."***

In the matter of Minister of Police –vs- Rabie, 1986 (1) SA 117 (A), the Appellate Division held that the determination of whether an employee acted within the scope of employment incorporates both a subjective and an objective enquiry. At paragraph 134 the Court held as follows:

***"It seems clear that an act done by a servant solely for his own interest and purposes, although occasioned by his employment, may fall outside the course and scope of his employment and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant's intention. The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test. It may be useful to add that a master is liable even for acts which he has not authorized provided that they are so connected with an act which he has authorized that they may be regarded as modes – although improper modes – of doing them."***

Admittedly, the actions of **Were** were criminal, would they still bind KBC as his employer?

72. The general rule is that vicarious liability has no place in criminal law as criminal responsibility is personal in nature. (See Republic v Joseph Muhia Mwaura & another [2017] eKLR and Gerishon Gioche Macharia v Republic [2017] eKLR). In Kahuhu Wang'ang'a Vs Republic[2002] eKLR Mbogholi Msagha J. held as follows:-

"The key words in an offence of malicious damage to property are that the damage must have been done "willfully" and "unlawfully". That willful and unlawful act carries with it the intention and cannot therefore be complete unless mens rea is proved. Above all, the said act must be attributed to the person charged "directly". I emphasize the word "directly" because, in the offence of this nature, unlike in a civil jurisdiction vicarious liability cannot attach. This is because malice, by its own nature is a conception of the mind which cannot be assigned. And so, in the instant case, the prosecution was duty bound to prove beyond any reasonable doubt that the appellant did willfully and unlawfully damage the alleged properties.

73. However, there will be occasion when an employer takes up vicarious liability on a civil plane arising from the criminal conduct of his employee. In the Court of Appeal for East Africa in the case of Mungowe – vs- Attorney-General of Uganda [1967] EA 17, Newbold P stated at page 18:-

“The test of a master’s liability for the acts of his servant does not depend upon whether or not the servant honestly believes that he is executing his master’s orders. If that were so the master would never be liable for the criminal act of the servant, at any rate when the criminal act is towards benefiting the servant himself. ....Each case must depend on its own facts. All that one can say, as I understand the law, is that even if he is acting for his own benefit, nevertheless if what he did was merely a manner of carrying out what he was employed to carry out then his acts are acts for which his master is liable.”

74. Are the circumstances herein such that KBC can be held liable for its employee’s criminal actions? Of significance in answering this question is the manner in which the account where the fraud was perpetrated was operated. What was the nature of the account and whether the manner in which Were participated in the fraud can be said to be merely the manner in which he was employed to carry out his duty. This is an inquiry as to whether, although for improper purpose, Were conducted himself in a manner which would pass as an ordinary mode of carrying out his duty.

75. The uncontested evidence is that the account was an imprest account in which only money from the Customers head office was received. Receipts from third parties was paid into the revenue account. The Bank did not dispute that money deposited into this account would not exceed Kshs. 100.000.00 monthly. The money stolen by Were exceeded this amount by far and was, in addition, from a third party. Both the deposit and withdrawal were for unusually large sums. This was not the ordinary manner in which the imprest account was operated. So, when Were withdrew the money in two tranches of three million shillings, then it was odd and cannot be said to be the manner in which he would ordinarily carry out his duty as a signatory to the account. In addition, it is a conceded fact that his employer did not benefit from the proceeds of his illegal contract. In these circumstances the Court cannot ascribe liability on his employer.

76. Ultimately, the Plaintiff’s action against the Defendant is merited. The Court enters judgment in favour of the Plaintiff against the Defendant for the Sum of Kshs. 6,021,101.00 with interest thereon at Court rates with effect from the date of filing suit until payment in full. The Plaintiff shall also have costs of the suit payable by the Defendant. The other prayers in the Plaintiff fail for lack of proof. As regards the Third Party proceedings, the same are unmerited and are dismissed with costs to the 3<sup>rd</sup> Parties.

**Dated, Signed and Delivered in Court at Eldoret this 28<sup>th</sup> Day of April 2020**

**F. TUIYOTT**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 19<sup>th</sup> April 2020, this Judgment has been delivered to the parties through virtual platform.

**F. TUIYOTT**

**JUDGE**

**PRESENT:**